



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

BETWEEN:

DEMETRIOS CHARISIOU

Appellant

and

THE KING

Respondent

**SUBMISSIONS OF
THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
SEEKING LEAVE TO BE HEARD AS *AMICUS CURIAE***

PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF LEAVE TO BE HEARD AS *AMICUS CURIAE*

2 The Victorian Equal Opportunity and Human Rights **Commission** seeks leave to be heard as *amicus curiae* in the proceeding.¹ The Commission seeks to make submissions only on Ground 1, focussing on the proper construction and operation of s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

PART III: REASONS FOR LEAVE TO BE HEARD AS *AMICUS CURIAE*

3 The Commission is a body corporate, continued in existence by s 154 of the *Equal*
 10 *Opportunity Act 2010* (Vic) (**EO Act**). The functions of the Commission include those conferred on it by the Charter.² Section 40(1) of the Charter provides that the Commission “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”. That function is facilitated by the requirement in s 35 that a party to a proceeding must give notice to the Commission if “a question of law arises that relates to the application of [the] Charter or a question arises with respect to the interpretation of a statutory provision in accordance with [the] Charter” (in the Supreme Court or County Court) or a “question is referred to the Supreme Court” under s 33.

20 4 Section 40(1) of the Charter does not appear to enable the Commission to intervene in this proceeding,³ the term “court” being defined as “Supreme Court, the County Court, the Magistrates’ Court, the Children’s Court or the Coroners Court”.⁴ The Commission is, however, empowered by s 160(c) of the EO Act to “assist a court or tribunal, as *amicus curiae*” in “proceedings where the Commission is satisfied that it would be in the public interest for the Commission to assist the court or tribunal as *amicus curiae*”, with the leave of the “court or tribunal”. The EO Act does not define “court or tribunal”, but the expression is broad enough to include this Court.

¹ *High Court Rules 2004* (Cth), rr 42.08A, 44.04.

² See Charter, ss 1(3)(b); EO Act, s 155(1)(c).

³ This position was conveyed to the Commission by the Registry: Email dated 22 December 2025 at 1:51pm.

⁴ Charter, s 3(1). The proceeding concerns State offences and there is no suggestion the proceeding is otherwise in federal jurisdiction. It is therefore unnecessary to explore the question of whether s 40(1) is a provision that would be applied in federal jurisdiction by ss 68(1) or 79(1) of the *Judiciary Act 1903* (Cth) and, if so, whether the word “court” would be construed more broadly: see *Rizeq v Western Australia* (2017) 262 CLR 1 at [81] (Bell, Gageler, Keane, Nettle and Gordon JJ).

5 Having formed the state of satisfaction required by s 160(c) of the EO Act (evidenced by the making of this application), the Commission seeks the Court’s leave to appear as *amicus curiae*. The following considerations support a grant of leave.

6 *First*, the Commission brings a long-term and institutional perspective to the construction and operation of the Charter, including s 32(1) of the Charter. The Commission advanced detailed submissions about s 32(1) in *Momcilovic v The Queen*.⁵ It has also advanced submissions about s 32(1) in various other proceedings, dating back almost 20 years.⁶

7 *Second*, as occurred in *Momcilovic*,⁷ had the Commission intervened in the Court of Appeal in this case, it would have been “taken to be a party” to the appeal and been able to make submissions accordingly. However, the Commission is unable to intervene in every matter raising the Charter and makes decisions based on information available to it at the time. Its capacity to intervene in proceedings in the Court of Appeal is limited. There will therefore be cases, such as this one, where important issues⁸ concerning the Charter are raised in this Court but where the Commission did not intervene below.

8 *Third*, because of the decision in *Momcilovic* there is a great deal of uncertainty regarding the proper operation of s 32(1) of the Charter. As Nettle JA observed shortly afterwards:⁹

20 The problem is that the judgments of the High Court in *Momcilovic v The Queen* do not yield a single or majority view as to what is meant by interpreting a statutory provision in a way that is compatible with human rights within the meaning of s 32 of the Charter.

Since *Momcilovic*, the Court has not had occasion to “revisit the important question of the content of the requirement” of s 32(1) of the Charter.¹⁰ The general operation of s 32(1) was not resolved in *Director of Public Prosecutions v Smith*.¹¹ This appeal may provide the occasion to do so, in circumstances where the operation of s 32(1) is squarely

⁵ See (2011) 245 CLR 1 at 11-13 (S P Donaghue), [412], [416] (Heydon J), [677] (Bell J).

⁶ See, eg, *RJE v Secretary to the Department of Justice* (2008) 21 VR 526; *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1; *Slaveski v Smith* (2012) 34 VR 206; *DPP (Vic) v Leys* (2012) 44 VR 1; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1; *DPP v Kaba* (2014) 44 VR 526.

⁷ See Charter, s 40(2); *Momcilovic* (2011) 245 CLR 1 at [128] (Gummow J).

⁸ As to the matters that the Commission generally considers in the context of considering whether to exercise its right of intervention, see Commission’s “Charter intervention guidelines” (May 2018) at <https://www.humanrights.vic.gov.au/resources/charter-intervention-guidelines/>.

⁹ *WK v The Queen* (2011) 33 VR 345 at [55].

¹⁰ *Minogue v Victoria* (2018) 264 CLR 252 at [80] (Gageler J), see also [55]-[56] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

¹¹ See (2024) 98 ALJR 1163 at [57]-[58] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

raised by one of the grounds of appeal and detailed written submissions have been filed. Section 32(1) has not been “relegated to the periphery”.¹²

- 9 *Fourth*, one aspect (but not the only aspect) of the uncertainty arising out of *Momcilovic* is the correct understanding of the relationship between ss 7(2) and 32(1) of the Charter. In 2012, the Court of Appeal summarised the position as follows:¹³

10 The Court of Appeal in *Momcilovic* held that the interpretative task under s 32 does not involve the application of s 7(2), which needs to be considered only for the purposes of making a declaration of inconsistent interpretation under s 36. In the High Court, French CJ, Crennan and Kiefel JJ concluded that s 7(2) “cannot inform the interpretative process which s 32(1) mandates” but is engaged only when and if “the statutory provision under consideration imposes a limit on its enjoyment”. “[I]t cannot be interpreted into the content of the rights and freedoms set out in the Charter”. In contrast, Gummow, Hayne and Bell JJ held that s 7(2) does inform the interpretative task to the extent that it will usually be appropriate for a court first to consider whether under s 7(2) there is scope for a justified limitation of the right in issue. It followed, as Gummow J put it, that “[s]ection 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Part 2, including, where it has been engaged, s 7(2)”. Heydon J observed that, if s 7(2) were valid, it would inform the interpretative task, but his Honour held that both s 7(2) and s 32(1) were invalid.

Hayne and Heydon JJ both dissented with respect to the final orders and Heydon J also dissented on the question of whether the appeal should be allowed.

