REVISITING SECTION 32(1) OF THE VICTORIAN CHARTER: STRAINED CONSTRUCTIONS AND LEGISLATIVE INTENTION

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A INTRODUCTION

The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) is one of now three bills of rights in Australia. The Charter is based on what is commonly known as a 'dialogue' model for human rights, which 'encourages and promotes'[1] a human rights dialogue between the three branches of government – the Executive, Parliament, and the courts. Unlike some other 'dialogue' models,[2] the Victorian Charter is not constitutional entrenched. It is intended to preserve parliamentary sovereignty. It is a statutory bill of rights like the *New Zealand Bill of Rights Act 1990* (NZ) (NZ BORA) and the *Human Rights Act 1998* (UK) (UK HRA).

The human rights protected by the Charter are democratically sanctioned. They are the rights which the Victorian Parliament 'specifically seeks to protect and promote',[3] clearly set out in Part 2 of the Charter. Section 32 is directed at the interpretation of

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[1] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1295 (Rob Hulls, Attorney-General).

[2] Namely, the Canadian Charter of Rights and Freedoms in Part I, the *Constitution Act 1982*.

[3] Charter, s 7(1).

legislation compatibly with those human rights. Sub-section (1) 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'. Following over ten years of the Charter's operation,[4] the significant High Court case of *Momcilovic v The Queen* (*Momcilovic*),[5] and two statutorily mandated reviews,[6] there remains much to be resolved regarding the Charter, including s 32(1).

This article revisits s 32(1), particularly the potential ability of the courts to deploy it to reach 'strained' constructions and 'depart' from legislative intention. A strained construction usually denotes a non-literal or non-grammatical meaning of a statutory provision. Legislative intention is central to statutory interpretation, as it is 'the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.[7] The notions of strained constructions and departing from legislative intention are controversial concepts in statutory interpretation generally.[8] They are especially controversial in the Charter context.

This article does not debate the 6:1 High Court majority's finding in *Momcilovic* that s 32(1) does not replicate the 'very strong and far reaching'[9] interpretive mechanism under s 3(1) of the UK HRA.[10] Rather, the article argues that even if that is the case,

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[4] The Charter fully commenced operation on 1 January 2008.
[5] (2011) 245 CLR 1.
[6] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011); Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015).
[7] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78].
[8] See, for example, the discussion and authorities cited in *Treasurer of Victoria v Tabcorp Holdings Ltd* [2014] VSCA 143, [99]-[102].
[9] *Sheldrake v DPP* [2005] 1 AC 264, 303 [28] (Lord Bingham).
[10] UK HRA, s 3(1) 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 … rights' under the European Convention on Human Rights.

there is still greater work to do than what is presently being allowed under the Victorian Charter. This article will also be of interest to the Australian Capital Territory[11] and Queensland,[12] whose interpretive mechanisms are both adapted from the Charter, as well as other jurisdictions contemplating enacting a statutory bill of rights.

Part B of this article provides further detail on what is meant by 'strained constructions' in statutory interpretation. Part C outlines the findings of the High Court in *Momcilovic* on s 32(1), and the Victorian Court of Appeal's interpretation of *Momcilovic*. Part D critiques three propositions derived from that post-*Momcilovic* jurisprudence, namely, that: s 32(1) does not allow for a departure from the 'ordinary meaning' of a statutory provision; s 32(1) does not allow for a departure from, or overriding of, legislative intention upon enactment; and the qualifications placed on s 32(1) are such that it will not usually permit the 'reading in' or 'reading down' of words as techniques used to reach strained constructions. This article disputes the accuracy of these propositions. There is greater scope in what remains possible ('[s]o far as it is possible to do so') in human rights-compatible interpretation, than what the post-*Momcilovic* jurisprudence suggests.[13]

Part E then turns to consider the proper limits of what is 'possible'. It provides some remarks on consistency with text and purpose. It suggests that a 'reasonably open' test

[11] See *Human Rights Act 2004* (ACT), s 30 as amended by the *Human Rights Amendment Act 2008* (ACT).
[12] See *Human Rights Act 2019* (Qld), s 48. See further Explanatory Notes, Human Rights Bill 2018 (Qld) 30; and the Department of Justice and Attorney-General's response to submissions contained in Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (2019) 70.
[13] To that extent, the author no longer adheres to the view that the post-*Momcilovic* jurisprudence 'provides for a solid framework in interpreting statutes compatibly with human rights': Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*' [2013] (74) *Australian Institute of Administrative Law Forum* 67, 74.

should be adopted for when s 32(1) can reach strained constructions, and discusses how identifying purpose is not always straightforward and can sometimes encompass human rights considerations. Part F briefly outlines the relevant findings on s 32(1) from the review of the Charter following eight years of operation, and the government's response. Part G concludes that in distinguishing s 32(1) from s 3(1) of the UK HRA, some members of the High Court in *Momcilovic*, and the post-*Momcilovic* jurisprudence, have gone too far the other way.

Also relevant to this article is the common law principle of legality – the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms, immunities and principles, or to depart from the general system of law (herein referred to collectively as 'fundamental common law protections'), except where rebutted by clear and unambiguous language. The principle of legality holds particular significance to the present discussion, as s 32(1) has (albeit disputably)[14] been equated with the principle in the post-*Momcilovic* jurisprudence. Throughout the article, comparisons will be made with the principle of legality, as well as the equivalent interpretive mechanism under s 6 of the NZ BORA (for reasons which will be explained).

The scope of this article does not allow for comparison of s 32(1) with cases where arguably strained constructions have been reached to preserve the constitutional

[14] See Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40 *Monash University Law Review* 340; Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter – Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43; Sir Anthony Mason, 'Statutory Interpretive Techniques under the Charter – Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69; *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1, 61-2 [188]-[190] (Tate JA, in obiter).

validity of legislation.[15] There is, of course, a well-established common law interpretive principle that statutes should be interpreted, so far as the language permits, so as to make it consistent with the Constitution, unless the contrary intention is clear. It is sufficient to note that there has been a relatively recent phenomenon whereby legislation which, on its face, is at constitutional risk has been interpreted so as to fall within legislative power.[16]

B MEANING OF 'STRAINED' CONSTRUCTIONS

We start with the concept of 'strained' constructions, which involves a subset of concepts – all of which are challenging to pin down. Usually, courts will adopt the literal meaning of a statutory provision.[17] A literal meaning 'is one arrived at from the wording of the enactment alone'.[18] Moreover, the literal meaning will *usually* correspond with the grammatical meaning of a statutory provision.[19] The grammatical meaning is 'the meaning it bears when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation, and the accepted

[15] But see *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, briefly discussed in Part E(a)

[16] See, for example, Harry Hobbs, Andrew Lynch and George Williams, 'The High Court under Chief Justice Robert French' (2017) 91 ALJ 53, 65; Bruce Chen, The French Court and the Principle of Legality (2018) 41(2) *University of New South Wales Law Journal* 401.

[17] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 47 [47]: 'The language which has actually been employed in the text of legislation is the surest guide to legislative intention'; *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297, 304 (Gibbs CJ): 'it is not unduly pedantic to begin with the assumption that words mean what they say'; *Collector of Customs v Agfa-Gevaert* (1996) 186 CLR 389, 398 quoting *Maunsell v Olins* [1975] AC 373, 391: 'statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances'; Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th ed, 2013) 780: 'Prima facie, the meaning of an enactment which was intended by the legislator (in other words its legal meaning) is taken to be that which corresponds to the literal meaning'.

