The Convention on the Rights of the Child and Domestic Human Rights Legislation: Opportunities and Future Directions

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> *Children are ends in themselves and not the means of others. They form part of the family, the fundamental group unit of society. Children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should be given proper consideration in relation to matters affecting them. Children are especially entitled to protection from harm, and to human development.*[3]
>
> *– Justice Kevin Bell*

I. Overview

1. The Convention on the Rights of the Child (CRC) is an important treaty that protects children's human rights under international law.[4]

2. Because Australia has what is known as a 'dualist' system, international treaties, even when ratified by Australia, do not become part of domestic law unless they are enacted as legislation.[5] Whilst Australia has ratified the CRC,[6] it has not been implemented as domestic law. This means that while the CRC plays a critical role in shaping Australia's human rights obligations at an international level, its provisions are not directly enforceable by Australian Courts.[7]

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[4] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[5] See *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] UKPC 6; [1937] AC 326, 348; *Koowarta v Bjelke-Peterson* [1982] HCA 27; (1982) 153 CLR 168, 193 (Gibbs CJ).

[6] Australia ratified the CRC on 17 December 1990.

[7] The ratification of the CRC had been held by the High Court to result in a 'legitimate expectation' that the executive would act in conformity with it and treat the best interest of the appellant's children as a primary consideration: *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273. Cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1. See *Royal Women's Hospital v Medical Practitioners Board* [2006] VSCA 85; (2006) 15 VR 22, 39 [75]-[79] (Maxwell P); *Tomasevic v Travaglini* [2007] VSC 337; (2007) 17 VR 100, 114-5 [73] (Bell J). However, the High Court has subsequently held that "the phrase 'legitimate expectation' when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded": *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ); *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326, 335 [29]-[30] (Kiefel, Bell and Keane JJ), 343 [61] (Gageler and Gordon JJ).

3. The purpose of this seminar is to highlight opportunities that are available to Australian lawyers and advocates to use domestic human rights legislation as a tool to protect and advance children's rights. We do so primarily through the lens of Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) but many of the lessons are also relevant to other domestic legislation.[8] Despite campaigns for well over two decades, Australia remains without a human rights instrument at a federal level.[9]

4. The Victorian Charter contains an interpretive provision, which explicitly states that "[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision".[10] Accordingly, the CRC may be relevant when interpreting laws, including when considering the content of human rights protected by the Charter. The Charter also imposes obligations on public authorities to properly consider human rights when making decisions and to act compatibly with them.[11]

5. The Charter can be a useful tool for encouraging the advancement and protection of human rights at a domestic level. In the courtroom, it can be used to defend rights and to bring international human rights law jurisprudence into Australian case law, setting helpful precedents to be followed in later cases. Outside of the courtroom, it provides a human rights framework that influences executive and legislative decision-making processes. It also provides a useful reference point and framework for advocates when talking to government actors about their policies and obligations.

6. This seminar will outline how the Charter works and provide two case studies of litigation involving the Charter and children's rights, including the landmark *Certain Children* litigation.[12] We have attempted to provide an accessible overview with references and hyperlinks to resources if people want to consider particular issues in more depth. We have also provided a list of resources as Appendix A.

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8 Such as the *Human Rights Act 2004* (ACT) and the *Human Rights Act 2019* (QLD).

9 For further information about the campaign for a Federal Charter of Human Rights, see: https://charterofrights.org.au.

10 Charter, s 32(2).

11 Charter, s 38.

12 *Certain Children (by their litigation guardian, Sister Marie Bridgit Arthur) v Minister for Families and Children & Ors* [2016] VSC 796; (2016) 51 VR 473 (*Certain Children No 1*); *Minister for Families and Children v Certain Children (by their litigation guardian, Sister Marie Bridgit Arthur)* [2016] VSCA 343; (2016) 51 VR 597; *Certain Children (by their litigation guardian, Sister Marie Bridgit Arthur) v Minister for Families and Children & Ors (No 2)* [2017] VSC 251; (2017) 52 VR 441 (*Certain Children No 2*).

II. How Does the Charter Work?

7. The most important thing to understand about the Victorian Charter is that it underpinned by a 'dialogue model'.[13] This provides for a dialogue between the legislature and the judiciary, whilst preserving parliamentary sovereignty. That is, Parliament remains the supreme law maker.

8. This means that while courts and tribunals must interpret laws, consistently with their purpose, compatibly with the human rights protected by the Charter, if a statutory provision cannot be interpreted consistently with the Charter then this does not invalidate the law in question. In such circumstances, the Supreme Court of Victoria is empowered to make a declaration of inconsistent interpretation.[14] If such a declaration is made, then Parliament is required to prepare a written response,[15] but no remedial legislative action is required. This contrasts with guarantees protected by the Australian *Constitution*, where the High Court is empowered to invalidate unconstitutional legislation.

9. The Charter also requires the legislature to make 'statements of compatibility' when new bills are introduced into Parliament.[16] These statements outline whether the new law is compatible with human rights and, if not, the nature and extent of the incompatibility. This is intended to promote accountability and transparency in Government.[17]

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[13] *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 462 [93]-[94] (Maxwell P, Ashley and Neave JJA). See further Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 Mon ULR 9.

[14] Charter, s 36(2).

[15] Charter, s 37.

[16] Charter, s 28.

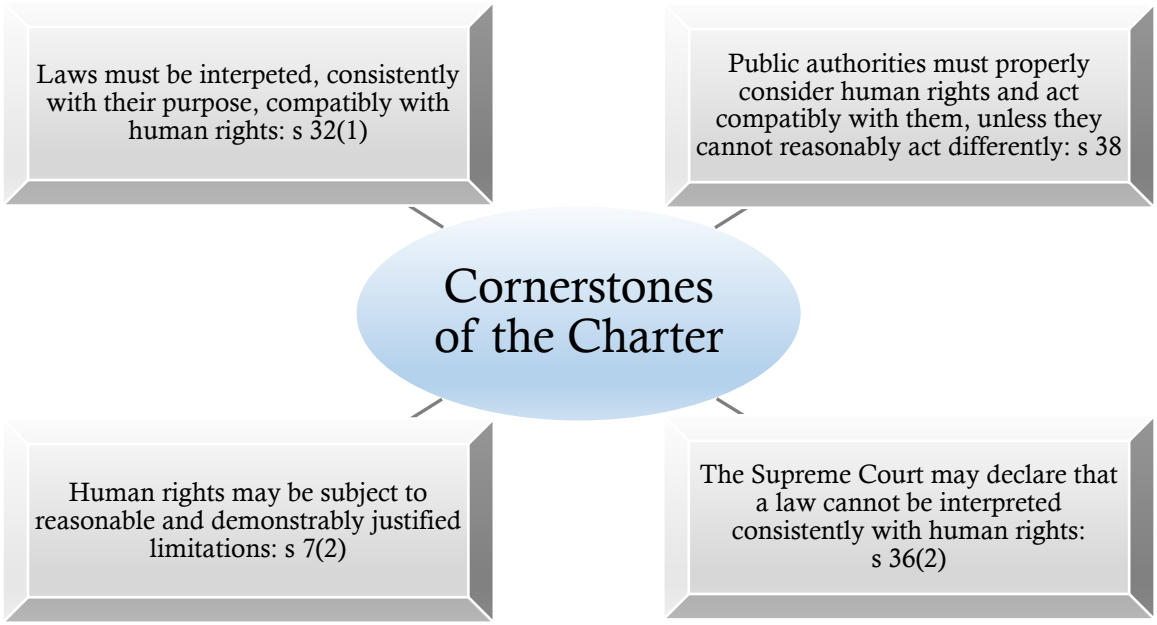
[17] Paradoxically, the protection of children has been cited by Parliament as providing a justification for legislative reform that it accepts is incompatible with human rights. In the Statement of (In)compatibility to the Control of Weapons Amendment Bill 2010 (Vic) (enabling searches of persons including children in gazetted areas without reasonable suspicion) the Minister for Police and Community Services stated:

> In my view, therefore, the bill is incompatible with section 17(2) of the Charter [which provides that "[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child"]. However, as I determined when these powers were introduced in 2009, the government strongly believes that effective and workable random search powers are important for preventative and deterrent reasons, including the protection of children. Therefore, despite the incompatible nature of the provisions, this government intends to proceed with this legislation. We believe it is important to help protect children.

Victoria, *Parliamentary Debates*, Legislative Council, 27 May 2010, 2000. A more recent example of a statement of (In)compatibility concerned the Firearms Amendment Bill 2017 (Vic) which created the firearms prohibition order regime: Victoria, *Parliamentary Debates*, Legislative Council, 21 September 2017, 2955.

The Cornerstones

10. In order to understand the operation and effect of the Charter, it is important to consider the interplay between its four cornerstones: ss 32, 38, 7 and 36.



The Interpretive Provision

11. Section 32(1) of the Charter (the interpretive provision) provides:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

12. Section 32(2) of the Charter provides:

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

13. In the first wave of Charter jurisprudence there was significant debate about the appropriate method to be employed when interpreting legislation pursuant to s 32(1). That debate concerned determining the permissible boundaries of interpretation, and how the interpretive provision operates with other sections in the Charter.[18]

[18] In particular whether the s 7(2) 'proportionality' considerations affect the interpretive exercise: see *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) 29 VAR 1, overturned in *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436.

14. For critics of human rights instruments, the interpretive provision has the potential to be undemocratic due to allowing for the 'reinterpretation' of laws by judicial officers contrary to Parliamentary intent.[19]

15. After the judgment of the High Court in *Momcilovic v The Queen* (*Momcilovic*),[20] it appears clear that the Charter's interpretive provision is not as far-reaching as its counterpart in the *Human Rights Act 1998* (UK).[21]

16. In *Momcilovic,* both the Court of Appeal and the High Court were unanimous that the Charter did not permit a reverse-onus provision regarding illicit drug offences to be interpreted as only imposing an evidentiary, rather than persuasive onus (on the balance of probabilities), on an accused person.[22]

17. While the High Court in *Momcilovic* was divided on the correct methodological approach to the interpretive provision, the Court of Appeal has continued to apply an approach whereby:

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[19] See Michael Stanton, 'Fighting Phantoms: A Democratic Defence of Human Rights Legislation' (2007) 32(3) AltLJ 138. See, eg, Heydon J, in dissent in *Momcilovic*, 179-185 [447]-[457], in particular 184 [455]: "[j]udicial fires which have sunk low may burn more brightly in response to a call to adventure." At the time the Charter was enacted there had been particular criticism of the British judgment of *Ghaidan v Godin-Mendoza* (2004) UKHL 30 ('*Ghaidan*'), [2004] 2 *AC* 557 (concerning inheritance of tenancy with regard to persons in same sex relationships). In *Ghaidan*, Lord Nicholls held at [29]:

> It is now generally accepted that the application of section 3 [the equivalent interpretive provision] does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning.

Lord Millet (in dissent but not on this point) held at [67]:

> [E]ven if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, section 3 may require it to be given a different meaning. It means only that the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. The court must "strive to find a *possible* interpretation compatible with Convention rights" (emphasis in original).

[20] [2011] HCA 34; (2011) 245 CLR 1.

[21] Section 3(1) of the *Human Rights Act 1998* (UK) provides:

> 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.

Note the addition in s 32(1) of the Victorian Charter 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" (our emphasis added).

[22] Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (*DPCSA*) provides that when drugs are located at a premises occupied, used, enjoyed or otherwise controlled by a person, that person is deemed to be in possession of the drugs unless he or she "satisfies the court of the contrary". That reverse onus provision has been consistently interpreted by Victorian Courts as requiring that an accused person must prove, on the balance of probabilities, that the drugs were not in his or her effective possession (a persuasive onus); *R v Clarke* [1986] VR 643. It should be noted that *Momcilovic* was decided on a technical point about the relationship between ss 5 and 71AC of the *DPSCA*, with the majority holding that the reverse onus provision did not apply to the expression 'possession for sale' with regard to trafficking offences, and so arguably the analysis about the Charter is *obiter dictum*, albeit considered analysis from the High Court.

> Section 32(1) does not create a "special" rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question.[23]

18. This arguably results in an interpretive provision with broad application and limited impact, which has been regarded as comparable to other interpretive principles such as the principle of legality.[24]

19. In *Gebrehiwot v State of Victoria* (*Gebrehiwot*),[25] the Court of Appeal (Tate, Kaye and Emerton JJA) observed:[26]

> As this Court emphasised in *R v DA*,[27] where there is a constructional choice, the interpretive obligation under the Charter requires that the construction be adopted that renders the statutory provision compatible with human rights, providing this is consistent with the purpose of the provision. This Court said:
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> > Where more than one interpretation of a provision is available on a plain reading of the statute, then that which is compatible with rights protected under the Charter is to be preferred.[28]

20. This approach was described in *Gebrehiwot* as the 'better accommodates' test.[29]

21. It is clear that, at least under the current approach, remedial interpretation which would involve a *departure* from the ordinary rules of statutory interpretation, in order to find a rights-compatible meaning, is not permitted. Thus, the interpretive provision can be useful, but it does not go as far as some of its international counterparts, such as s 3 of the *Human Rights Act 1998* (UK).[30]

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[23] *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 446 [35] (Maxwell P, Ashley and Neave JJA). See, eg, *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91; (2012) 38 VR 569, 576-7 [28]-[31] (Warren CJ and Cavanough JA); 609 [142] (Nettle JA); *Slaveski v Smith and Victoria Legal Aid* [2012] VSCA 25; (2012) 34 VR 206, 215 [23] (Warren CJ, Nettle and Redlich JJA). Cf Tate JA in *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; (2013) 49 VR 1, 62 [189].

[24] See French CJ in *Momcilovic* at 50 [51]: "Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application". The principle of legality is a principle of statutory interpretation that provides that legislation should not be understood to abrogate fundamental rights in the absence of clear and unambiguous language. Justice Tate has criticised a narrow conception of the interpretive provision, see *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; (2013) 49 VR 1, 62 [189]-[190]; see further her Honour's extra-judicial writing: '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*?', Judicial College of Victoria Online Journal 2 (2014), 68.

[25] [2020] VSCA 315; (2020) 287 A Crim R 226 (***Gebrehiwot***).

[26] Ibid, 262 [135].

[27] *R v DA* [2016] VSCA 325; (2016) 263 A Crim R 429.