- 10 In short, four judges held that s 7(2) has a role to play in the operation of s 32(1), but two of those judges dissented in the final orders. As a result, no *ratio decidendi* can be extracted from *Momcilovic* on this point.¹⁴ The Court of Appeal has since left open the question of whether it should therefore follow its own earlier decision in *Momcilovic*, despite that decision being overruled.¹⁵ As it did in *Momcilovic* and again afterwards in the Court of Appeal,¹⁶ the Commission seeks to advance submissions consistent with the reasoning of four judges of the High Court on this point.¹⁷ That approach also has consequences for the operation of s 32(1) in so far as it operates upon statutory provisions

¹² Cf *Minogue v Victoria* (2018) 264 CLR 252 at [80] (Gageler J); *R v IBAC* (2016) 256 CLR 459 at [71]-[72] (Gageler J).

¹³ *Slaveski* (2012) 34 VR 206 at [21]-[22] (Warren CJ, Nettle and Redlich JJA) (citations omitted).

¹⁴ *Commonwealth v Yunupingu* (2025) 99 ALJR 519 at [25] (Gageler CJ, Gleeson, Jagot, Beech-Jones JJ), [177] (Gordon J), [263]-[265] (Edelman J). See also *Kerrison v Melbourne City Council* (2014) 228 FCR 87 at [172] (Flick, Jagot and Mortimer JJ); *Noone v Operation Smile (Australia) Inc* (2012) 38 VR 569 at [28]-[29] (Warren CJ and Cavanough AJA).

¹⁵ See *Nigro* (2013) 41 VR 359 at [88] (Redlich, Osborn and Priest JJA); *Noone* (2012) 38 VR 569 at [31] (Warren CJ and Cavanough AJA), cf [142] (Nettle JA); *Taha* (2013) 49 VR 1 at [214] (Tate JA).

¹⁶ See *Nigro* (2013) 41 VR 359 at [88] (Redlich, Osborn and Priest JJA).

¹⁷ See *Momcilovic* (2011) 245 CLR 1 at [166] (Gummow J), [280] (Hayne J), [682]-[684] (Bell J), [408]-[409] (Heydon J); cf AS [35]; LACW [72].

that confer powers on decision-makers. As it has done in the Court of Appeal both before and after *Momcilovic*,¹⁸ the Commission seeks to advance submissions on that topic too.

11 *Fifth*, the Commission's various functions under the Charter are informed by the
operation of s 32(1) of the Charter.¹⁹ For example, one of the Commission's functions is
to "provide education" about the Charter. Given the uncertainty in the state of authority
concerning s 32(1), that is presently not a straightforward exercise. The same can be said
about the function of presenting to "the Attorney-General an annual report that examines
... the operation of [the] Charter, including its interaction with other statutory provisions
and the common law". The Commission seeks to advance submissions on those topics,
10 including the interaction between s 32(1) of the Charter and the common law "principle
of legality". Following *Momcilovic*, the Court of Appeal has not definitively resolved that
interaction.²⁰

12 *Sixth*, the Court "should have" the Commission's proposed submissions to assist it to
reach a correct determination", being submissions on issues "not fully argued" or not
"fully covered" in the parties' submissions.²¹

13 *Seventh*, in circumstances where one of the grounds of appeal squarely raises questions
about the operation of s 32(1) of the Charter, a grant of leave ought not add materially to
the parties' preparation for the hearing or the length of the oral hearing itself.²² The
Commission seeks only a short period for any oral submissions.

20 **PART IV: PROPOSED SUBMISSIONS**

A INTRODUCTION

14 Ground 1 of the Notice of Appeal raises a question of statutory construction. "Statutory
construction is the process of attributing meaning to statutory text. The construction of a
statutory provision begins and ends with the statutory text understood in context and in
light of the statutory purpose — being what the provision is designed to achieve in fact
— insofar as that purpose is discernible from the statutory text and context".²³ Numerous

¹⁸ See *RJE* (2008) 21 VR 526 at [56(b)] (Maxwell P and Weinberg JA); *Nigro* (2013) 41 VR 359 at [179]-[187] (Redlich, Osborn and Priest JJA).

¹⁹ See Charter, s 41.

²⁰ See, eg, *R v DA* (2016) 263 A Crim R 429 at [44] (Ashley, Redlich and McLeish JJA), noting "[i]t is not necessary to decide whether s 32(1) of the Charter is a statutory articulation of the common law 'principle of legality' as applied to the rights set out in the Charter".

²¹ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [6], [7(3)] and [7(5)] (the Court).

²² *Roadshow Films* (2011) 248 CLR 37 at [4] (the Court).

²³ *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362 at [4] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ) (citations omitted).

common law and statutory principles of construction are part of the “context” in which statutory text must be understood. Two are significant for this appeal: (1) the common law “principle of legality”; and (2) the statutory principle in s 32(1) of the Charter.

B THE PRINCIPLE OF LEGALITY

15 The “principle of legality” is to the effect that a “legislative intention to abrogate or curtail a fundamental right or freedom should not be imputed unless clearly manifested by unmistakable and unambiguous language”.²⁴ The rationale for the principle is that it is “in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness”.²⁵ At the same time, “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”.²⁶ The principle “is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted”.²⁷

16 The principle is “not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law”; it extends to the “protection of fundamental principles and systemic values”.²⁸ That being so, the principle is capable of protecting the “human rights” set out in Pt 2 of the Charter. That Part “sets out the human rights that Parliament specifically seeks to protect and promote”.²⁹ The Charter as a whole, including Pt 2, was enacted by the Parliament on behalf of the people of Victoria, “recognising that all people are born free and equal in dignity and rights”, and founded on principles including that “human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom”.³⁰ In circumstances where the Victorian Parliament

²⁴ *TCXM v Minister for Immigration and Citizenship* [2026] HCA 13 at [48] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

²⁵ *Bropho v WA* (1990) 171 CLR 1 at 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

²⁶ *Coco v The Queen* (1994) 179 CLR 427 at 437-438 (Mason CJ, Brennan, Gaudron and McHugh JJ).

²⁷ *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309 at [21] (Gleeson CJ).

²⁸ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [313] (Gageler and Keane JJ).

²⁹ Charter, s 7(1).

³⁰ Charter, Preamble.

has attributed particular value to the expressly recognised “human rights” set out in Pt 2, and has done so being aware of the “working hypothesis” underpinning the principle of legality, the human rights in the Charter can be understood to attract the principle of legality in the same way as those rights recognised by the common law.³¹ That conclusion follows simply from the enactment of the Charter; it does not depend on the operation of s 32(1) of the Charter.³² Having given specific recognition to those human rights to protect and promote them, it should not then be presumed that Parliament intended to abrogate or curtail those rights other than by unmistakable and unambiguous language.