[18] F A R Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, 2001) 98.

[19] Ibid: '"the literal meaning" corresponds to the grammatical meaning where this is straightforward'; see also 36. See further Jones, above n 17, 429 which outlines that the only instance where the literal meaning will not correspond with a grammatical meaning is 'where the enactment is semantically obscure (that is without any straightforward grammatical meaning)'.

linguistic canons of construction'.[20] The literal and grammatical meaning can also be described as the 'ordinary' and 'natural' meaning.[21]

What then is a 'strained' construction? *Bennion on Statutory Interpretation* describes it as 'any meaning other than its literal meaning'.[22] A strained construction is one which departs from that literal meaning. However, that is not to say that a strained construction is necessarily impermissible, or contrary to legislative intention. Indeed, it is sometimes required to ensure that legislative intention is adhered to. It has been recognised that strained constructions can be adopted to ensure consistency with purpose (ie. a purposive construction), often in what might be described as exceptional circumstances. For example, French CJ said in *Momcilovic*:[23]

> if the words of a statute are clear, so too is the task of the Court in interpreting the statute with fidelity to the Court's constitutional function. The meaning given to the words must be a meaning which they can bear. … In an exceptional case the common law allows a court to depart from grammatical rules and to give an unusual or strained meaning to statutory words where their ordinary meaning and grammatical construction would

[20] Jones, above n 17, 423.
[21] Bennion, above n 18, 36; R I Carter, *Burrows and Carter: Statute Law in New Zealand* (LexisNexis, 5th ed, 2015) 308. Cf Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40(1) *Statute Law Review* 40, 43: 'the qualifying term "ordinary" seems to serve primarily as an instrumental caution rather than delineating a subset of possible meanings of words, phrases or provisions … It accommodates the reality that words and phrases may be read in more than one way, each of which can be said to accord with common usage'.
[22] Jones, above n 17, 430. Cf *DPP v Leys* (2012) 44 VR 1, 39 n 183: 'We consider the expression a "strained construction" to be a misnomer, as it suggests that the construction to be adopted is unnatural, incongruous or unreasonable, or inconsistent with the statutory scheme, and yet the preferred construction should be none of those things'.
[23] (2011) 245 CLR 1, 45 [40].

> contradict the apparent purpose of the enactment. The Court is not thereby authorised to legislative.[24]

There are further categories of purposive constructions (or some might describe them as sub-categories) which may compel a strained construction, such as to avoid manifest absurdity, inconvenience, irrationality or illogicality. In *Maxwell on the Interpretation of Statutes*, it was said that:[25]

> Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, *or to some inconvenience or absurdity which can hardly have been intended*, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning.[26]

Much of the discussion on strained constructions in the literature and jurisprudence has focused predominantly on the above circumstances. However, in the leading case of *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation*,[27] Mason and

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[24] See also Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2012) 81: 'A strained construction is used where the text of the legislative provision *would not otherwise stretch enough to give effect to the purpose*' (emphasis added); and Jones, above n 17, quoting *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174, 201: '*When the purpose of the enactment is clear*, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used …' (emphasis added).

[25] P St J Langan, *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 12th ed, 1969) 228 (emphasis added).

[26] Cited with approval in *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 651-2 [9] (French CJ and Bell J).

[27] (1981) 147 CLR 297.

Wilson JJ indicated that there is only so much utility to such categories,[28] and it is ultimately a matter of legislative intention:[29]

> when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. *It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent* as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.

Thus, there is indication that strained constructions can be adopted for reasons aside from ensuring consistency with purpose of the statute being interpreted. The 'consideration of purpose is only *one* factor that can cause a provision's legal meaning to depart from its literal or grammatical meaning'.[30] The question then is whether s 32(1) of the Charter can require or authorise the adoption of strained constructions, to ensure compatibility with human rights.[31]

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[28] Ibid 320-1.

[29] Ibid 321 (emphasis added). Cited with approval in *Mills v Meeking* (1990) 169 CLR 214, 242-3 (McHugh J); *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492, 535 (McHugh J); and *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 422 (McHugh JA).

[30] Dale Smith, 'Is the High Court Mistaken about the Aim of Statutory Interpretation?' (2016) 44 *Federal Law Review* 227, 248.

[31] In *DPP v Leys* (2012) 44 VR 1, the Victorian Court of Appeal adopted a strained construction to ensure consistency with purpose, and to avoid absurd and irrational consequences: 39-40 [114]-[115], 41 [117]. Section 32(1) of the Charter, and the right not to be subjected to arbitrary detention (s 21(2)), was raised in argument for adopting a strained construction. However, the Court considered there was no need to rely on s 32(1): 46-7 [138].

C SECTION 32(1) OF THE CHARTER

1 *The rationale for the Charter and section 32*

The enactment of the Charter germinated from the *Attorney-General's Justice Statement*.[32] This policy document, published in May 2004, established 'directions for reform and areas of priority in the Attorney-General's portfolio'.[33] One of those initiatives was to: '[e]stablish a process of discussion and consultation with the Victorian community on how human rights and obligations can best be promoted and protected in Victoria, including the examination of options such as a charter'.[34] The Justice Statement expressed the preliminary view that a constitutional charter was not favoured, and a statutory charter was preferable, due to concerns about preserving parliamentary sovereignty.[35] Nevertheless, it noted that a statutory charter still 'creates a presumption that other legislation must be interpreted to give effect to the rights listed in that Charter'.[36]

A community consultation process was undertaken by the Victorian Human Rights Consultation Committee, appointed by the Victorian Government. The Committee recommended that Victoria should enact a 'Charter of Human Rights and Responsibilities' as a statutory charter,[37] reflecting the 'dialogue' model for human rights.[38] The Committee had found that the existing protection of human rights in Victoria, including under the common law, was inadequate.[39] Specifically in relation

[32] Department of Justice, *New Directions for the Victorian Justice System 2004-2014: Attorney-General's Justice Statement* (2004).
[33] Ibid 10.
[34] Ibid 52.
[35] Ibid 56.
[36] Ibid 54.
[37] Human Rights Consultation Committee, Parliament of Victoria, *Rights, Responsibilities and Respect* (2005) recommendations 1-3.
[38] Ibid iii, 67-8.
[39] Ibid 5.

to statutory interpretation, it recognised that courts 'traditionally have an important role to play in a democratic society by interpreting laws made by Parliament', and 'such a role can be especially important under a human rights framework'.[40]

Accordingly, when the Charter was introduced 'to protect and promote'[41] human rights, the interpretive mechanism in s 32 was recognised as one of its main pillars.[42] The role of the courts as one of the three branches of government was integral to the 'dialogue' model.[43] Together with obligations imposed on Parliament (s 28) and the Executive through 'public authorities' (s 38), this established 'a framework for the protection and promotion of human rights in Victoria'.[44] Section 32's object was 'to ensure that courts and tribunals interpret legislation to give effect to human rights'.[45] As to its operation, there is some debate as to whether the Charter's extrinsic materials support the view that s 32(1) replicated the United Kingdom approach.[46]

2 *Momcilovic v The Queen*

In *Momcilovic*, usage of the term 'dialogue' was criticised by members of the High Court.[47] The Court also examined at length the operation of s 32(1). A 6:1 majority

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[40] Ibid 81.
[41] Charter, s 1(2).
[42] The Supreme Court also has the power to make declarations of inconsistent interpretation: Charter, s 36.
[43] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1295 (Rob Hulls, Attorney-General).
[44] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 2822; see also Charter, s 1(2)(b).
[45] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 2844.
[46] See Julie Debeljak, 'Who is Sovereign Now? The *Momcilovic* Court Hands Back Power over Human Rights that Parliament Intended it to Have (2011) 22 *Public Law Review* 15, 31-9; and (2011) 245 CLR 1, 178-182 [445]-[450] (Heydon J dissenting). Cf *R v Momcilovic* (2010) 25 VR 436, 458-63 [79]-[96].
[47] In response, it has been said that the notion of a dialogue 'serves a political as well as legal purpose, and the fact remains that the Victorian Charter was enacted on the basis of creating an interaction between all the arms of government': Julie Debeljak, 'Does Australia Need A Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 61–2 n 104.