[28] Ibid, 443 [44] (Ashley, Redlich and McLeish JJA).

[29] [2020] VSCA 315; (2020) 287 A Crim R 226, 263 [138], after citing *Nguyen v Director of Public Prosecutions (Vic)* [2019] VSCA 20; (2019) 59 VR 27, 63 [104]-[105] (Tate JA, Maxwell P agreeing at 30 [1], Niall JA agreeing at 74 [151]).

[30] For further consideration of the proper construction of the interpretive provision, see the articles by Bruce Chen: 'Section 32(1) of the Charter: Confining Statutory Discretions Compatibly with Charter Rights?' [2016]

The Obligations on Public Authorities

22. Section 38 of the Charter places obligations upon public authorities.[31] Section 38(1) of the Charter provides:

> Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

23. Thus, public authorities are required both to act compatibly with human rights and to properly consider them when making decisions. These obligations are often referred to respectively as the 'substantive' and 'procedural' limbs of s 38.

24. Importantly, the obligations are subject to the limitation under s 38(2) where under the relevant law the public authority could not reasonably have acted differently or made a different decision.

25. The second wave of Charter jurisprudence has focussed upon the extent and content of such obligations. In *Certain Children v Minister for Families and Children (No 2)*,[32] John Dixon J identified a useful roadmap for assessing incompatibility under s 38,[33] which we have extracted below in the first case study.[34]

Limitations on Human Rights

26. The human rights protected by the Charter are not absolute,[35] and can be subject to limitations. Some rights also have internal limitations.[36] Section 7(2) of the Charter provides:

MonashULawRw 21; and 'Revisiting s 32(1) of the Victorian Charter: Strained Constructions and Legislative Intentions' [2020] MonashULawRw 6.

31 The term 'public authority' is defined by s 4 of the Charter. Section 4(1)(d) expressly includes Victoria Police. The Director of Public Prosecutions has been regarded as a public authority: *Baker v Director of Public Prosecutions (Vic)* [2017] VSCA 58; (2020) 270 A Crim R 318, 331 [55] (Tate JA). Courts and tribunals are not public authorities except when acting in an administrative capacity: Charter, s 4(1)(j), although some obligations under the Charter (such as the right to a fair hearing as protected by s 24(1) of the Charter) can apply directly to courts and tribunals when exercising their functions pursuant to s 6(2)(b) of the Charter: *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 82 [252] (Tate JA).

32 [2017] VSC 251; (2017) 52 VR 441.

33 Ibid, 497 [174]. The roadmap was prepared by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).

34 At [69].

35 Even though, under international law, some human rights are absolute and/or non-derogable, such as the freedom from torture, freedom from slavery, and the prohibition against the retrospective operation of criminal laws.

36 For example, the right to privacy protected by s 13(a) of the Charter provides that a person has the right "not to have his or her privacy, family, home or correspondence *unlawfully or arbitrarily* interfered with" (our emphasis added). With regard to the right to liberty protected by s 21 of the Charter, s 21(3) provides that "[a] person must not be deprived of his or her liberty *except on grounds, and in accordance with procedures, established by law*" (our emphasis added).

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-
>
> (a) the nature of the right; and
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> (b) the importance of the purpose of the limitation; and
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> (c) the nature and extent of the limitation; and
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> (d) the relationship between the limitation and its purpose; and
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> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

27. Once a human right is identified as being limited by the action of a public authority, the onus of 'demonstrably justifying' the limitation in accordance with s 7(2) of the Charter resides with the party seeking to uphold the limitation. In light of what must be justified, the standard of proof is high.[37]

Declarations of Inconsistent Interpretation

28. Section 36(2) of the Charter provides:

> 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.

29. No declaration of inconsistent interpretation has been made in Victoria.

30. In *Momcilovic*, the Court of Appeal proposed to make a declaration of inconsistent interpretation in relation to the reverse onus provision, s 5 of the *DPCSA*.[38] However,

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Under international law, when considering whether there is 'arbitrary' interference with the right, arbitrariness can extend to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought. Interference can be arbitrary although it is lawful: *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 395 [85] (Bell J); cf *WBM v Chief Commissioner of Police* [2012] VSCA 159; (2012) 43 VR 446, 469-73 [102]-[120] (Warren CJ).

[37] *Re an application under the Major Crime (Investigative Powers) Act 2004* (Vic); *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381; (2009) 24 VR 415 *('DAS')*, 448 [147] (Warren CJ). Approved by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 475 [144]. Warren CJ cited with approval the observations of Dickson CJ in the celebrated Canadian judgment of *R v Oakes* [1986] 1 SCR 10, 43 [70]:

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

[38] *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 478 [157]. The Court of Appeal observing at 477 [152]-[153]:

> In our view, there is no reasonable justification, let alone any "demonstrable" justification, for reversing the onus of proof in connection with the possession offence. As we have said, the combined effect of ss 5 and 72(1) is to presume a person guilty of the offence of possession unless he/she proves to the contrary. That is not so

the High Court, by majority, held that the declaration of inconsistent interpretation should not be made.[39]

III. The Charter's Impact

31. Over the past fifteen years the Charter has resulted in some significant wins for human rights. However, it has clearly not reached its full potential. Writing extra-judicially in 2014, Justice Pamela Tate noted "[i]t is apparent that the voyage undertaken by the Charter has been a choppy one. It has sought to cope as best it can and has demonstrated resilience".[40]

32. The sources of this 'choppiness', or roadblocks to success, are due to a variety of issues such as:

    (1) The complexity of the separate reasons for judgment of the High Court in *Momcilovic* (see Appendix B);

    (2) The fact that some judicial officers and advocates perceive that the interpretive provision adds very little to common law principles such as the principle of legality;

    (3) The notice requirements to the Attorney-General (AG) and the Victorian Equal Opportunity and Human Rights Commission (VEHORC) in proceedings in the County Court of Victoria and the Supreme Court of

much an infringement of the presumption of innocence as a wholesale subversion of it. It was not suggested on the appeal that either the nature of the offence or the exigencies of prosecution could justify such a step.

Nor, in our view, did the arguments advanced come close to justifying the infringement of the presumption in relation to the trafficking offence. As already noted, there was no evidence to support the assertion that the successful prosecution of trafficking offences depended upon the availability of the reverse onus; and the Chief Crown Prosecutor doubted that the reverse onus made much difference at all.

[39] Crennan and Kiefel JJ also observed "[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate": *Momcilovic*, 229 [605].

[40] 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*?', Judicial College of Victoria Online Journal 2 (2014), 68.

Victoria,[41] and the possibility of delay and possible costs consequences caused by raising the Charter; [42]

(4) The perception that, by giving notice to the AG, this may result in an inequality of arms in the proceeding;

(5) The decision by the Court of Appeal that the Victorian Civil and Administrative Appeals Tribunal (VCAT) does not have the power to undertake 'collateral review' of the actions of public authorities under the Charter;[43]

(6) The uncertainty over whether a breach of s 38(1) of the Charter by a public authority constitutes a jurisdictional error, which can influence the availability of judicial review and the remedies available under it;[44]

(7) The complexity of the remedies provision, s 39 of the Charter;[45] and

(8) The prohibition on the awarding of damages because of a breach of the Charter.[46]

33. Notwithstanding those issues, and consistently with the Justice Tate's reference to its 'resilience', there are many examples of the Charter having had a powerful impact in litigation. Some cases include:

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41 Charter, s 35(1). Notably the 2015 review of the Charter recommended, amongst other things:

> Section 35 of the Charter be amended to remove the notice requirement for proceedings in the County Court and to give a judicial officer or tribunal member power to require a notice to be issued for a Charter issue of general importance or when otherwise in the interests of justice (at their discretion). Further, an explanatory note should be added to section 35 to make clear that proceedings do not have to be adjourned while notice is issued and responded to. The Attorney-General and the Commission should retain their right to intervene in all proceedings.