17 That alignment of “human rights” with other common law rights for the purpose of the
 10 principle of legality has the benefit of attributing to the Parliament a rational and consistent legislative intention, acknowledging that many “human rights” overlap with common law rights that were already within the scope of the principle.³³ The enactment of the Charter did not dilute the importance of those rights.³⁴ Moreover, because most of the “human rights” are primarily drawn from the *International Covenant on Civil and Political Rights (ICCPR)*,³⁵ that alignment also ensures coherence between the principle of legality and the “overlapping and mutually reinforcing” general principle of construction that “legislation should be interpreted and applied, as far as its language permits, to be in conformity and not in conflict with the established rules of international law”.³⁶ That conformity principle is itself reinforced by s 32(2) of the Charter, which
 20 provides 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”.³⁷

18 The principle of legality can be “powerful”.³⁸ “General words” will rarely be sufficient for the purpose of manifesting the necessary intention to abrogate or curtail the protected rights.³⁹ If there is a choice between reading a provision in a way that abrogates or curtails

³¹ See *Kaba* (2014) 44 VR 526 at [193] (Bell J), expressing a tentative view to that effect.

³² See *Momcilovic* (2011) 245 CLR 1 at [565] (Crennan and Kiefel JJ).

³³ See, eg, *Momcilovic* (2011) 245 CLR 1 at [444] (Heydon J); Pearce, *Statutory Interpretation in Australia* (10th ed, 2024) at 300-305 [5.72].

³⁴ See Charter, ss 5, 7(3). See also *Fitzgerald v R* [2021] 1 NZLR 551 at [51] (Winkelmann CJ).

³⁵ See Legislative Assembly, *Parliamentary Debates* (4 May 2006) (**Second Reading Speech**) at 1291; **Explanatory Memorandum**, *Charter of Human Rights and Responsibilities Bill* (2006) at 8.

³⁶ *TCXM* [2026] HCA 13 at [48] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

³⁷ See *Momcilovic* (2011) 245 CLR 1 at [18] (French CJ).

³⁸ *Momcilovic* (2011) 245 CLR 1 at [43] (French CJ).

³⁹ See *Coco* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

a right, and reading a provision in a way that does not have that effect, the principle requires the court to choose the latter meaning when it is “reasonably open”.⁴⁰ That “may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning”.⁴¹ But the principle has limits. Where the Parliament has expressed an “unmistakable and unambiguous intention to abrogate or curtail” a protected right, the principle may have little, if any, work to do. In those circumstances, it will not permit the adoption of a construction that does not abrogate or curtail that right.⁴² At most, it may permit the adoption of a construction that involves a *lesser* curtailment of the right if such a construction is “reasonably open”.⁴³

10 C SECTION 32 OF THE CHARTER

19 Section 32(1) of the Charter 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”. A “statutory provision” is an “Act (including [the] Charter) or a subordinate instrument or a provision of an Act (including [the] Charter) or of a subordinate instrument”.⁴⁴ Section 32 thereby enacts a principle of statutory construction, in that it is concerned with “the process of attributing meaning to statutory text”.⁴⁵ In its terms, it explains how statutory provisions “must” be “interpreted”. The principle applies to the interpretation of all statutory provisions, “whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or
20 after that commencement”.⁴⁶

C.1 A “contingent” and “imperative” operation

20 Apart from other human rights instruments in Australia and overseas,⁴⁷ the closest analogue to s 32(1) of the Charter is s 15A of the *Acts Interpretation Act 1901* (Cth) and its equivalents.⁴⁸ Section 15A was enacted against the background of the common law

⁴⁰ See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ) (*NAAJA*).

⁴¹ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78] (McHugh, Gummow, Kirby and Hayne JJ).

⁴² See *Hurt v The King* (2024) 281 CLR 286 at [106] (Edelman, Steward, Gleeson JJ), quoting *Lee* (2013) 251 CLR 196 at [314] (Gageler and Keane JJ). See also *R v IBAC* (2016) 256 CLR 459 at [77] (Gageler J).

⁴³ See *NAAJA* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ).

⁴⁴ Charter, s 3(1).

⁴⁵ See *Deripaska v Minister for Foreign Affairs* [2026] HCA 14 at [25] (Gageler CJ, Gleeson and Jagot JJ).

⁴⁶ Charter, s 49(1).

⁴⁷ *New Zealand Bill of Rights Act 1990* (NZ), s 6; *Human Rights Act 1998* (UK), s 3(1); *Human Rights Act 2004* (ACT), s 30; *Human Rights Act 2019* (Qld), s 48(1).

⁴⁸ See, eg, *Interpretation of Legislation Act 1984* (Vic), s 6(1).

principle of statutory construction that “the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid”, from which it follows that “[i]f the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open”.⁴⁹ Section 15A incorporates but goes beyond that common law principle — it applies where legislation “would”, but for the section, “have been construed as being in excess” of constitutional power. “In the event of that contingency, s 15A requires what might otherwise be “an entirely artificial construction” to be placed on the legislation “in order to save so much of it as might have been validly enacted”.⁵⁰

- 10 21 Like s 15A of the Acts Interpretation Act, s 32(1) of the Charter was enacted against the background of a common law principle requiring a particular choice to be made where two constructions are “reasonably open” underpinned by a presumption concerning Parliament’s intention. Like s 15A of the Acts Interpretation Act, s 32(1) of the Charter was deliberately designed to go beyond the relevant common law principle.⁵¹ That legislative design would be frustrated if s 32(1) did nothing more than apply “to the interpretation of statutes in the same way as the principle of legality but with a wider field of application”,⁵² particularly once it is acknowledged that the principle of legality already extends to protect a very wide range of common law rights.⁵³ However, influenced by French CJ’s judgment in *Momcilovic*, the Court of Appeal has generally
- 20 adopted a cramped understanding of s 32(1) along those lines.⁵⁴ In truth, s 32(1) applies to the interpretation of statutory provisions in a more sophisticated way.
- 22 Like s 15A of the Acts Interpretation Act, s 32(1) of the Charter is “contingent” and “imperative”.⁵⁵ It amounts to a “general declaration of the contingent intention of the legislature that if a law in the form enacted would operate” in a way that is *not* “compatible with human rights” then the law “must” instead be given a construction that

⁴⁹ *Clubb v Edwards* (2019) 267 CLR 171 at [140] (Gageler J).

⁵⁰ *Deripaska* [2026] HCA 14 at [26] (Gageler CJ, Gleeson and Jagot JJ), see also at [204] (Beech-Jones J).

⁵¹ See *Smith* (2024) 98 ALJR 1163 at [139] (Edelman J). See also *Momcilovic* (2011) 245 CLR 1 at [450] (Hedon J); Justice Tate, “Statutory Interpretive Techniques under the Charter: Three Stages of the *Charter*” (2014) 2 *Judicial College of Victoria Online Journal* 69 at 44-52.

⁵² Cf *Momcilovic* (2011) 245 CLR 1 at [51] (French CJ). See *Taha* (2013) 49 VR 1 at [189] (Tate JA).

⁵³ Indeed, it has been said the principle of legality at common law has “wider scope” than s 6 of the *Bill of Rights Act 1990* (NZ): see *Fitzgerald* [2021] 1 NZLR 551 at [217] (O’Regan and Arnold JJ).