(French CJ, Gummow J, Hayne J, Crennan and Kiefel JJ, Bell J, Heydon J dissenting) held that s 32(1) did not replicate the extensive effects of s 3(1) of the UK HRA. The United Kingdom approach is exemplified by the leading case of *Ghaidan v Godin-Mendoza* ('*Ghaidan*').[48] The UK HRA's interpretive provision has been described as 'remedial'[49] – allowing a court to 'depart from the unambiguous meaning'[50] or 'actual words'[51] of a statutory provision; to 'give an abnormal construction,[52] or 'do considerable violence to the language';[53] and to 'depart from the intention of the Parliament which enacted the legislation'.[54] However, this is subject to the qualification that the construction cannot be 'inconsistent with a fundamental feature' of the legislation/legislative scheme;[55] 'must be compatible with the underlying thrust of the legislation';[56] and words being read in/implied must 'go with the grain of the legislation'.[57]

So what does *Momcilovic*'s rejection of the United Kingdom approach mean for whether s 32(1) can result in strained constructions? Chief Justice French was the only member of the majority[58] to expressly equate s 32(1) with the principle of legality (Heydon J, in dissent, contrasted s 32(1) and the principle of legality). Section 32(1) 'applies in the same way as the principle of legality but with a wider field of

[48] [2004] 2 AC 557.
[49] Ibid 577 [49] (Lord Steyn).
[50] Ibid 571 [30] (Lord Nicholls).
[51] Ibid 600 [119] (Lord Rodger).
[52] Ibid 584 [60] (Lord Millett dissenting, but not on this point).
[53] Ibid 585 [67] (Lord Millett dissenting, but not on this point).
[54] Ibid 571 [30] (Lord Nicholls).
[55] Ibid 572 [33] (Lord Nicholls); 586 [68] (Lord Millett dissenting, but not on this point).
[56] Ibid 572 [33] (Lord Nicholls).
[57] Ibid 572 [33] (Lord Nicholls); see also 601 [121] (Lord Rodger).
[58] Justices Crennan and Kiefel only went so far as to say that some of the human rights protected by the Victorian Charter 'are fundamental freedoms which have for some time been recognised and protected by the principle of legality at common law': (2011) 245 CLR 1, 203 [522].

application'.[59] Notably, French CJ would give an unusual or strained construction '[i]n an exceptional case', only where the ordinary and grammatical meaning would contradict the apparent purpose of the enactment.[60]

Justices Crennan and Kiefel held that s 32 'does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes'.[61] Their Honours noted that the Charter itself acknowledges it may not be possible in all cases to, consistently with a statute's purpose, interpret statutory provisions compatibly with Charter rights,[62] and in such circumstances, the validity of the Act or provision is not affected.[63] Therefore, according to their Honours, it could not be said 'that s 32(1) requires the language of a section to be strained to effect consistency with the Charter'.[64] Any inconsistent legislation prevails.

Justice Gummow (Hayne J agreeing) quoted from an authoritative passage of the majority in *Project Blue Sky v Australian Broadcasting Authority*, before suggesting that s 32(1) may operate more strongly than ordinary principles of statutory interpretation:[65]

> McHugh, Gummow, Kirby and Hayne JJ, before setting out a lengthy passage from Bennion's work *Statutory Interpretation*,[66] said:[67]

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[59] Ibid 50 [51].
[60] Ibid 45 [40].
[61] Ibid 217 [565].
[62] By reference to Charter, s 32(3)(a).
[63] (2011) 245 CLR 1, 217 [566].
[64] Ibid.
[65] (2011) 245 CLR 1, 92 [170] (emphasis added).
[66] (3rd ed, 1997) 343-4.
[67] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78]. See also *Kennon v Spry* (2008) 238 CLR 366, 397 [90].

> the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[68] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

> *That reasoning applies a fortiori where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1).*

That passage from *Project Blue Sky*, which footnotes the principle of legality as an example of the 'canons of construction', recognises that such canons may require a strained construction to be adopted. There is a slightly different way to conceptualise this. It is based on the High Court's modern 'catchcry' or 'repeated moniker' of statutory interpretation involving consideration of text, context and purpose.[69] The 'canons of construction' form part of the context. Context or purpose may lead to a departure from the text (ie. the literal and grammatical meaning). Justice Gummow (Hayne J agreeing) considered that such reasoning applies more strongly with s 32(1).

[68] The High Court said in this reference: 'For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437'.

[69] James Duffy and John O'Brien, 'When Interpretation Acts Require Interpretation: Purposive Statutory Interpretation and Criminal Liability in Queensland' (2017) 40(3) *University of New South Wales Law Journal* 952, 952.

Justice Bell considered that where the 'literal or grammatical meaning'[70] of a statutory provision unjustifiably limited human rights under the Charter, then:

> the court is required to seek to resolve the apparent conflict between the language of the provision and the mandate of the Charter by giving the provision a meaning that is compatible with the human right if it is possible to do so consistently with the purpose of the provision.[71]

Legislation enacted prior to the Charter 'may yield different, human rights compatible, meanings in consequence of s 32(1)'.[72] The task was 'one of interpretation and not of legislation' – '[i]t does not admit of "remedial interpretation" of the type undertaken by the Hong Kong Court of Final Appeal as a means of avoiding invalidity'. This last sentence is somewhat cryptic.[73]

Justice Heydon was the only judge to find that the Charter was 'remedial in character',[74] and s 32(1) replicated s 3(1) of the UK HRA. Section 32(1) was meant to go 'well beyond the common law'.[75] However, this was one reason to find that s 32(1) was constitutionally invalid.[76] Section 32(1) '[i]n effect' permitted the courts to 'disregard

[70] (2011) 245 CLR 1, 250 [684].
[71] Ibid.
[72] Ibid.
[73] The Hong Kong Bill of Rights incorporates the ICCPR into Hong Kong domestic law and is quasi-constitutional, such that legislation can be invalidated. In comparison, the Charter is not a constitutional bill of rights, and cannot invalidate primary legislation. So it seems self-evident that s 32(1) cannot be utilised 'as a means of avoiding invalidity'. Much more likely, Bell J was repudiating the notion that s 32(1) went so far as replicating s 3(1) of the UK HRA. But it remains clear Bell J considered that s 32(1) allowed for departures from the literal and grammatical meanings, and adopted the UK HRA and NZ BORA methodology. See further Debeljak, above n 14, 379-81.
[74] (2011) 245 CLR 1, 153 [385].
[75] Ibid 181 [450].
[76] Ibid 184 [456].

the express language of a statute'.[77] Justice Heydon repeatedly emphasised that s 32(1) crossed over into Parliament's legislative function.[78]

Thus, the general tenor of *Momcilovic* is a reassertion of *common law* statutory interpretation techniques as entirely orthodox (including, according to French CJ, the principle of legality). On the other hand, straining the statutory language and departing from the literal meaning of the text to ensure *human rights* compatibility was looked down upon by French CJ, Crennan, Kiefel and Heydon JJ.[79] That was because it was considered to be legislating rather than interpreting; going beyond the proper role of the courts in interpreting statutes in the Australian context. Only Gummow, Hayne and Bell JJ were open to the notion that s 32(1) could result in the straining of statutory words so as to be compatible with human rights, in a way that was not constitutionally invalid (contrast Heydon J).