42 See, eg, *Bare v Small* [2013] VSCA 204, where the applicant was granted a protective costs order by the Court of Appeal after agreement could not be reached with the AG as to whether the AG would seek costs if the appeal was dismissed (VEOHRC had agreed not to seek costs).

43 *Director of Housing v Sudi* [2011] VSCA 266; (2011) 33 VR 559.

44 Left undecided in *Bare v Independent Broad-Based Anti-Corruption Commission* [2015] VSCA 197; (2015) 48 VR 129.

45 Section 39(1) of the Charter provides:

> 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.

See further Jeremy Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33 MULR 101; *Director of Housing v Sudi* [2011] VSCA 266; (2011) 33 VR 559, 580 [96] (Maxwell P), 604-5 [267]-[269] (Weinberg JA); *Director of Public Prosecutions v Debono* [2013] VSC 407, [82] (Kyrou J).

46 *Charter*, s 39(3). Although it should be noted that the 2015 review of the Charter recommended that this prohibition be retained. See further *Gebrehiwot v State of Victoria* [2020] VSCA 315; (2020) 287 A Crim R 226, 261-2 [133] (Tate, Kaye and Emerton JJA).

(1) *Kracke v Mental Health Review Board*:[47] where Bell J as President of VCAT found that that the failure by the Mental Health Review Board to conduct reviews of the patient's compulsory Community Treatment Order (CTO) constituted a breach of his right to a fair hearing (although the CTO was not invalidated as a consequence of the breach);

(2) *Taha v Broadmeadows Magistrates' Court & Ors; Brookes v Magistrates' Court of Victoria & Anor* (*Taha*):[48] concerning the power of the Magistrates' Court of Victoria to make orders for imprisonment for non-payment of fines under the *Infringements Act 2006* (Vic) (*Infringements Act*). The plaintiffs had an intellectual disability and mental illness respectively.[49] Justice Emerton held that the Charter, in combination with other principles of interpretation, required s 160 of the *Infringements Act* to be construed in a 'unified fashion' so that there was a duty on the judicial officer to inquire and ensure that the plaintiff's disability and/or illness was considered by the Court before the imprisonment orders were made;

(3) *DPP v Kaba*:[50] where Justice Bell held that it was correct for a Magistrate to find that there had been a breach of the right to privacy of a passenger of a vehicle stopped after a purportedly random interception by police, which had formed a basis for the Magistrate to exclude the evidence of an alleged assault against police pursuant to s 138(1) of the *Evidence Act 2008* (Vic) (exclusion of improperly or illegally obtained evidence);[51]

(4) The *Certain Children* litigation:[52] concerning the treatment of child detainees, which will be considered below in the first case study;

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47 [2009] VCAT 646; (2009) 29 VAR 1.

48 [2011] VSC 642, upheld on appeal in *Victoria Police Toll Enforcement and Others v Taha and Others* [2013] VSCA 37; (2013) 49 VR 1.

49 Pursuant to s 160(2)(a) of the *Infringements Act*, both plaintiffs would have been eligible to have had their fines in respect of which imprisonment orders were made waived or reduced, a lesser term of imprisonment imposed or measures other than imprisonment imposed. In neither case did the Magistrate consider the plaintiffs' eligibility for such orders or measures.

50 [2014] VSC 52; (2014) 44 VR 526.

51 Although the matter was remitted because of an error in relation to the construction of s 59(1) of the *Road Safety Act 1986* (Vic) regarding the 'stop and check' powers of police in relation to motorists.

52 *Certain Children (by their litigation guardian, Sister Marie Bridgit Arthur) v Minister for Families and Children & Ors* [2016] VSC 796; (2016) 51 VR 473 (*Certain Children No 1*); *Minister for Families and Children v Certain Children (by their litigation guardian, Sister Marie Bridgit Arthur)* [2016] VSCA 343; (2016) 51 VR 597; *Certain Children (by their litigation guardian, Sister Marie Bridgit Arthur) v Minister for Families and Children & Ors (No 2)* [2017] VSC 251; (2017) 52 VR 441 (*Certain Children No 2*).

(5) *PBU & NJE v Mental Health Tribunal*:[53] where Justice Bell held that VCAT erred when confirming orders for compulsory electroconvulsive therapy (ECT) for the plaintiffs by failing to apply the capacity test under s 68(1) of the *Mental Health Act 2014* (Vic) compatibly with human rights protected by the Charter; and

(6) *Minogue v Thompson*:[54] where Justice Richards held that correctional authorities at Barwon Prison had failed to give proper consideration to, and had acted incompatibly with, the plaintiff's human rights to privacy and dignity in detention when conducting urine tests and strip-searches.

34. The above cases demonstrate that the Charter is far from 'toothless' in practice; it has great potential when advocates are willing to employ it.

IV. Rights of Children Expressly Protected by the Charter

35. Justice Bell has stated:[55]

> The human rights in the *Charter* that generally and specifically apply to children reflect the provisions of international treaties to which Australia is a party, including the *International Covenant on Civil and Political Rights* (the ICCPR) and the *Convention on the Rights of the Child* (CROC). These provisions in turn reflect the fundamental principle of the best interests of the child, which is itself-expressed in s 17(2) of the Charter.[56]

36. Section 3(1) of the Charter defines a 'child' as a person under 18 years of age.

37. Section 17(2) of the Charter is headed 'Protection of families and children', and provides:

> Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

38. Section 23 of the Charter is headed 'Children in the Criminal Process' and provides:

(1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.

(2) An accused child must be brought to trial as quickly as possible.

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53 [2018] VSC 564; (2019) 56 VR 141.

54 [2021] VSC 56.

55 *DPP v SL* [2016] VSC 714; (2016) 263 A Crim R 193.

56 Ibid, 195-6 [7] (citations omitted).

(3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

39. Section 25(3) of the Charter is headed 'Rights in criminal proceedings', and provides:

> A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

40. Section 8(3) of the Charter is headed 'Recognition and equality before the law', and provides:

> Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.[57]

41. At the outset it should be acknowledged that some of the key cases advancing children's rights in Victoria have not referred to the Charter, or the CRC, at all.[58]

42. However, in other cases the Charter and the CRC have been considered.

43. For example, in *A & B v Children's Court of Victoria*,[59] in the context of a protection proceeding under the *Children, Youth and Families Act 2005* (Vic) (*CYFA*), Garde J found that the Children's Court had erred in finding that the plaintiffs lacked the maturity to provide instructions to legal representatives and in denying them leave to be represented by the same legal practitioner. The Children's Court had "misconceived its function as confined to a conclusion as to the maturity of the girls based on chronological age alone",[60] and there was no evidence to support such a finding.[61] His Honour also found that there had been breaches of procedural fairness and natural justice.[62]

44. In reaching his decision, Garde J considered the Charter and the CRC and applied *Momcilovic*:

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57 Section 3 of the Charter defines 'discrimination', in relation to a person, as discrimination within the meaning of the *Equal Opportunity Act 2010* (Vic) on the basis of an attribute set out in s 6 of that Act. 'Age' is a protected attribute.