⁵⁴ See, eg, *Slaveski* (2012) 34 VR 206 at [45] (Warren CJ, Nettle and Redlich JJA), cited by Walker JA at CA [138]. See generally Chen, “Revisiting Section 32(1) of the Victorian Charter: Strained Constructions and Legislative Intention” (2020) 46 *Monash University Law Review* 174 at 185-188, 226-227.

⁵⁵ *Deripaska* [2026] HCA 14 at [26]-[27] (Gageler CJ, Gleeson and Jagot JJ).

makes it operate in a way that *is* “compatible with human rights”.⁵⁶ As a matter of technique:

22.1 *First*, a court must determine the apparent meaning of the statutory provision by applying all *other* relevant principles of statutory construction — including the principle of legality.⁵⁷

22.2 *Second*, a court must determine whether that apparent meaning is “compatible with human rights” (as to what “compatibility” entails, see Part C.3 below). If the apparent meaning is “compatible”, s 32(1) will have no role to play in the process of construction.⁵⁸ If the apparent meaning is not “compatible”, s 32(1) will require the court to adopt a construction that is “compatible” — subject to the limits identified in Part C.2 below.

23 Where s 32(1) of the Charter has the contingent and imperative operation described above, it may result in the court giving a “statutory provision” a construction that does not correspond with the literal or grammatical meaning of the words used⁵⁹ or even an “entirely artificial construction”.⁶⁰ That outcome may be understood as the court “adjusting the meaning” of a statutory provision, so that the statutory provision operates harmoniously with the legislative direction in s 32(1) of the Charter.⁶¹

C.2 Limits on s 32(1)

24 The contingent and imperative operation of s 32(1) described above is subject to limits, which ensure a court’s role under s 32(1) remains one of “interpretation”⁶² and is therefore within the “limits of judicial power”.⁶³

⁵⁶ See *Clubb v Edwards* (2019) 267 CLR 171 at [140] (Gageler J).

⁵⁷ See *Fitzgerald* [2021] 1 NZLR 551 at [45] (Winkelmann CJ). See also *R v Hansen* [2007] 3 NZLR 1 at [88] (Tipping J).

⁵⁸ See *Hansen* [2007] 3 NZLR 1 at [60] (Blanchard J), [89] (Tipping J), [192] (McGrath J). Cf *Human Rights Act 2019* (Qld), s 48(2).

⁵⁹ *Momcilovic* (2011) 245 CLR 1 at [170] (Gummow J), quoting *Project Blue Sky* (1998) 194 CLR 355 at [78] (McHugh, Gummow, Kirby and Hayne JJ), see also at [684] (Bell J).

⁶⁰ See *Smith* (2024) 98 ALJR 1163 at [137]-[138] (Edelman J); *HKSAR v Lam Kwong Wai* [2006] HKCFA 84 at [65]-[66], [71]-[78] (Sir Anthony Mason NPJ).

⁶¹ See *Project Blue Sky* (1998) 194 CLR 355 at [69]-[71] (McHugh, Gummow, Kirby and Hayne JJ), cited with approval in *Momcilovic* (2011) 245 CLR 1 at [145(vi)] (Gummow J), see also at [684] (Bell J); *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [78] (Crennan, Kiefel and Bell JJ), [98] (Gageler J); *Hansen* [2007] 3 NZLR 1 at [61] (Blanchard J).

⁶² See *Momcilovic* (2011) 245 CLR 1 at [170], see also at [146(v)-(vi)] (Gummow J, Hayne J agreeing at [280]), [684] (Bell J); *Fitzgerald* [2021] 1 NZLR 551 at [59], [66], [73] (Winkelmann CJ).

⁶³ See generally *Spence v Queensland* (2019) 268 CLR 355 at [87] (Kiefel CJ, Bell, Gageler and Keane JJ). See also Sir Anthony Mason, “Statutory Interpretive Techniques under the Charter — Section 32” (2014) 2 *Judicial College of Victoria Online Journal* 69 at 75-76.

25 *First*, as the text of s 32(1) makes clear, the provision only requires a “compatible” construction of a statutory provision to be adopted if that construction is “consistent” with the purpose of the provision.⁶⁴ Section 32(1) cannot require the adoption of a construction that would “displace” that purpose or avoid its achievement.⁶⁵ It might, however, require “a Court to adopt an interpretation of a legislative provision compatible with human rights which [does] not necessarily best achieve the purpose”.⁶⁶

25.1 This limit means it is essential to identify carefully the purpose of the “statutory provision” in issue — what that provision is “designed to achieve in fact”, as ascertained from the text and surrounding context.⁶⁷

10 25.2 This limit also ensures that s 32(1) of the Charter operates harmoniously with the principle contained in s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) that, in the interpretation of a provision of an Act or subordinate instrument, “a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object”.

25.3 A similar limit applies to s 15A of the Acts Interpretation Act,⁶⁸ in New Zealand⁶⁹ and in the United Kingdom.⁷⁰

20 26 *Second*, even though s 32(1) is capable of requiring the adoption of a strained or artificial construction, any such construction must derive from the text and context of the statutory provision (including “the nature of the subject-matter with which it deals”).⁷¹ Thus, like s 15A of the Acts Interpretation Act, s 32(1) of the Charter does not require or authorise a court to “redraft” a statute, that being a function of a “law-making character”.⁷² That limit might suitably be captured by the notion that the text and context must render an

⁶⁴ See *Momcilovic* (2011) 245 CLR 1 at [684] (Bell J).

⁶⁵ See Explanatory Memorandum at 23.

⁶⁶ See *R v Fearnside* [2009] 3 ACTLR 25 at [89] (Besanko J, Gray P and Penfold J agreeing).

⁶⁷ *Palmanova* (2025) 99 ALJR 1362 at [4] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

⁶⁸ *Deripaska* [2026] HCA 14 at [73] (Gordon and Steward JJ), [152] (Edelman J).

⁶⁹ See *Fitzgerald* [2021] 1 NZLR 551 at [67]-[68] (Winkelmann CJ).

⁷⁰ See *Smith* (2024) 98 ALJR 1163 at [138], [140] (Edelman J); *Ravbar v Commonwealth* (2025) 99 ALJR 1000 at [183]-[184] (Edelman J).

⁷¹ See *Deripaska* [2026] HCA 14 at [29] (Gageler CJ, Gleeson and Jagot JJ), [74] (Gordon and Steward JJ), [153] (Edelman J), [208], [210] (Beech-Jones J).