Members of the High Court also emphasised that caution is required with respect to overseas approaches on bills of rights.[80] For example, New Zealand has a different constitutional system to Australia. Nevertheless, it has been acknowledged that the jurisprudence on its interpretive mechanism, s 6 of the NZ BORA, may be helpful in working out s 32(1)'s operation. Justice Gummow (Hayne J agreeing) in *Momcilovic* lamented that the United Kingdom jurisprudence 'exercised a fascination to the point of obsession in the preparation and presentation of much of the submissions'.[81] This

[77] Ibid 181 [450] quoting Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616, 633.
[78] See, for example, ibid 182 [450], 183 [452], 184 [454], 184 [456].
[79] Chen, above n 16, 426.
[80] See in particular (2011) 245 CLR 1, 37-8 [19]-[20] (French CJ); 83-4 [146(i)] (Gummow J).
[81] Ibid 90 [160].

'proved unfortunate'.[82] His Honour considered that the New Zealand jurisprudence, particularly the leading case of *R v Hansen* ('*Hansen*'), was '[o]f greater comparative utility'.[83] Justice Tate of the Victorian Court of Appeal has subsequently observed: '*Momcilovic* has made it clear that analogies with [NZ] BORA are likely to be more productive than reliance upon meanings adopted under s 3 of the [UK HRA]'.[84] This may be the beginning of an Australasian approach to human rights law.'[85]

Taking such cues, this article will draw more upon the New Zealand jurisprudence in considering the issue of whether s 32(1) of the Charter can lead to strained constructions. As will be explained below, s 3(1) of the UK HRA and s 6 of the NZ BORA broadly share the same methodology, but they do not share the same comparative strength (the latter is considered more modest in its operation). Methodology and strength are separate matters. Yet it appears they have been conflated in both the *Momcilovic* and post-*Momcilovic* jurisprudence.

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[82] Ibid 90 [160].

[83] Ibid 90 [161]; see also French, above n 21, 46: '[s]ome of the case law of the last 20 years suggests a divergence between the position of Australia and New Zealand on the one hand and the United Kingdom when it comes to legislation requiring statutes to be interpreted compatibly with human rights … A similar approach [to *Momcilovic*] had been taken four years earlier by the Supreme Court of New Zealand in *R v Hansen*'.

[84] See also Debeljak, above n 14, 382: 'Although textual and constitutional differences also exist between the Charter/Australia and the NZBORA/New Zealand, a closer analysis of the NZBORA and its jurisprudence may prove more fruitful in the future …'; Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, 2015) 426-39, particularly 432, where he refers to 'the difference of approach in New Zealand and Australia compared to … other jurisdictions'; Kris Gledhill, 'Rights-Promoting Statutory Interpretive Obligations and the "Principle" of Legality' in Dan Meagher and Matthew Groves (eds), The Principle of Legality in Australia and New Zealand (Federation Press, 2017) 105, 109; and Petra Butler, 'Australian Bills of Rights: The ACT and Beyond: Lessons from New Zealand' (Speech delivered at the Australian Bills of Rights: The ACT and Beyond Conference, 21 June 2006) 9: 'the New Zealand experience is the more relevant one for an Australian audience'.

[85] Tate, above n 14, 63.

3 Post-*Momcilovic* jurisrpudence

In subsequent cases, the Victorian courts have predominantly interpreted *Momcilovic* as providing that s 32(1) is a codification of the common law principle of legality, but with 'a wider field of application'.[86] That seems to be based on the judgment of French CJ.

The Victorian courts have said that 's 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision'.[87] Although '[e]xceptionally, a court may depart from grammatical rules to give an usual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment.'[88] However, in the context of s 32(1) 'it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.'[89] Section 32(1) 'does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down of words so far as to change the true meaning of a provision.'[90] Section 32(1) 'is not to be viewed as establishing a new paradigm of interpretation which requires courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision and hence from the intention of the parliament which enacted the statute.'[91]

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[86] *Slaveski v Smith* (2012) 34 VR 206, 215 [23], 219 [45]; *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Aust) Inc* (2012) 38 VR 569, 608 [139] (Nettle JA); *Victoria Police Enforcement v Taha* (2013) 49 VR 1, 12-3 [25] (Nettle JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 383 [85]; *Carolan v The Queen* (2015) 48 VR 87, 103-4 [46].
[87] *Slaveski v Smith* (2012) 34 VR 206, 214 [20].
[88] Ibid 215 [24].
[89] Ibid.
[90] Ibid 219 [45].
[91] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85].

It 'does not permit an interpretation of the statutory provision which overrides the intention of Parliament in the Act'.[92]

The outlier is Tate JA. In *Taha*, her Honour disputed that the passage by French CJ accurately reflected the views of the six-member majority in *Momcilovic*. Justice Tate said '[t]o my mind this would be to misread the reasoning of the High Court'.[93] Her Honour focused particularly on the judgment of Gummow J (Hayne J agreeing) in *Momcilovic*.[94] From this, Tate JA took the view that s 32(1) 'might more stringently require that words be read in a manner "that does not correspond with literal or grammatical meaning" than would be demanded, or countenanced, by the common law principle of legality'.[95] However, her Honour's comments in *Taha* were obiter.[96]

It appears that the Court of Appeal is now more cautious about repeating the proposition that s 32(1) is a mere codification of the common law principle of legality, with 'a wider field of application'. In *R v DA*,[97] the Court of Appeal declined to approve the judgment of French CJ. In a passing footnote, their Honours said in that particular case: 'It 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' – acknowledging that Tate JA 'has taken a different view'.[98]

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[92] Ibid 382 [82].
[93] *Victoria Police Enforcement v Taha* (2013) 49 VR 1, 62 [189].
[94] Justice Tate also cited *Momcilovic* (2011) 245 CLR 1, 250 [684] (Bell J).
[95] *Victoria Police Enforcement v Taha* (2013) 49 VR 1, 62 [190].
[96] Justice Tate was more assertive in subsequent remarks made extra-curially: see Tate, above n 14, 66-7; see also 44, 52, 61.
[97] (2016) 263 A Crim R 429.
[98] Ibid 443 n 46.

D CRITIQUE OF *MOMCILOVIC* AND POST-*MOMCILOVIC* JURISPRUDENCE

1 General observations

There are therefore several interrelated propositions which can be derived from the Victorian jurisprudence. Section 32(1) does not allow for a departure from the 'ordinary meaning' of a statutory provision ('First Proposition'). Section 32(1) does not allow for a departure from, or overriding of, legislative intention upon enactment ('Second Proposition'). Section 32(1) will not usually permit the 'reading in' or 'reading down' of words ('Third Proposition'). The accuracy of the First and Second Propositions will be examined here. The Third Proposition will be examined later in this article.