58 See, eg, *CNK v The Queen* [2011] VSCA 228; (2011) 32 VR 641, where the Court of Appeal held that the principle of general deterrence (punishing an offender to set an example to others) was excluded from consideration when sentencing children under the *CYFA.*

59 [2012] VSC 589

60 Ibid, [120].

61 Ibid, [122].

62 Ibid, [125], [134].

> If I were of the view that the words of ss 524(2) and (4) [provisions in the *CYFA* relating to the legal representation of children] were capable of more than one meaning, it would have been appropriate to consider which of those meanings best accords with the human rights in question. It might also have been necessary to consider, as the Commission submitted, whether Articles 3 and 12 of the CROC should be taken into account and given weight in determining the ultimate construction to be adopted.[63]
>
> Consideration of the human rights sought to be relied on by the plaintiffs and the presumption of statutory interpretation that provisions should be interpreted consistently with international law only serve to provide further reasons why the construction of ss 524(2) and (10) that I have preferred should be adopted. Such a construction is consistent with the best interests principles generally and the principle that the best interests of the child must always be paramount.[64]

45. The Charter and the CRC have also been referred to in the context of an, ultimately unsuccessful, application for bail by a child accused held at Barwon Children's Remand Centre, which was within the confines of Barwon Prison.[65]

46. In a series of judgments of the Supreme Court of Victoria, Justice Bell considered international law, including the CRC, when giving meaning to Charter rights:

    (1) *Secretary to the Department of Human Services v Sandling*:[66] the Court considered the proper interpretation of the *CYFA* in the context of child protection, and in particular considered international law, including the CRC, when giving meaning to the 'best interest principles' under the *CYFA*;[67]

    (2) *ZZ v Secretary to the Department of Justice*:[68] the Court considered the proper construction of the *Working with Children Act 2005* (Vic) and the *Transport (Compliance and Miscellaneous) Act 1983* (Vic).[69] Justice Bell observed that an interpretation which is consistent with Australia's obligations and the Charter is one which positively ensures protection of children from harm,

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63 In addition to the relevance of Article 12 of CROC in interpreting "best interests" in both the Act and the Charter, it is, as an established principle of international law, relevant of itself by reason of the presumption of statutory interpretation that provisions should be interpreted consistently with international law, given the presumption that Parliament intends to comply with Australia's international treaty obligations (footnote in original).

64 Ibid, [109]-[110].

65 *Application for bail by HL* (No 2) [2017] VSC 1, [121]-[123] (Elliott J).

66 [2011] VSC 42; (2011) 36 VR 221.

67 Ibid, 227-30 [11]-[23]. Ultimately the Court dismissed the appeal by the Secretary against the decision of the Children's Court ordering the aboriginal children be returned to the care of their maternal grandmother.

68 [2013] VSC 267.

69 Ibid, [54]-[71].

not one which would deny a person access to their chosen field of employment when there was no real risk of harm;[70]

(3) *Director of Public Prosecutions v SL* (*SL*):[71] the Court had regard to international law, including the International Covenant on Civil and Political Rights (ICCPR),[72] the CRC and statements by the Committee on the Rights of the Child, when making protective directions regarding the manner of trial for a child accused.[73] Bell J stated:

> It is generally recognised under these treaties, as it is implicitly recognised under the Charter, that children are especially vulnerable to physical and emotional harm and negative formative influence in criminal detention and to discriminatory exclusion in the operation of the processes of the criminal law, and that governments and courts must take and adopt all necessary actions and procedures to protect them from that harm and influence and ensure their effective participation in those processes;[74]

(4) *Director of Public Prosecutions v SE* (*SE*):[75] where the Court applied *SL* and made protective directions for an aboriginal child accused.[76]

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[70] Ibid, [68]. It was held that it was not legally open to refuse ZZ's application on public interest grounds without first determining whether granting accreditation would or would not pose an unjustifiable risk to the safety of children: at [236].

[71] [2016] VSC 714; (2016) 263 A Crim R 193.

[72] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[73] SL was charged with attempted murder, and therefore not within the jurisdiction of the Children's Court of Victoria. The directions were:

(1) the detention on remand of SL is to be subject to regular judicial oversight;

(2) at court, SL is neither to be handcuffed nor detained with adult prisoners;

(3) directions and sentencing hearings are to be conducted in Court 7;

(4) SL is to be given the opportunity to become familiar with the court precinct, Court 7 and the hearing procedures;

(5) during hearings, counsel and I will not robe (neither counsel nor judges wig in this court) and will remain seated when speaking;

(6) counsel for SL is to ensure that SL understands the procedure to be adopted at hearings and I as the judge will also so ensure;

(7) SL may sit with counsel at hearings or with family or friends as SL wishes;

(8) counsel for the prosecution and SL are to speak in a language that so far as possible can be understood by SL and I will also do so; and

(9) the procedure at hearings is otherwise to be conducted in accordance with the principles explained in this ruling and, generally, all possible steps are to be taken to enable SL to understand and effectively participate in the proceeding.

[74] [2016] VSC 714; (2016) 263 A Crim R 193, 195-6 [7].

[75] [2017] VSC 13.

[76] Ibid, [17]. The directions were:

(a) at court, SE is neither to be handcuffed nor detained with adult prisoners;

(b) SE is to be given the opportunity to become familiar with the court precinct, the court in which the hearing is to be conducted and the hearing procedures;

47. In both *SL* and *SE*, Justice Bell observed that the directions were required by direct application of s 6(2)(b) of the Charter when the Court was exercising its functional responsibilities, including those under ss 17(2), 23 and 25(3) of the Charter.[77]

48. For completeness, it should be noted that the CRC has been referred to, albeit briefly, in Court of Appeal judgments:

    (1) When refusing a permanent stay of a prosecution because of a delay in charging a child offender which prevented the Children's Court of Victoria from having jurisdiction to sentence;[78]

    (2) When considering the entitlement of a person with a criminal history of sexual offences against a minor to access assisted reproduction treatment (IVF);[79] and

    (3) When making rules concerning the proper cross-examination of child witnesses, where the Court recommended the introduction of neutral

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(c) during hearings, counsel and I will not robe (neither counsel nor judges wig in this court) and will remain seated when speaking;

(d) during hearings, counsel for SE is to ensure that SE understands the procedure to be adopted at hearings and I as the judge will also so ensure;

(e) during hearings, SE may sit with counsel or with carers and support service officers as SE wishes;

(f) during hearings, counsel for the prosecution and SE are to speak in a language that so far as possible can be understood by SE and I will also do so;

(g) during hearings, SE is to be referred to by SE's preferred first name; and

(h) the procedure at hearings is otherwise to be conducted in accordance with the principles explained in this ruling and the ruling in *SL* and, generally, all possible steps are to be taken to enable SE to understand and effectively participate in the proceeding.