⁷² See *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [75] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *Momcilovic* (2011) 245 CLR 1 at [171] (Gummow J).

alternative construction “tenable” or “available”.⁷³ Those terms have been used in New Zealand, where it has similarly been recognised that the “Courts may interpret but must not legislate”.⁷⁴

27 *Third*, like any principle of statutory construction, s 32(1) of the Charter “yields to a contrary intention”.⁷⁵ Of particular significance is s 31 of the Charter (“Override by Parliament”), under which the “Parliament may expressly declare” that a statutory provision “has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter”.⁷⁶ “If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision”.⁷⁷ That has the effect that “the requirement under section 32 to interpret that provision in a way that is compatible with human rights does not apply”.⁷⁸ A “statement of compatibility” prepared and laid before Parliament under s 28 of the Charter may also be relevant to the ascertainment of a contrary intention.⁷⁹ Given the existence of those specific statutory mechanisms, a court should be very slow to identify a “contrary intention” in the absence of any reliance upon them by Parliament. That is consistent with Parliament’s intention that an “override declaration will only be made in exceptional circumstances”.⁸⁰

28 If one or more of those limits applies to preclude the adoption of a “compatible” construction, the statutory provision must be given the “incompatible” construction that has otherwise been reached in accordance with all the other principles of statutory construction. As confirmed by s 32(3)(a) of the Charter, that outcome does not have any effect on the validity of the provision.⁸¹ However, in certain identified proceedings, if “the Supreme Court is of the opinion that a statutory provision cannot be interpreted

⁷³ See *Fitzgerald* [2021] 1 NZLR 551 at [58], (Winkelman CJ), [181] (Arnold and O’Regan J); *Repia v The King* [2026] NZSC 82 at [47], [70] (Ellen France, Kós and Miller J), [94] (Winkelman CJ).

⁷⁴ *Hansen* [2007] 3 NZLR 1 at [156] (Tipping J) see also at [290] (Anderson J); *Fitzgerald* [2021] 1 NZLR 551 at [59], [66] (Winkelman CJ). In *Momcilovic*, Gummow J recognised the potential comparative utility of New Zealand jurisprudence, particularly the decision in *Hansen*: (2011) 245 CLR 1 at [161].

⁷⁵ *Deripaska* [2026] HCA 14 at [27] (Gageler CJ, Gleeson and Jagot JJ), see also [72] (Gordon and Steward JJ), [152] (Edelman J), [206] (Beech-Jones J).

⁷⁶ Charter, s 31(1).

⁷⁷ Charter, s 31(6). See *Minogue v Victoria* (2018) 264 CLR 252 at [74]-[76] (Gageler J).

⁷⁸ See Note to s 31(6).

⁷⁹ See *R v IBAC* (2016) 256 CLR 459 at [72] (Gageler J); *Smith* (2024) 98 ALJR 1163 at [140] (Edelman J); *Interpretation of Legislation Act 1984* (Vic), s 35(b)(iii).

⁸⁰ Charter, s 31(4).

⁸¹ Subject to the point at paragraph 38 below concerning subordinate instruments. See also *Fitzgerald* [2021] 1 NZLR 551 at [60], [66] (Winkelman CJ), [172] (O’Regan and Arnold JJ); *Hansen* [2007] 3 NZLR 1 at [179], [190] (McGrath J).

consistently with a human right, the Court may make a declaration to that effect in accordance” with s 36 of the Charter.⁸²

C.3 The role of s 7(2)

29 The “human rights” to which s 32(1) of the Charter refers are defined in s 3 to mean “the civil and political rights set out in Part 2” (ss 8 to 27). Most of those rights are based on rights contained in the ICCPR. However, while the ICCPR rights are generally expressed in articles that commence by setting out the right in broad terms, and then specify the circumstances in which the right may permissibly be limited, Pt 2 of the Charter does not generally follow that structure.⁸³ Rather, it contains s 7(2), a general limitation provision that identifies the circumstances in which all human rights protected by the Charter may be limited.⁸⁴ Section 7(2) “embodies” a “proportionality” test,⁸⁵ involving “criteria of a kind that are readily capable of judicial evaluation”.⁸⁶

30 The adoption of that drafting style does not mean that the scope of the human rights protected by the Charter can properly be determined without reference to the circumstances in which rights may be limited. To the contrary, the location of s 7(2) within Pt 2 of the Charter, when read with the definition of “human rights”, strongly suggests that the question whether a particular statutory provision is “compatible” with “human rights” can only be answered by considering the particular right in combination with s 7(2) of the Charter.

31 That approach is reinforced by the structure of the Charter as a whole, which uses the concept of “compatibility with human rights” in ss 1(2)(b) to (d), 28(3)(a) and 32(1). In addition to those sections, ss 28(3)(b), 30, 31(1) and 38(1) each use the related term “incompatible” with human rights.⁸⁷ The phrase “compatible with human rights” should

⁸² But not if the Supreme Court is exercising federal jurisdiction. That is one consequence of the decision in *Momcilovic*: see *Kerrison* (2014) 228 FCR 87 at [194] (Flick, Jagot and Mortimer JJ); Bateman and Stellios, “Chapter III of The Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights” (2012) 36 *Melbourne University Law Review* 1 at 18-19, 27-28

⁸³ There are a limited number of “specifically qualified rights”. Whether those rights are “further qualified by s 7(2)” was a question of construction noted by Gummow J in *Momcilovic* (2011) 245 CLR 1 at [165]. That issue has since been addressed by the Court of Appeal in the context of the right in s 13(a): see *HJ v IBAC* (2021) 64 VR 270 at [45], [55]-[58], [78] (Kyrou, McLeish and Niall JJA).

⁸⁴ “The general limitation clause, including the list of relevant factors, is modelled on section 5 of the New Zealand Bill of Rights Act 1990 and, more particularly, on section 36 of the Bill of Rights contained in the Constitution of the Republic of South Africa 1996”: Explanatory Memorandum at 7.

⁸⁵ Second Reading Speech at 2555; *Momcilovic* (2011) 245 CLR 1 at [541]-[558] (Crennan and Kiefel JJ).

⁸⁶ *Momcilovic* (2011) 245 CLR 1 at [684] (Bell J).

⁸⁷ See also *Subordinate Legislation Act 1994* (Vic), ss 12D(2)(a)-(b), 12A(1)-(2), 21(1)(ha), 25A(1)(c); *Ombudsman Act 1973* (Vic), s 13(2).

be given a consistent meaning wherever it is used in the Charter.⁸⁸ Sections 28 and 38 of the Charter are particularly instructive.

31.1 Section 28 concerns the “statements of compatibility” that must be tabled in Parliament on the introduction of any Bill. In the context of that section, the reference to “compatibility with human rights” must be a reference to human rights as reasonably limited having regard to s 7(2) of the Charter, because otherwise a member of Parliament who introduced a Bill that limited human rights in a way that was demonstrably justified having regard to the factors identified in s 7(2) would be required by s 28(3)(b) to inform Parliament that the Bill was “incompatible with human rights”. On that reading, permissible limitations on rights would be ignored, and the Charter would not achieve the purpose of ensuring proper debate “about whether proposed measures strike the right balance between the rights of Victorians and what limits can be justified in a free and democratic society”.⁸⁹

31.2 Section 38(1) makes it “unlawful” for a public authority to “act” in a way that is “incompatible with human rights”. Since *Momcilovic*, it has become well-established that an “act” will be “incompatible” with a human right if it “limits” a right in a way that is not demonstrably justified having regard to the criteria in s 7(2).⁹⁰ That approach to s 38(1) was inevitable. If s 7(2) did not operate together with s 38(1), then a “public authority” that acted in a way that limited a human right would act “unlawfully”, even if that limit was demonstrably justified.⁹¹

32 The extrinsic materials point to the same conclusion.⁹² In short, as Bell J put it in *Momcilovic*: “The Charter’s recognition that rights may be reasonably limited and that their exercise may require consideration of the rights of others informs the concept of compatibility with human rights. That concept is central to the ways in which the Charter applies to the Parliament, to courts and tribunals and to public authorities”.⁹³

33 It follows that, when s 32(1) requires an assessment of whether a construction of a statutory provision is “compatible with human rights”, it requires an assessment of

⁸⁸ See generally *R v Rohan (a pseudonym)* (2024) 280 CLR 288 at [25] (Gageler CJ, Gordon and Edelman JJ).