In light of *Momcilovic*, s 32(1) has thus far been used rarely.[99] When it has been used, the courts have usually done so conservatively to fortify constructions of statutes *already* reached on non-Charter principles of statutory interpretation.[100] Section 32(1) has been far from transformative. There appear to be almost no cases post-*Momcilovic* where a statutory interpretation question has turned predominantly on s 32(1), to reach an outcome that would not otherwise have been reached.[101] Commentators have

[99] See also the more recent High Court case of *Minogue v Victoria* (2018) 356 ALR 363, discussed in Julie Debeljak, 'Statutory Interpretation, the Victorian *Charter* and Parole: *Minogue v Victoria*', '2019 Constitutional Law Conference' (Gilbert + Tobin Centre for Public Law, Sydney, 15 February 2019) <https://www.youtube.com/watch?v=wjVwxwzTXb8&feature=youtu.be>.

[100] *Taha v Broadmeadows Magistrates' Court & Ors; Brookes v Magistrates' Court of Victoria* [2011] VSC 642, [59] (upheld on appeal); *A & B v Children's Court of Victoria* [2012] VSC 589, [109]-[110]; *Carolan v The Queen* (2015) 48 VR 87, 104 [47]; *Bare v IBAC* (2015) 48 VR 129, 250 [375] (Tate JA); *ZD v Secretary to the Department of Health and Human Services* [2017] VSC 806, [106]-[113]; *Owners Corporation OC1-POS539033E v Black* [2018] VSC 337, [67]-[68]; *Nguyen v DPP & Attorney-General* [2019] VSCA 20, [103]-[105]. See further *Marke v Victoria Police FOI Division (Review and Regulation)* [2018] VCAT 1320, [158]-[166] (Quigley P); and the post-*R v Momcilovic* case of *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 173 [125], 173 [127].

[101] A possible exception is the Magistrates' Court case of *Vpol v Anderson and Ors (Criminal)* [2012] VMC 22. See also the pre-*Momcilovic* cases of *Re Application under the Major Crime (Investigative*

observed that *Momcilovic* has 'cast sufficient doubt' on the Charter's meaning and operation 'so as to significantly stymie its future development';[102] 'virtually paralyzing the development of rights jurisprudence in Victoria'.[103] Unfortunately, the focus of attention post-*Momcilovic* has been on what s 32(1) cannot do, rather than what it can still do.

2 First Proposition: Departing from ordinary meaning

(a) Pre-Momcilovic understanding

This article now turns to the proposition that s 32(1) does not allow for a departure from an ordinary meaning. Prior to the *Momcilovic* litigation, the predominant view was that s 32(1) was a 'special rule'[104] of interpretation, which allowed for 'reinterpretation'[105] of a statute, or alternatively referred to as a 'remedial'[106] interpretation. The general methodology could be set out in the following steps:[107]

Step 1: Ascertain the meaning of the relevant provision by applying ordinary principles of statutory interpretation.

Step 2: Determine whether the provision thus construed limits a Charter right.

Powers) Act 2004 (2009) 24 VR 415; and *RJE v Secretary, Department of Justice* (2008) 21 VR 526, 556-7 [114]-[117], 558 [119].

[102] Saunders, Cheryl, 'Transplants in Public Law' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 271.

[103] Julie Debeljak, 'Legislating Statutory Interpretation under the Victorian *Charter*: An Unusual Tale of Judicial Disengagement with Rights-Compatible Interpretation' in Chris Hunt, Lorne Neudorf and Micah Rankin (eds), *Legislating Statutory Interpretation: Perspectives from the Common Law World* (Thomson Reuters, 2018) 184.

[104] *R v Momcilovic* (2010) 25 VR 436, 447 [39].

[105] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 26 [61], 27 [65], 27 [70], 51 [198].

[106] *Ghaidan* [2004] 2 AC 557 (Lord Steyn) 577 [49]; *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, 605 [58], 606-7 [62]-[65] (Sir Anthony Mason NPJ).

[107] As submitted by the Attorney-General for the State of Victoria, and Victorian Equal Opportunity and Human Rights Commission in the Court of Appeal proceeding: *R v Momcilovic* (2010) 25 VR 436, 445 [30]-[31].

Step 3: If so, decide whether that limit is a 'reasonable limit [which] can be demonstrably justified', under s 7(2) of the Charter …[108]

Step 4: If (but only if) the limit on the right is unjustified, apply s 32(1) of the Charter to determine whether it is possible to reinterpret the relevant provision so that it is compatible with the relevant Charter right.[109]

Under this methodology, s 32(1) only applies once the meaning has been ascertained in the absence of the Charter, and that meaning has been determined to be incompatible with human rights. Broadly speaking, this is the accepted approach with respect to s 3(1) of the UK HRA,[110] and s 6 of the NZ BORA[111] (the 'UK HRA and NZ BORA methodology'). The NZ BORA methodology is encapsulated in *Hansen* – although, their Supreme Court said this methodology need not strictly be applied in every

[108] Section 7(2) provides:

> 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
> (b) the importance of the purpose of the limitation; and
> (c) the nature and extent of the limitation; and
> (d) the relationship between the limitation and its purpose; and
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

[109] The Court of Appeal said in a footnote: 'This approach, and the characterisation of the s 32(1) step as one of "reinterpretation", were first adopted by Bell J' of the Victorian Supreme Court in *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 27 [65].

[110] See *Poplar Housing Association Ltd v Donoghue* [2002] QB 48, 72 [75]; *R v A (No 2)* [2002] 1 AC 45, 66 [39], 67-8 [43]-[45] (Lord Steyn), 72 [58], 86 [106] (Lord Hope), 91 [121], 97 [136] (Lord Clyde), 104-6 [160]-[163] (Lord Hutton); *Ghaidan* [2004] 2 AC 557, 565 [5]-[7], 570 [24]-[25] (Lord Nicholls), 584 [60] (Lord Millett dissenting, but not on this point); *ANS v ML* [2012] UKSC 30, [15]-[17] (Lord Reed, Lady Hale and Lord Wilson agreeing); *Kennedy v Information Commissioner* [2015] AC 455, 556 [225] (Lord Carnwath dissenting, but not on this point).

[111] See *Hansen* [2007] 3 NZLR 1, 37 [92] (Tipping J). The approaches of Blanchard and McGrath JJ were broadly consistent with Tipping J's approach. Only Elias CJ dissented. The approach of Anderson J 'is more difficult to classify': Hanna Wilberg, 'Resisting the Siren Song of the *Hansen* Sequence: The State of Supreme Court Authority on the Sections 5 and 6 Conundrum' (2015) 26 *Public Law Review* 39, 42 n 23.

instance,[112] and indeed it has not always been applied in practice.[113] Moreover, the methodology has attracted critical commentary.[114]

The contrasting methodology reached by the Victorian Court of Appeal in *R v Momcilovic* (VCA methodology),[115] which French CJ in *Momcilovic v The Queen* essentially approved,[116] was as follows:

Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984*.

Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.

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[112] See *Hansen* [2007] 3 NZLR 1, 27 [61] (Blanchard J), 37-8 [93]-[94] (Tipping J), 66 [192] (McGrath J); see further Wilberg, above n 111.