These directions were not to apply where something else was required in SE's best interests or on account of other demonstrable justification, such as legitimate security concerns.

It should be noted that the Supreme Court now has a Protocol: Principles for Managing Children in the Custody of the Supreme Court (created 7 April 2017, last updated 13 September 2019).

[77] *DPP v SL* [2016] VSC 714; (2016) 263 A Crim R 3, 195 [6]; *DPP v SE* [2017] VSC 13, [12]; see also *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 82 [252] (Tate JA). The operation and effect of s 6(2)(b) of the Charter has not been the focus of his seminar, for more information see the Judicial College of Victoria, Human Rights Bench Book: https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57270.htm.

[78] *Baker v Director of Public Prosecutions (Vic),* [2017] VSCA 58; 270 A Crim R 318, 341 fn 98 (Tate JA). It should be noted that Tate JA found that, even though the appellant was over 18 years-old when he was investigated by police and charged in relation to alleged criminal conduct from when he was a child, at 343-4 [99] (Maxwell P agreeing 321 [1], Beach JA contra at 351 [132]):

> The Charter required that the relevant public authorities were to act compatibly with that form of special protection afforded to children in Victoria, and were to give proper consideration to Baker's right to that special protection.

See also *LM v Childrens Court of the Australian Capital Territory* [2014] ACTSC 26, where the Supreme Court of the Australian Capital Territory dismissed judicial review proceedings after the Children's Court had refused an application for a permanent stay of proceedings based on delay and, amongst other things, the right protected by s 20(3) of the *Human Rights Act 2004* (ACT) that "[a] child must be brought to trial as quickly as possible".

[79] *Patient Review Panel v ABY and Anor* [2012] VSCA 264; (2012) 37 VR 634, 651 [88] (Warren CJ, Tate JA and Beach AJA).

'intermediaries' in the questioning of children, as recommended by the Victorian Law Reform Commission.[80]

49. The CRC has also informed human rights judgments in comparable Australian jurisdictions, such as in the ACT, for example in relation to the need to make proper arrangements for children being a relevant factor in the sentencing of a parent.[81]

50. The above analysis demonstrates that human rights instruments, and the CRC, can have a broad field of relevance, and a significant impact, in litigation.

V. Case Studies

Case Study 1: Using the Charter to Challenge Conditions of Detention

51. In late 2016, riots and consequent damage at the Parkville Youth Justice Precinct significantly reduced the capacity of Victoria's Youth Justice System. The result was described by the government and the courts as an 'accommodation crisis'.

52. In response, the Government established a Youth Justice and Remand Centre within a maximum-security adult male prison known as the Grevillea Unit. It transferred several children to the unit, which had previously been known as part of HM Barwon Prison. Although the children were kept separate from adult prisoners, the built environment was that of a maximum-security adult prison, and the conditions were described as 'harsh and austere.' The evidence was that the children did not receive adequate education, had minimal time outside and were frequently locked down in isolation in their cells for extended periods of time.

53. The establishment of the Grevillea Unit led to two sets of proceedings which resulted in Supreme Court judgments considering children's rights under the Charter. Both proceedings were judicial review proceedings; they involved the plaintiffs challenging the lawfulness of government decisions in relation to the establishment

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[80] *Ward v The Queen* [2017] VSCA 37; (2017) 54 VR 68, 93-4 [98] fn 28 (Maxwell P and Redlich JA). Intermediaries have now been introduced for witnesses who are children and/or have cognitive impairments: *Criminal Procedure Act 2009* (Vic), Pt 8.2A.

[81] *Aldridge v The Queen* [2011] ACTCA 20, [34] (Refshauge J); *Hugg v Driessen* [2012] ACTSC 46; (2012) 261 FLR 324, [62] (Refshauge J), referring to the Constitutional Court of South Africa judgment of *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18, which in turn had regard to the CRC. This principle has not yet been applied in Victoria: see *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105; (2010) 30 VR 589; 594-5 [16]-[19] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA).

and running of the Grevillea Unit. Each proceeding was brought on both traditional administrative law grounds and Charter unlawfulness grounds. This seminar is only concerned with the Charter grounds. As a result, there are some legal complexities that are not considered, but it is nevertheless helpful to understand how these cases advanced the law in relation to children's rights in Australia.

First Proceeding: Certain Children (1)[82]

54. In this proceeding, the plaintiffs challenged the decisions to: (a) establish the Grevillea Unit as a Youth Justice and Remand Centre; and (b) transfer children there. The plaintiffs sought writs of habeas corpus and an order directing the plaintiffs' release from the Unit. They also sought orders declaring invalid or quashing both the Orders in Council which established the Unit and the transfer decisions.

55. The Charter grounds relied on were that the Government had failed to give proper consideration to the plaintiffs' rights under s 38(1) of the Charter. The primary Charter rights relied on were:

    (1) Section 17(2) — Best interests of the child;

    (2) Section 10(b) — Prohibition on treatment that is cruel, inhumane or degrading; and

    (3) Section 22(1) — Right to humane treatment when deprived of liberty.

56. The Court ultimately found that the Government had failed to give proper consideration to each of these rights in both making the decision to establish the Grevillea Unit and in deciding to transfer the children there. As a result, the decisions were unlawful under the Charter. The Court observed that there was some legal complexity around whether this could render the decisions invalid, but it was ultimately unnecessary to decide as the decisions were ruled invalid on other administrative law grounds. The Government was ordered by the Court to transfer the children to a lawfully established Youth Justice and Remand Centre.

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[82] *Certain Children v Minister for Families and Children* [2016] VSC 796; (2016) 51 VR 473 ('*Certain Children (No 1)*'). Note that this decision was subject to a partially successful appeal, but the appeal did not concern the Charter grounds: *Minister for Families and Children v Certain Children* [2016] VSCA 343; (2016) 51 VR 597.

57. Of particular interest to this seminar is the Court's consideration of the protection of the best interests of the child under s 17(2). The Court specifically stated that the CRC and materials from the United Nations inform the scope of the right.[83]

58. The Court observed, for example, that the CRC:

> [P]rovides for the protection of children's dignity in the criminal process in art 40(1). It states that children should be:
>
> > 'treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedom of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.[84]

59. The Court went on to examine the Committee on the Rights of the Child's consideration of art 40(1), noting that it had described this right as embodying the following fundamental principles:

(1) treatment that is consistent with the child's sense of dignity and worth;

(2) treatment that reinforces the child's respect for the human rights and freedoms of others;

(3) treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society; and

(4) respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented.

60. The Court also relied on the United Nations Standard Minimum Rules for the Administration of Justice (the Beijing Rules), which provide that, while in custody, "juveniles shall receive care, protection and all necessary individual assistance — social, educational, vocational, psychological, medical and physical — that they may require in view of their age, sex and personality".[85]

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[83] Ibid, 497 [146].

[84] Ibid, 497 [150].

[85] Ibid, see especially 498 [152]-[154].

61. International legal materials, it can be seen, played a significant role in the Court's consideration.

Second Proceeding: Certain Children (2)[86]

62. Following the first proceeding, the Government made the decision to re-establish the Grevillea Unit as a Youth Justice and Remand Centre.