⁸⁹ Second Reading Speech at 1290. See *Momcilovic* (2011) 245 CLR 1 at [416] (Heydon J), [678] (Bell J).

⁹⁰ See *Thompson v Minogue* (2021) 67 VR 301 at [94]-[101] (Kyrou, McLeish and Niall JJA).

⁹¹ See *Momcilovic* (2011) 245 CLR 1 at [416] (Heydon J), [681] (Bell J).

⁹² See Explanatory Memorandum at 7-9; Second Reading Speech at 1291; *Momcilovic* (2011) 245 CLR 1 at [418]-[419] (Heydon J).

⁹³ *Momcilovic* (2011) 245 CLR 1 at [678].

whether, on that construction: *first*, the provision imposes a “limit” on one or more human rights; and, *second*, if so, whether that limit is “demonstrably justified in a free and democratic society based on human dignity, equality and freedom”, taking into account the criteria in s 7(2). If a construction limits human rights in a way that is demonstrably justified (or does not limit them at all), that construction will be “compatible” with human rights. Conversely, if a construction limits human rights in a way that is not demonstrably justified, that construction will be “incompatible” with human rights.

34 As noted, that approach to the relationship between ss 7(2) and 32 accords with that
 10 adopted by four of the judges in *Momcilovic*. Further, as Gummow J recognised, the
 “relationship” between ss 32(1) and 7(2) of the Charter identified above is “similar” to
 that between ss 5 and 6 of the *New Zealand Bill of Rights Act 1990* (NZ).⁹⁴ Those two
 provisions operate in harmony, such that “[w]here a statutory provision does impose a
 limitation on a right or freedom protected by the Bill of Rights and that limitation can be
 demonstrably justified as reasonable in a free and democratic society, the statutory
 provision will, of course, not breach the Bill of Rights but rather be consistent with it”.⁹⁵

C.4 Section 32(1) and statutory powers

35 Because the “limits” of a “statutory conferral of decision-making authority” are to be
 determined by a process of statutory construction,⁹⁶ s 32(1) of the Charter may also
 operate to inform the scope of “statutory provisions” that confer a power upon a decision-
 20 maker. The mere *conferral* of a statutory power will not immediately have the effect of
 “limiting” a person’s human rights. But if a power is conferred in terms that mean it is
 capable of being *exercised* to “limit” a person’s human rights, and the power is in fact
 exercised in that way, a question will arise as to whether that resulting “limit” will be
 demonstrably justified.

36 In some cases, the construction of a statutory provision reached by applying all of the
 principles of construction (apart from s 32(1)) will mean that the scope of the statutory
 power is confined in a way that means, so long as the decision-maker complies with all
 of the express and implied conditions on the exercise of that power, any exercise of the
 power that limits a person’s human rights will necessarily do so in a way that is

⁹⁴ See *Momcilovic* (2011) 245 CLR 1 at [166]-[168] (Gummow J), citing *Hansen* [2007] 3 NZLR 1 at [57]-[62] (Blanchard J), [88]-[92] (Tipping J), [191] (McGrath J); see also at [683] (Bell J).

⁹⁵ *Fitzgerald* [2021] 1 NZLR 551 at [172] (O’Regan and Arnold JJ).

⁹⁶ See generally *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [4].

demonstrably justified. In other words, the conferral of power will be “so constrained” by the express and implied conditions on its exercise, it will only be capable of being validly exercised in a way that is “compatible with human rights”.⁹⁷ In such a case, s 32(1) will have no work to do.⁹⁸

37 In other cases, the construction of a statutory provision reached by applying all of the principles of construction (apart from s 32(1)) will mean that the scope of the statutory power appears to be “broad and general”.⁹⁹ That power may be exercised to limit a person’s human rights, but the power will be “insufficiently controlled” by its express and implied constraints to ensure that any such limit will be demonstrably justified.¹⁰⁰

10 Such a power may be exercised in a way that is compatible with human rights (by limiting human rights in a way that is demonstrably justified); equally it may be exercised in a way that is incompatible with human rights (by limiting human rights in a way that is not demonstrably justified). In such a case, subject to the three limits identified in Part C.2 above, s 32(1) will require that the provision conferring the power be construed so that it may only be exercised in a way that is compatible with human rights.¹⁰¹ That might be achieved by giving a particular construction to words contained in the statutory provision or in associated provisions.¹⁰² Or it might be achieved by requiring the broad terms of the power to be construed as containing an implied “compatibility” limitation.¹⁰³ An equivalent approach has been applied in New Zealand¹⁰⁴ and in the United Kingdom.¹⁰⁵

⁹⁷ See *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 607 (Brennan J). See also *A-G v Chisnall* [2024] 1 NZLR 768 at [105] (Winkelmann CJ, O’Regan, Williams and Kós JJ).

⁹⁸ See, eg, *RJE* (2008) 21 VR 526 at [54] (Maxwell P and Weinberg JA).

⁹⁹ See *Palmer v Western Australia* (2021) 272 CLR 505 at [68] (Kiefel CJ and Keane J), see also at [122] (Gageler J), [208] (Gordon J).

¹⁰⁰ See *Miller* (1986) 161 CLR 556 at 605 (Brennan J).

¹⁰¹ See *Palmer* (2021) 272 CLR 505 at [122] (Gageler J), [227]-[228] (Edelman J); *Ravbar* (2025) 99 ALJR 1000 at [63] (Gageler J), [104] (Gordon J); *Kracke* (2009) 29 VAR 1 at [206]-[211] (Bell P); **CA [138]**.

¹⁰² See, eg, *RJE* (2008) 21 VR 526 at [119] (Nettle JA); *Hogan v Hinch* (2011) 243 CLR 506 at [67]-[78] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Schubert v Wanganui District Council* [2011] NZHC 48 at [139]-[151] (Clifford J).

¹⁰³ See, eg, *Cotterill v Romanes* (2023) 413 ALR 360 at [109]-[111] (Emerton P, McLeish and Kennedy JJA); *Wainohu v New South Wales* (2011) 243 CLR 181 at [113] (Gummow, Hayne, Crennan and Bell JJ).