[113] The NZ BORA methodology in *Hansen* was applied in: *Television New Zealand Ltd v Solicitor-General* [2009] NZFLR 390, 403-4 [62]-[66] (O'Regan and Robertson JJ); *AMM and KJO* [2010] NZFLR 629, [15]; *Commerce Commission v Air New Zealand* [2011] 2 NZLR 194, 209-10 [65]; *Spencer v Attorney-General* [2014] 2 NZLR 780, 814-5 [129], 825 [164] (upheld on appeal); *Adoption Action Inc v Attorney-General* [2016] NZFLR 113, 134-5 [56]-[57], 137 [62], 139 [66]; *New Health New Zealand Inc v South Taranaki District Council* [2018] 1 NZLR 948, 978-9 [103]-[104] (O'Regan and Ellen France JJ); Decision temporarily removed [2019] NZHC 184. See further the earlier case of *Hopkinson v Police* [2004] 3 NZLR 704, which applied an approach consistent with *Hansen*. The NZ BORA methodology in *Hansen* was not applied in: *Brooker v Police* [2007] 3 NZLR 91; *Schubert v Wanganui District Council* [2011] NZAR 233, 250-1 [82]-[85]; *Morse v Police* [2012] 2 NZLR 1, 12-3 [12]-[17] (Elias CJ), 26 [64] (Blanchard J), 27 [68] (Tipping J), 39 [124] (Anderson J), cf 35 [105] (McGrath J); *Stanton v Police* [2013] NZAR 24, 29 [16]-[17]; *Watson v Electoral Commission* [2015] NZHC 666, [103]-[106], [112], and on appeal, *Electoral Commission v Watson* [2017] 2 NZLR 63, 72-3 [27]; *R v Harrison* [2016] 3 NZLR 602, 637 [120]; *Taylor v Attorney-General* [2016] 3 NZLR 111, 130-1 [76]-[78] (upheld on appeal); *Mangawhai Ratepayers and Residents Association v Kaipara* [2016] 2 NZLR 437, 479-81 [182]-[186], 481 [189] (Harrison and Cooper JJ) (leave to appeal dismissed); *Wall v Fairfax New Zealand Ltd* [2018] 2 NZLR 471, 483-5 [40]-[43]; *New Zealand Police v Chiles* [2019] NZDC 3860, [44]-[45]. See the contrasting methodology in the earlier case of *Moonen v Film and Literature Board of Review* ('*Moonen*') [2002] 2 NZLR 9, 16-7 [17]-[19] which was not overruled by *Hansen* and continues to be applied where there is a 'continuum' of possible meanings: see *Hansen* [2007] 3 NZLR 1, 38 [94] (Tipping J).

[114] Paul Rishworth, 'Human Rights' [2012] *New Zealand Law Review* 321, 330-1, 333; Claudia Geiringer, 'The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*' (2008) 6(1) *New Zealand Journal of Public and International Law* 59, 83-4.

[115] (2010) 25 VR 436, 446 [35(2)].

[116] (2011) 245 CLR 1, 50 [51].

Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified.

Under both of these methodologies, Step 1 includes consideration of non-Charter common law principles of statutory interpretation – which involves having regard to the text of the statutory provision (ie. the literal and grammatical meaning), as well as context and purpose.

The main difference – aside from the issue of whether proportionality and justification under s 7(2) of the Charter has any role to play in interpretation under s 32(1) (which is of itself a significant issue) – is that under the UK HRA and NZ BORA-type methodology, s 32(1) does not come into play until later in the process. Step 1 of that methodology was to ascertain the meaning of the statutory provision, reached in the absence of s 32(1), with s 32(1) only relevant at Step 4. This is sometimes referred to as the 'ordinary meaning'. Whereas under the VCA methodology, s 32(1) is applied at Step 1 as part of ascertaining the meaning of the statutory provision.

Describing Step 1 under the UK HRA and NZ BORA methodology as ascertaining the 'ordinary meaning' is shorthand. Some early cases,[117] commentary[118] and submissions[119] on the Charter would describe s 32(1) as permitting a departure from that ordinary meaning. However, this description is apt to mislead. What is meant by 'ordinary meaning' under the UK HRA and NZ BORA methodology is different from

[117] *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 427 [51], 429 [56]-[57], 434 [78], 453 [167], 455 [177].
[118] Pound and Evans, above n 286, 218-9.
[119] See the appellant's submissions summarised in *Momcilovic v The Queen* (2011) 245 CLR 1, 164-5 [411].

what it means under statutory interpretation generally. As explained earlier, an ordinary meaning in statutory interpretation usually denotes a literal and grammatical meaning. It would be non-sensical to say that s 32(1) does not allow for departures from ordinary meaning, in the general statutory interpretation sense. A non-literal or non-grammatical meaning may already be reached under Step 1 of the UK HRA and NZ BORA methodology, even before s 32(1) of the Charter is applied. Step 1 incorporates regard to context and purpose which can lead to a strained construction, as per *Project Blue Sky*.

For clarity, this article will refer to a construction reached in the absence of the Charter as the 'non-Charter' meaning (rather than 'ordinary meaning'), and refer to existing common law principles of statutory interpretation as 'non-Charter' principles of statutory interpretation (rather than 'ordinary' principles).

(b) Post-Momcilovic understanding

The Victorian Court of Appeal was placed in an unenviable position, given six separate judgments were produced in *Momcilovic* – creating considerable difficulty in identifying the exact precedent set by the High Court.[120] However, the way in which the Court of Appeal has expressed its understanding of *Momcilovic* has perpetuated confusion.

[120] As has been observed in Debeljak, above n 14, 341: 'Even where there was apparent agreement on one provision, the reasoning underlying that agreement differed, and/or opinions on other interconnecting provisions differed'.

The post-*Momcilovic* jurisprudence is replete with references to s 32(1) not requiring or authorising departure from the 'ordinary meaning'.[121] This can be taken in three different ways: (1) it could relate to the proper methodology of s 32(1) as outlined above; (2) it could mean that s 32(1) cannot be applied to adopt a strained construction; or (3) it could mean that s 32(1) has no real role to play.

(i) Methodology?

As to the first possibility, the Court of Appeal could be observing from *Momcilovic* that s 32(1) is not a 'special rule' of interpretation, or of 'reinterpretation'.[122] Thus, one does not, as Step 1 of the UK HRA and NZ BORA methodology provides, ascertain the non-Charter meaning before s 32(1) can be applied. This rejects the UK HRA and NZ BORA methodology. Hence, this is why it might be said that s 32(1) does not establish 'a new paradigm of interpretation'.[123] Rather, as French CJ said, s 32(1) 'takes its place in a milieu of principles and rules, statutory and non-statutory, relating to the interpretation of statutes'.[124] Section 32(1) is applied at the same time as other principles of statutory interpretation (as per the VCA methodology).

Yet, no methodology was clearly endorsed by the High Court in *Momcilovic*.[125] The correct methodology of s 32(1) remains unclear. Justice Bell appear to support the UK HRA and NZ BORA methodology, and Gummow J (Hayne J agreeing) cited *Hansen* with approval, but did not go so far as to expressly approve the NZ BORA methodology. Whereas French CJ, and Crennan and Kiefel JJ did not approve the UK

[121] *Slaveski v Smith* (2012) 34 VR 206, 214 [20]; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85]; *Bare v IBAC* (2015) 48 VR 129, 169 [113] (Warren CJ).
[122] Indeed, that was the position adopted by the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436.
[123] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85].
[124] *Momcilovic v The Queen* (2011) 245 CLR 1, 44 [37].
[125] See Chen, above n 13; Debeljak, above n 14; Brett Young, above n 6, 141-2.