63. A legal challenge was again brought on both traditional administrative law grounds and Charter grounds. In terms of the Charter grounds, the plaintiffs argued that the Government had both failed to give proper consideration to, and substantively acted incompatibly with, several rights under the Charter in respect of three categories of decisions: to re-establish the Grevillea Unit as a Youth Justice and Remand Centre, to transfer children to the Unit, and to allow some staff to possess and use OC spray.

64. The main rights relied upon were again:

    (1) Section 17(2) — Best interests of the child;

    (2) Section 10(b) — Prohibition on treatment that is cruel, inhumane or degrading; and

    (3) Section 22(1) — Right to humane treatment when deprived of liberty.

65. The Court ultimately found that both limbs of s 38(1) had been breached in relation to the decision to re-establish the Grevillea Unit and transfer children there, but only with respect to the rights under ss 17(2) and 22(1). The Court found that s 10(b) was not engaged, taking into account the high threshold at law in respect of this right. It should be noted that in the intervening period between the two cases, the evidence suggested that the conditions at Grevillea had been somewhat improved.

66. In relation to the weapons exemption, which allowed some staff to possess and use OC spray, the Court found that the right had not been substantively breached, as although it was engaged, the limitation of the right was reasonable under s 7(2), largely because the use of any weapons was subject to strict conditions. It did, however, find that the Government had nevertheless failed to properly consider the right when making the decision.

[86] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; 52 VR 441 ('*Certain Children (No 2)*').

67. In arriving at these decisions, the Court was persuaded by evidence from a variety of sources, including expert evidence about the 'built environment' of the Grevillea Unit, its impact on the psychological wellbeing of the children, and its inability to cater for their developmental needs.

68. The ultimate result was that each decision was unlawful under the Charter. The Court declared the decisions unlawful and made an order restraining the Government from continuing to detain any children at Grevillea. For the purposes of this seminar, there are two particularly notable aspects of the judgment.

69. First, the Court set out a useful framework or roadmap for applying s 38(1) of the Charter. The Court observed that when deciding whether a decision is lawful under s 38(1), it needs to ask itself the below questions.[87] Those same questions can be asked by potential plaintiffs when challenging government decisions, and provide a useful conceptual map:

    (1) Is any human right relevant to the decision or action that a public authority has made, taken, proposed to take or failed to take? (the relevance or engagement question);

    (2) If so, has the public authority done or failed to do anything that limits that right? (the limitation question);

    (3) If so, is that limit under law reasonable and is it demonstrably justified having regard to the matters set out in s 7(2) of the Charter? (the proportionality or justification question);

    (4) Even if the limit is proportionate, if the public authority has made a decision, did it give proper consideration to the right? (the proper consideration question); and

    (5) Was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted under s 32 of the Charter in a way that is consistent with the protected right (the inevitable infringement question).

[87] Ibid, 497 [174].

70. Secondly, the Court made interesting observations about the rights of children and resource allocation, which could provide fruitful ground for future cases. In considering whether the Charter rights had been substantively breached under s 38(1), the Court observed:

> The evidence does not support the proposition that the defendants thought extensively or creatively about solutions to the emergency crisis that was before them. A traditional, but limited, response emerged that imposed some significant limitations on the rights of a few. Broadly speaking, the resources available to government are a relevant factor when determining what reasonable limits on human rights can be justified. In a free and democratic society based on human dignity, equality and freedom, the executive is expected to make a proper proportion of its resources available for the protection and advancement of its children … By simply identifying four alternative places that are not suitable, the defendants fell well short in demonstrating that resources were inadequate for the provision of less restrictive measures.[88]

71. In conclusion, these twin proceedings demonstrate several significant things about Charter litigation. First and foremost — it can work. The Charter, when employed well, can result in concrete remedies for plaintiffs and significant developments in the law. Second, the proceedings show that courts are ready and willing to take guidance from international law as to the nature and scope of the rights under the Charter, including from the CRC. Both features present real opportunities for both defending and advancing children's rights through the legal system.

72. The tables below summarise the Charter findings in relation to each decision.

First proceeding

Right	**Decision to establish Grevillea Unit**	**Transfer decisions**
S 10(b)	Breach of proper consideration limb of s 38(1)	Breach of proper consideration limb of s 38(1)
S 17(2)	Breach of proper consideration limb of s 38(1)	Breach of proper consideration limb of s 38(1)
S 22(1)	Breach of proper consideration limb of s 38(1)	Breach of proper consideration limb of s 38(1)
Charter result: each decision was unlawful under s 38(1).		

[88] Ibid, 581 [474]-[475].

Second proceeding

Right	Decision to re-establish Grevillea Unit	Transfer decisions	Weapons exemption decision
S 10(b)	Right not engaged	Right not engaged	Right not engaged
S 17(2)	Breach of both limbs of s 38	Breach of both limbs of s 38	Breach of 'proper consideration' limb of s 38(1)
S 22(1)	Breach of both limbs of s 38	Breach of both limbs of s 38	Breach of 'proper consideration' limb of s 38(1)
Charter result: each decision was unlawful under s 38(1).			

Case Study 2: Using the Charter in the Absence of Legislation to Raise the Age

73. While there has been a strong push over recent years to raise the minimum age of criminal responsibility,[89] the principle of *doli incapax* continues to apply in Victoria.

74. *Doli incapax,* as explained by the High Court in *RP v The Queen*,[90] is a common law rule by which it is presumed that children under the age of 14 lack the capacity to be criminally responsible for their acts.[91]

75. This case concerned a prospective appeal at the County Court of Victoria against a conviction imposed by the Children's Court of Victoria, where a child (the applicant)

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[89] See: https://www.raisetheage.org.au/

[90] (2016) 259 CLR 641.

[91] Ibid, 647 [4] (Kiefel, Bell, Keane and Gordon JJ). The High Court explained the operation of the principle as follows at 648-9 [8]-[9] (Kiefel, Bell, Keane and Gordon JJ) (citations omitted, our emphasis added):

> The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea. The presumption of *doli incapax* at common law is irrebuttable in the case of a child aged under seven years. From the age of seven years until attaining the age of 14 years it is rebuttable: the prosecution may adduce evidence to prove that the child is *doli capax*. …
>
> Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous. This distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was "seriously wrong" or "gravely wrong". No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts. … The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised…

pleaded guilty and was sentenced for alleged offending committed as an 11 year-old. The applicant had a history of significant developmental and mental health issues. Before the Children's Court, the applicant had agreed to participate in a Therapeutic Treatment Order (TTO).[92]

76. However, that TTO was not completed, and it appears that the issue of *doli incapax* was not raised by the child's lawyers, the prosecution or the judicial officer before the applicant was sentenced. The applicant was not adequately advised of his appeal rights based on the principle of *doli incapax.* It was not until years later that the applicant, and his family, received proper legal advice on that issue.

77. The applicant made an application for an extension of time to appeal his conviction pursuant to s 430 of the *CYFA*. The applicable test was: (1) whether the failure to file a notice of appeal within time (28 days) was due to 'exceptional circumstances', and (2) whether the court was satisfied that the respondent's case would not be materially prejudiced because of the delay.

78. Relying on *SL*, the applicant employed s 32(1) of the Charter to submit that the human rights as protected by ss 17(2) and 25(3) of the Charter should inform the interpretation of 'exceptional circumstances'.