¹⁰⁴ See *Zaoui v A-G (No 2)* [2006] 1 NZLR 289 at [90]-[91] (Keith J for the Court); *Dotcom v A-G* [2015] 1 NZLR 745 at [100], [161]-[162] (McGrath, William Young, Glazebrook and Arnold JJ); *D v New Zealand Police* [2021] 1 NZLR 213 at [101]-[102] (Winkelmann CJ and O’Regan J); *J v A-G* [2025] 1 NZLR 485 at [81]-[89], [141]-[145] (Ellen France and Miller JJ), [176]-[178], [214]-[218] (Winkelmann CJ), [307] (Williams J), [364] (Kós J); *Grinder v A-G* [2025] 1 NZLR 1062 at [50], [57]-[59] (Winkelmann CJ, Ellen France and Williams JJ), [114]-[122] (Kós and Miller JJ).

¹⁰⁵ See *R v Waya* [2013] 1 AC 294 at [15]-[16], [20] (Lord Walker and Sir Anthony Hughes, with whom Lady Hale, Lord Judge, Lord Kerr, Lord Clarke and Lord Wilson agreed), [82]-[83] (Lord Phillips and Lord Reed).

38 The approach described above is a permissible exercise in statutory construction, as illustrated by the application of equivalent principles to confine the scope of statutory powers that might otherwise be exercised in a way that contravenes a constitutional limit.¹⁰⁶ It is also an approach contemplated by the terms of the Charter. Section 32(3)(b) provides that s 32 does not affect the validity of “a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and *is empowered to be so by the Act under which it is made*” (emphasis added). The “corollary” of those emphasised words is that s 32 may affect the validity of a subordinate instrument or a provision of a subordinate instrument where the authorising Act (“statutory provision”) does *not* empower the making of an instrument or provision of an instrument that is “incompatible” with a human right.¹⁰⁷ That may be the case, for example, if s 32(1) operates to confine the scope of a broad and general regulation-making power. In such a case, the subordinate instrument or provision may be invalid because it will be made beyond the scope of the authorising power.¹⁰⁸

39 It has been suggested that to give s 32(1) of the Charter the operation described above would be in tension with s 38(1) of the Charter.¹⁰⁹ However, that criticism is answered by recognising that the provisions serve different purposes and have different (albeit overlapping) fields of operation. Section 32(1) is concerned with the proper construction of all statutory provisions, some of which may be provisions that confer statutory powers on decision-makers (some of whom may be “public authorities”). In contrast, the obligations imposed by s 38(1) are imposed only on “public authorities” and are “additional or supplementary” to those obligations imposed by “the primary legislation governing the operations of the public authority”.¹¹⁰

¹⁰⁶ See *Miller* (1986) 161 CLR 556 at 613-614 (Brennan J); *Wotton v Queensland* (2012) 246 CLR 1 at [9]-[10], [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁰⁷ See Explanatory Memorandum at 24.

¹⁰⁸ See, eg, *YBFZ* (2024) 99 ALJR 1 at [19] (Gageler CJ, Gordon, Gleeson and Jagot JJ), [170] (Edelman J); *Deripaska* [2026] HCA 14 at [44], [69]-[70] (Gordon and Steward JJ), [138] (Edelman J), [193] (Beech-Jones J); *Drew v A-G* [2002] 1 NZLR 58 at [68] (Richardson P, Keith, Blanchard and Tipping JJ); *Cropp v Judicial Committee* [2008] 3 NZLR 774 at [24]-[25], [33] (Blachard J for the Court).

¹⁰⁹ See, eg, Chen, “How Does the Charter Affect Discretions? The Limits of s 38(1) and Beyond” (2018) 25 *Australian Journal of Administrative Law* 28 at 37, 40-41.

¹¹⁰ See *HJ* (2021) 64 VR 270 at [154] (Beach, Kyrou and Kaye JJA); *Thompson v Minogue* (2021) 67 VR 301 at [80] (Kyrou, McLeish and Niall JJA); *Bare v IBAC* (2015) 48 VR 129 at [322]-[323], [326], [388]-[389] (Tate JA).

D THE SENTENCING ACT

D.1 The sentencing discretion conferred by s 7(1)

40 The *Sentencing Act 1991* (Vic) is designed to contain “all general provisions dealing with the powers of courts to sentence offenders”.¹¹¹ Section 7(1) empowers a “court” that has found a “person guilty of an offence” to “record a conviction and order that the offender serve a term of imprisonment”, among a range of other sentencing outcomes.¹¹² Section 7(1) thereby confers on a “court” a “wide sentencing discretion”,¹¹³ both as to whether to sentence a person to a term of imprisonment and, if so, the length of that term. The breadth of that discretion reflects “the duty of the judge to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances”.¹¹⁴ In exercising that discretion, “the judge must act in accordance with statutory and any applicable common law principles and in a manner that is consonant with reasonable consistency”.¹¹⁵ Because s 7(1) of the Sentencing Act is a “statutory provision”, s 32(1) of the Charter requires the discretion conferred by s 7(1) of the Sentencing Act to be “interpreted in a way that is compatible with human rights”, so far as it is possible to do so consistently with its purpose.

41 It is s 7(1) of the Sentencing Act that ought to be the focus of the constructional exercise in so far as “human rights” are concerned. Sections 5(1) and 5(2) do not themselves place any “limits” on a person’s human rights. Any such limits are not imposed unless and until the court exercises the sentencing discretion conferred by s 7(1). The nature and extent of any such limit will depend on the nature and extent of the sentence imposed by the sentencing judge. For example, the exercise of the discretion to impose a period of imprisonment will invariably “limit” at least the rights to movement (s 12) and liberty (s 21(1)), and the extent of those limits will correspond to the period of imprisonment.

42 As a general proposition, the breadth of the discretion conferred by s 7(1) means that it is capable of being construed so that it does not authorise the imposition of a sentence that is not “compatible” with human rights (consistently with the approach outlined in Part C.4 above). That is, s 7(1) is capable of being construed so that it only authorises the imposition of a sentence that limits human rights in a way that is demonstrably justified.¹¹⁶

¹¹¹ Section 1(b).

¹¹² Subject to the Act and “any specific provision relating to the offence”.

¹¹³ *Elias v The Queen* (2013) 248 CLR 483 at [27] (the Court).

¹¹⁴ *Elias* (2013) 248 CLR 483 at [27] (the Court).

¹¹⁵ *Elias* (2013) 248 CLR 483 at [28] (the Court).

¹¹⁶ See *Fitzgerald* [2021] 1 NZLR 551 at [117]-[118] (Winkelmann CJ).