HRA and NZ BORA methodology. It cannot be said with any confidence that s 32(1) operates in the same way as the principle of legality.[126]

Interpreting *Momcilovic* as rejecting the UK HRA and NZ BORA methodology has nevertheless not always eventuated in practice, because s 32(1) tends not to be considered until after non-Charter principles of statutory interpretation have been applied (which conforms to the UK HRA and NZ BORA methodology). The courts post-*Momcilovic* have often compartmentalised s 32(1). They have mainly looked for reasons not to rely on s 32(1). The courts have said, after exhausting the non-Charter interpretive principles, that the meaning of the statutory provision is clear and unambiguous, and therefore there is no work for s 32(1) to do.[127] In effect, this means that s 32(1) is still being treated as a special rule of interpretation or reinterpretation, which only potentially comes into play once the non-Charter meaning is established. But the sting in the tail is that s 32(1) has little normative force, with the Victorian courts by this stage of the process reaching the view that no other interpretation is possible[128] (showing that the issue of s 32(1)'s strength is actually distinct from its methodology).

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[126] That is especially so given that the role of justification and proportionality under s 7(2) in interpretation pursuant to s 32(1), if any, remains unresolved. Whereas under the principle of legality, the predominant view is that justification and proportionality has no role to play in Australia: See Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41 *Monash University Law Review* 329, 362-4; and Dan Meagher, 'The Principle of Legality and Proportionality in Australian Law' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 114.

[127] See *A & B v Children's Court of Victoria* [2012] VSC 589, [109]-[110]; *DPP v Leys* (2012) 44 VR 1, 46-7 [138]; *Tikiri Pty Ltd v Fung* [2016] VSC 460, [53], [57]; *ZD v Secretary to the Department of Health and Human Services* [2017] VSC 806, [106]-[107]; *Owners Corporation OC1-POS539033E v Black* [2018] VSC 337, [67]-[68]; *EHT18 v Melbourne IVF* [2018] FCA 1421, [91]; *DPP v Rayment* [2018] VSC 663, [103]; *Michos v Eastbrooke Medical Centre Pty Ltd* [2019] VSC 131, [38]. Cf the approach of Bell J in *ZZ v Secretary, Department of Justice & Anor* [2013] VSC 267; *DPP v Kaba* (2014) 44 VR 526; *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 (interpretation upheld on appeal); *PBU & NJE v Mental Health Tribunal* [2018] VSC 564.

[128] See also Debeljak, above n 99.

(ii) No strained constructions?

The second possibility is that the application of s 32(1) cannot lead to strained constructions. When the Court of Appeal says that s 32(1) does not require or authorise departure from the 'ordinary meaning', it means that s 32(1) cannot result in a departure from a literal or grammatical meaning – ie. a strained construction.[129] That appears to be the view adopted by French CJ, and Crennan and Kiefel JJ in *Momcilovic*, who *did not* support the UK HRA and NZ BORA methodology. Notably, that is not the view reached by Bell JJ who *did* appear to support the UK HRA and NZ BORA methodology (Gummow and Hayne JJ might have too). The issues of methodology and strength were treated as hand in hand. But again, this is a conflation of two distinct issues[130] (and as highlighted below, in New Zealand Elias CJ dissented from the UK HRA and NZ BORA methodology, yet acknowledged that s 6 can lead to strained constructions).

It would be odd if s 32(1) does not allow for strained constructions. Strained constructions can already be reached by non-Charter principles of statutory interpretation. While the trend is for High Court of Australia authorities to emphasise the primacy of the text in statutory interpretation,[131] these 'would go too far if it were understood to assert that the text was to be given some *unyielding* primacy'.[132] To be

[129] See further *Nguyen v DPP & Attorney-General* [2019] VSCA 20, [105] where the Court of Appeal said the construction supported by s 32 in that case, 'does not strain the language used but, rather, … is in accordance with the ordinary meaning of the words that Parliament has chosen'.
[130] See Debeljak, above n 46, 23 n 64: 'the methodology is not dictated by the strength of s 32(1)'.
[131] See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *R v Getachew* (2012) 248 CLR 22, 27-8 [11] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Maloney v The Queen* (2013) 252 CLR 168, 291-2 [324] (Gageler J); *Minogue v Victoria* (2018) 356 ALR 363, 381 [82], 381 [84], 381 [85] (Gageler J). See also Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87 *Australian Law Journal* 820, 826: 'it is the text of the statute which governs'.
[132] Justice Susan Kenny, 'Current Issues in the Interpretation of Federal Legislation' [2013] *Federal Judicial Scholarship* 41 (emphasis added); see also Justice Susan Kenny, 'Constitutional Role of the Judge: Statutory Interpretation' (2014) 1 *Judicial College of Victoria Online Journal* 4, 10.

clear, 'the natural and ordinary grammatical meaning of the provision is not decisive'.[133] Nor are strained constructions limited to ensuring consistency with the statutory purpose, as French CJ in *Momcilovic* and others often appear to suggest. This would be contrary to *Project Blue Sky*. More recently, in *SZTAL v Minister for Immigration and Border Protection*,[134] Kiefel CJ, Nettle and Gordon JJ said:[135]

> Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, *some other meaning of a word may be suggested* …

The principle of legality, as a common law 'canon' of construction, forms part of that context.[136] The High Court has, especially in recent times, applied the principle of legality to reach quite strained constructions, even if the Court did not always acknowledge that this was so.[137] For example, in *Lacey v Attorney-General (Qld)* ('*Lacey*'),[138] a 6:1 majority interpreted a provision conferring an 'unfettered discretion' on the Queensland Court of Appeal to vary a criminal sentence, as still requiring an

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[133] *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 421 (McHugh J).
[134] (2017) 262 CLR 362.
[135] Ibid 368 [14] (emphasis added). See also *Taylor v Owners – Strata Plan 11564* (2014) 253 CLR 531, 556 [65]: '[c]ontext sometimes favours an ungrammatical legal meaning' (Gageler and Keane JJ dissenting); cf *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 350 ALR 404, 422-3 [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).
[136] See also *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 346-7 (McHugh J); Justice Nye Perram 'Constitutional Principles and Coherence in Statutory Interpretation' (Speech delivered at the La Trobe Law School Symposium on the Coherence of Statutory Interpretation, Melbourne, 18 November 2016) 18, who said the principle of legality 'is, so it seems to me, a direct invitation not to read legislation in accordance with its ordinary language. In such a context, ordinary words will not do; only the very clear will suffice.'
[137] See Chen, above n 16, 414-8, 426-7.
[138] (2011) 242 CLR 573.

error of law on the part of the sentencing judge before the discretion was enlivened.[139] The High Court saw ambiguity in the word 'appeal' – associating it with an appeal by way of rehearing, which requires error.[140] This interpretation was reached pursuant to the principle of legality[141] and the rule against double jeopardy,[142] as well as the 'common law principles governing the administration of [criminal] justice'.[143] This was arguably a departure from the provision's literal and grammatical reading. The construction was both strained and disjointed. A discretion that requires error in sentencing is not truly 'unfettered' in a literal sense. Moreover, the word 'unfettered' applied grammatically to the discretion in its totality, yet that is not how it was interpreted.[144]

The principle of legality has been described as 'a powerful one'.[145] It has been grounded in weighty terms – '"constitutional" in character even if the rights and freedoms it protects are not'.[146] This constitutionalisation[147] of the principle of legality is telling. Section 32(1) of the Charter was not described in the same weighty terms in *Momcilovic*. This is rather indicative of the lack of normative force attributed to s 32(1). It is also ironic, given: (1) there is ongoing debate about the principle of legality's underlying rationale[148] and its legitimacy in contemporary times;[149] (2) the function of