79. Further, it was submitted that s 24(1) of the Charter (the right to a fair hearing) was engaged, and by analogy with *Taha*, the Children's Court was under a duty to inquire about the applicability of *doli incapax* on the facts of the case. It was submitted:

> [W]here a child is aged 10-13 and charged with a criminal offence, in the absence of the issue being directly addressed by the prosecution or defence, the Court has a duty to enquire as to whether the child is *doli capax* or *incapax*. This 'duty to enquire' stems from the child's Charter rights (particularly those in ss 17, 24 and 25) and is analogous to the 'duty to enquire' recognised by the Court of Appeal in *Victorian Toll v Taha* (2013) 49 VR 1 ('*Taha*').

80. Notice was given to the AG and VEORC as required by s 35(1) of the Charter. The AG and VEORC decided not to intervene in the proceeding.

81. Ultimately, the County Court Judge decided to grant the extension of time on the basis of the evidence and did not substantively engage with the Charter submissions,

[92] This was understandably so – successful completion would have required that the applicant be discharged from the criminal offences without further hearing pursuant to s 354(4) of *CYFA*.

despite the Charter having been squarely relied upon. The conviction was set aside and the prosecution determined to discontinue proceedings.

VI. Opportunities and Future Directions

82. The purpose of this seminar has been to provide an overview of the opportunities that domestic human rights legislation such as the Charter present for both lawyers and advocates, especially in the context of the CRC.

83. The nature of human rights legislation is that (generally speaking) the more it is used, the more useful it becomes. When frequently called upon by advocates and lawyers, human rights legislation remains front and centre in government decision-making. And when frequently used in litigation, there is opportunity for precedent to develop, shaping Australian laws in light of international human rights protections and jurisprudence.

84. There are also some exciting future directions. For example, the Committee on the Rights of the Child has committed to publishing a General Comment on children's rights and the environment, with a special focus on climate change. This could provide a further foundation for Australian human rights cases in this area. Similarly, as we continue to see State and Territory governments fail to enact legislation to protect children's rights in the criminal justice system, domestic human rights legislation can be used to encourage and enforce compliance.

85. In an adversarial system of justice though, the future of the Charter necessarily depends on the active choices of lawyers and advocates to use it, and to do so responsibly, but also bravely and creatively. We hope that this seminar has inspired you to consider how domestic human rights legislation might form part of your advocacy toolkit and provided you with resources and information for further exploration.

Michael Stanton

Katharine Brown

20 October 2021

APPENDIX A: FURTHER RESOURCES ON THE CHARTER

If you are interested in learning more about the operation of the Charter, there are several fantastic resources. For example:

- The full text of the Charter can be found here.
- The Second Reading Speech (4 May 2006, Legislative Assembly) for the Charter made by then Attorney-General Rob Hulls can be found here. A second reading speech is where a Member of Parliament explains the operation and purpose of a new Bill to Parliament.
- The Explanatory Memorandum to the Charter can be found here (an Explanatory Memorandum is a document which explains what each provision of a Bill means and what it attempts to achieve if passed as a law).
- The Judicial College of Victoria publishes the Charter of Human Rights Bench Book, which provides a comprehensive overview and commentary on the Charter. It is a great starting point if you want to understand how the courts have interpreted the scope of a power or right under the Charter.
- The Judicial College if Victoria also publishes this very handy Charter Case Collection, which summarises key cases applying the Charter.
- The Human Rights Law Centre publishes case summaries of human rights decisions, including those applying the Charter.
- The Human Rights Law Centre also publishes Advocacy Guides on the Charter, specific to certain rights and groups.
- The Victorian Equal Opportunity and Human Rights Commission also publishes information about the operation of the Charter, which can be found here.

APPENDIX B: TABLE OF REASONS FOR JUDGMENT IN *MOMCILOVIC*

Issue	French CJ	Gummow J	Hayne J	Heydon J	Crennan and Kiefel JJ	Bell J	Ratio/ Obiter
Interplay between ss 5 and 71AC of the *DPCSA*	Section 5 does not apply to s 71AC	Section 5 does not apply to s 71AC	Agrees with Gummow J	Section 5 applies to s 71AC	Section 5 does not apply to s 71AC	Section 5 applies, but s 71AC required direction as to intent – insufficient direction given	**Section 5 does not apply to trafficking under s 71AC (5:2)**
Burden of Proof	Clear language - s 32(1) of the Charter does not change the burden	Clear language - s 32(1) of the Charter does not change the burden	Agrees with Gummow J	Section 32(1) is irrelevant, because it is invalid	Clear language - s 32(1) of the Charter does not change the burden	Clear language - s 32(1) of the Charter does not change the burden	**Section 32(1) of the Charter does not change the burden of proof (7:0)**
Validity of the Charter	Section 32(1) of the Charter is valid. It applies in the same way as principle of legality but with a wider field of application. A declaration pursuant to s 36 of the Charter does not infringe the *Constitution*	Section 32(1) of the Charter is valid. Sections 33, 36 and 37 are offensive to *Kable* and invalid under the *Constitution*	Agrees with Gummow J	Section 7(2) of the Charter is invalid. Section 32(1) of the Charter is invalid. Sections 33, 36 and 37 of the Charter are invalid	Section 36 is valid, but declaration should not have been made in this case given s 5 of the *DPCSA* does not apply to s 71AC.	Agrees with French CJ	**Section 32(1) of the Charter is valid (6:1)** **Section 36 of the Charter is valid (4:3)**

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Issue	French CJ	Gummow J	Hayne J	Heydon J	Crennan and Kiefel JJ	Bell J	Ratio/ Obiter
Interplay between ss 32(1) and 7(2) of the Charter	Section 7(2) plays no part when interpreting law pursuant to s 32(1)	Section 7(2) does have role to play, when engaged, with s 32(1)	Agrees with Gummow J	Section 32(1) is invalid, but were it valid s 7(2) is relevant pursuant to s 32(1)	Section 7(2) plays no part when interpreting law pursuant to s 32(1)	Section 7(2) is inseparable from the task pursuant to s 32(1)	**Split 3:3 regarding whether s 7(2) informs the task pursuant to s 32(1).** **Heydon J – Had s 32(1) been valid, s 7(2) would be relevant**
Inconsistency (whether State laws invalid because of Cth laws)	The state laws are valid given s 300.4 of the *Criminal Code*	The state laws are valid given s 300.4 of the *Criminal Code*	The state offence is invalid pursuant to s 109 of the *Constitution*	The state laws are valid given s 300.4 of the *Criminal Code*	The state laws are valid given s 300.4 of the *Criminal Code*	The state laws are valid given s 300.4 of the *Criminal Code*	**The State laws are valid (6:1)**
High Court Appellate Jurisdiction	The High Court does not have jurisdiction to set aside a declaration pursuant to s 36 of the Charter	The declaration should be set aside	Agrees with Gummow J	The declaration was invalid	The declaration should not have been made	Agrees with French CJ	**The declaration should be set aside (5:2)**
Disposition of Appeal	Appeal allowed – Retrial	Appeal allowed – Retrial	Appeal allowed - presentment should be quashed	Appeal dismissed	Appeal allowed – Retrial	Appeal allowed – Retrial	**<u>Appeal allowed – Retrial</u>**