Indeed, that construction of s 7(1) might be capable of being reached by the application of the ordinary principles of statutory construction (without reliance on s 32(1) of the Charter), having regard to the purposive constraints imposed by s 5(1) of the Sentencing Act, the more general constraints imposed by the common law (such as proportionality, totality and parity¹¹⁷) and the factors as set out in s 5(2) of the Sentencing Act.¹¹⁸

43 With that in mind, the focus of Ground 1 concerns the proper construction of the provision identifying one of those factors (s 5(2)(g)) and the relationship between that factor and the right in s 17(1) of the Charter. On the approach to s 32(1) of the Charter outlined in Part C above, the Court would:

10 43.1 *first*, apply all the ordinary principles of statutory construction (including the principle of legality) to construe s 7(1) of the Sentencing Act, operating together with all other relevant provisions (including s 5(2)(g));

43.2 *second*, determine whether that construction would be “compatible with human rights” and, in particular, compatible with the right in s 17(1) of the Charter — that would depend on whether the discretion in s 7(1) is sufficiently constrained such that it can only be exercised to impose a sentence that limits the right in s 17(1) of the Charter in a way that is demonstrably justified.

20 (a) If that construction of s 7(1) is “compatible” with the right in s 17(1) of the Charter, then s 32(1) of the Charter will have no work to do. That is effectively the position advanced by the Respondent at **RS [64]**.

(b) If that construction is not “compatible” with the right in s 17(1) of the Charter, then s 32(1) would require a “compatible” construction to be adopted (subject to the limits identified in Part C.2 above). If the construction is not “compatible” because of the existence of an “exceptional circumstance” threshold, then that might be achieved by construing s 5(2)(g) in a way that does not impose that threshold. That is, in effect, the construction contended for by the Appellant and adopted by Walker JA: see **AS [11]**; **CA [138]**, **[147]**.

¹¹⁷ *Elias* (2013) 248 CLR 483 at [25] (the Court). See also *Markarian v The Queen* (2005) 228 CLR 357 at [83] (McHugh J), describing the principle of “proportionality” as the “ultimate control” on the discretion.

¹¹⁸ See generally *DPP (Vic) v Dalglish* (2017) 262 CLR 428 at [4]–[7] (Kiefel CJ, Bell and Keane JJ), [79] (Gageler and Gordon JJ).

44 The Commission does not advocate for any particular construction, but rather seeks to illustrate how s 32(1) of the Charter may assist to resolve Ground 1.

D.2 Section 17(1) of the Charter

45 The Commission makes the following brief points about the right in s 17(1) of the Charter, noting it is “beyond question” that s 32(1) requires “close attention to the particular rights said to be engaged by the statutory provision that falls for interpretation”.¹¹⁹

46 *First*, the right in s 17(1) overlaps with the right in s 13(a) of the Charter. Sections 17(1) and 13(a) are based on Arts 23 and 17 of the ICCPR respectively. The jurisprudence of the United Nations treaty body that rules on complaints under the ICCPR (the Human Rights Committee) considers these rights together.¹²⁰

47 *Second*, s 17(1) of the Charter recognises that families are the fundamental group unit of society and bestows an entitlement on families to be protected by the State. The Supreme Court has indicated that s 17(1) of the Charter protects “the important aims of preserving the family unit” generally, as well as a consideration of the particular family in question.¹²¹

48 *Third*, the Charter does not define the term “family”. The Human Rights Committee interprets the concept of family broadly.¹²² What is clear from s 17(1) is that the family is a “group unit of society”. The Committee has found that there must be “[s]ome minimal requirements for the existence of a family ... such as life together, economic ties, a regular and intense relationship”.¹²³

49 *Fourth*, the deportation of a person away from their family has been found by the Committee to be an interference with family, and where the interests of the family have not been considered the interference has been found to be arbitrary for the purposes of Art 17.¹²⁴ On the other hand, the mere fact that certain members of a family are entitled to remain in a State does not necessarily mean that requiring other members of the family to leave involves an arbitrary interference with Arts 17 and 23 (although by implication

¹¹⁹ *Smith* (2024) 98 ALJR 1163 at [58] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

¹²⁰ ICCPR *General Comment 19: Article 23 (The Family) Protection of the Family, Right to Marriage and Equality of the Spouses*, 27 July 1990, [1].

¹²¹ *JR Mokbel Pty Ltd v Director of Public Prosecutions* [2007] VSC 119 at [103] (Hargrave J).

¹²² *Nystrom v Australia*, 18 July 2011, CCPR/C/102/D/1557/2007 at [7.7].

¹²³ *Santacana v Spain*, 15 July 1994, CCPR/C/51/D/417/1990, at [10.2].

¹²⁴ *Nystrom v Australia*, 18 July 2011, CCPR/C/102/D/1557/2007 at [7.11].

it does involve an interference with family).¹²⁵ The Committee has declined to conclude that a judge's decision to prevent contact between a parent and their child "violated" the author's rights under Arts 17(1) and 23(1), where the judge had concluded that the best interests of the child required it, after a full and balanced evaluation of the situation on the basis of testimony and expert evidence.¹²⁶

50 *Fifth*, the entitlement of families to protection in Art 23 has been found by the Committee to be limited in circumstances where a child was removed by a parent from the country in which they lived with the other parent.¹²⁷ The Committee has also found that the common residence of family members together is the normal situation, so an interference
10 with this arrangement will limit the right.¹²⁸

PART V: ESTIMATED TIME

51 If the Court grants leave for the Commission to appear at the hearing of the appeal, it is estimated that 20 minutes would be required for the presentation of oral argument.

Dated: 7 July 2026



Sarala Fitzgerald
03 9225 6448
fitzgerald@vicbar.com.au

Counsel for the Commission



Thomas Wood
03 9225 6078
twood@vicbar.com.au

¹²⁵ *N v Canada*, 18 March 2025, CCPR/C/143/D/4367/2023 at [7.6].

¹²⁶ *EB v New Zealand*, 16 March 2007, CCPR/C/89/D/1368/2005 at [9.5].

¹²⁷ *Z v Australia*, 5 November 2015, CCPR/C/115/D/2279/2013 at [7.4].

¹²⁸ *Aden & Hassan v Denmark*, 25 July 2019, CCPR/C/126/D/2531/2015 at [10.8].

ANNEXURE TO THE SUBMISSIONS OF THE COMMISSION

Pursuant to paragraph 1 of Practice Direction No 1 of 2024, this annexure sets out the constitutional provisions, statutes and statutory instruments referred to in the submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	Comp 15	ss 1, 3, 7-24, 28, 31-32, 35, 36, 38, 40, 41	Version in force on sentence date (provision unchanged since)	24 May 2024 (sentence) 20 November 2025 (appeal judgment)
2.	<i>Equal Opportunity Act 2010</i> (Vic)	Current	ss 154-155, 160	Functions as at date of Commission's application	7 July 2026
3.	<i>Sentencing Act 1991</i> (Vic)	Comp 226	ss 5(1), (2), 7	Version in force on sentence date (provision unchanged since)	
4.	<i>Human Rights Act 2004</i> (ACT)	Current	s 30	Comparative purposes	
5.	<i>Human Rights Act 2019</i> (Qld)	Current	s 48	Comparative purposes	
6.	<i>New Zealand Bill of Rights Act 1990</i> (NZ)	Current	ss 4-6	Comparative purposes	

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
7.	<i>Human Rights Act 1998</i> (UK)	Current	s 3(1)	Comparative purposes	