[139] Ibid 598 [62].
[140] Ibid 596-8 [56]-[60].
[141] Ibid 583-4 [20].
[142] Ibid 582-3 [17]-[19].
[143] Ibid 583 [18], quoting *Byrnes v The Queen* (1986) 161 CLR 119, 129 (Deane J).
[144] Chen, above n 16, 414-5.
[145] *Momcilovic* (2011) 245 CLR 1, 46 [43] (French CJ).
[146] Chief Justice Robert French, 'The Common Law and the Protection of Human Rights' (Speech delivered at the Anglo-Australasian Lawyers Society, Sydney, 4 September 2009) 8; see also *Momcilovic* (2011) 245 CLR 1, 46 [42] (French CJ): 'The common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions. That is a reflection of its character as "the ultimate constitutional foundation in Australia" … It is in that context that this Court recognises the application to statutory interpretation of the common law principle of legality'.
[147] See further Chen, above n 126, 334-5.
[148] See below n 216.
[149] See Chen, above n 16, 408-9.

s 32(1) was 'to make up for the putative failure of the common law rules';[150] (3) the Charter protects democratically sanctioned rights and s 32(1) is a statutory command given by Parliament; and (4) it has been observed that French CJ in *Momcilovic* actually 'read down' the operation of s 32(1) by applying the principle of legality.[151]

So the courts may already permissibly depart from the literal and grammatical meaning on non-Charter principles of statutory interpretation. Then why not under the Charter? It would be highly undesirable and contrary to the rights-protective purpose of the Charter if s 32(1) had *less strength* than the principle of legality in this respect. Looking to the text of s 32(1) itself, 'it does not say that the interpretation cannot be a strained one, rather that it cannot be strained in a way that displaces the purpose of the legislation'.[152] This is supported by the explanation given in the Explanatory Memorandum.[153] It is also supported by the New Zealand jurisprudence, discussed below.

(iii) No real work to do?

The third possibility is that the Court of Appeal is using the phrase 'ordinary meaning' to mean that s 32(1) has no real work to do beyond what is already done by non-Charter ('ordinary') principles of statutory interpretation.[154] Such an understanding would be

[150] *Momcilovic* (2011) 245 CLR 1, 181 [450] (Heydon J dissenting). See also Gledhill, 'Rights-Promoting Statutory Interpretive Obligations and the "Principle" of Legality', above n 84, 93.
[151] Chen, above n 16, 424, 427.
[152] Gledhill, *Human Rights Acts: The Mechanisms Compared*, above n 84, 421.
[153] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 2844, which said cl 32 'provides for certain rules of statutory interpretation under the Charter … The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.'
[154] For example, it has led to at least one instance where the Victorian Supreme Court, after noting the existence of s 32(1), completely cast aside its relevance in the statutory interpretation process: *Daniels v Eastern Health* [2016] VSC 148, [6]-[8].

deeply flawed. The application of s 32(1) must in certain circumstances compel a departure from a non-Charter meaning – particularly where the right involved under the Charter is not otherwise protected at common law or goes further than the common law. Otherwise, s 32(1) would be rendered otiose.[155] Yet that is what commentators have accused the courts of doing, observing that the courts post-*Momcilovic* 'seem[ed] intent on rendering s 32(1) entirely redundant';[156] 'neutraliz[ing]' it;[157] 'with nothing at all to add to the interpretive exercise'[158]

(c) Comparisons with NZ BORA

In New Zealand, the courts have strived to give the NZ BORA work to do. Section 6 provides: 'Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning'.

It has been argued with significant force that the wording of s 32(1) is modelled on s 3(1) of the UK HRA, and that s 3(1) was intentionally drafted so as to distinguish itself from s 6 of the NZ BORA.[159] Section 6 is worded differently to s 32(1) of the Charter – the former refers to a meaning which *can* be given, whereas the latter refers to *so far as it is possible to do so consistently with purpose*. Nevertheless, as mentioned earlier, New Zealand jurisprudence is more likely to be considered of utility post-

[155] Emrys Nekvapil, 'Using the Charter in Litigation' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights: A Decade On* (Federation Press, 2017) 84, 94, who said it 'would be pointless for Parliament to have enacted s 32(1) if it could not produce any interpretation beyond that produced by the common law principles'.
[156] Claudia Geiringer, 'Inside and Outside Criminal Process: The Comparative Salience of the New Zealand and Victorian Human Rights Charters' (2017) 28 *Public Law Review* 219, 229.
[157] Debeljak, above n 103, 184.
[158] Claudia Geiringer, 'What's the Story? The Instability of the Australasian Bills of Rights' (2016) 14(1) *International Journal of Constitutional Law* 156, 173.
[159] Debeljak, above n 46, 29.

Momcilovic than United Kingdom jurisprudence. As we will see below, the word 'can' in s 6 has been imbued with concepts of reasonable possibility or tenability, and consistency with purpose. The prevailing view from *Hansen* is that s 6 (like the Charter) does not operate with the same force as s 3(1) of the UK HRA.[160]

In any event, the issue still remains – even if s 6 of the NZ BORA does not operate as strongly as s 3(1) of the UK HRA, can it still lead to a strained construction consistent with human rights? Initially, the predominant view was that s 6 did 'not countenance a strained and unnatural interpretation'.[161] This has changed with *Hansen*, although there remains debate in some quarters.[162]

In *Hansen*, Elias CJ in her dissenting judgment was emphatic that s 6 could require strained constructions. Her Honour said that a construction must be 'tenable on the text

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[160] See *AMM and KJO* [2010] NZFLR 629, [29]; *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, 606 [63], 607 [65] (Sir Anthony Mason NPJ); Claudia Geiringer, 'It's Interpretation, Jim, But Not As We Know It: *Ghaidan v Mendoza*, the House of Lords and Rights-Consistent Interpretation' in Paul Morris and Helen Greatrex (eds), *Human Rights Research* (Victoria University of Wellington, 2005) 3; Andrew Geddis and Bridget Fenton, '"Which is to be Master?" Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom' (2008) 25(3) Arizona Journal of International & Comparative Law 733, 736, 753, 760; Geiringer, above n 114, 65-6; Rishworth, above n 114, 335-6; Chief Justice Dame Sian Elias, 'A Voyage Around Statutory Protections of Human Rights' (2014) 2 *Judicial College of Victoria Online Journal* 4, 14; Carter, above n 21, 378-9; Justice Susan Glazebrook, 'Do They Say What They Mean and Mean What They Say? Some Issues in Statutory Interpretation in the 21st Century' (2015) 14(1) *Otago Law Review* 61, 78; Paul Rishworth, 'The Supreme Court and the Bill of Rights' in Andrew Stockley and Michael Littlewood (eds), *The New Zealand Supreme Court: The First Ten Years* (LexisNexis NZ Ltd, 2015) 169, 184; Geiringer, above n 156, 229.
Cf Kris Gledhill, 'The Interpretative Obligation: The Duty to Do What is Possible' (2008) New Zealand Law Review 283; Paul Rishworth, 'The Bill of Rights and "Rights Dialogue" in New Zealand: After 20 Years, What Counts as Success?' (Speech delivered at the University of Sydney Workshop on Judicial Supremacy or Inter-Institutional Dialogue? Political Responses to Judicial Review, Sydney, May 2010); Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, 2nd ed, 2015) 245 [7.11.21].

[161] Philip A Joseph, 'The New Zealand Bill of Rights Experience' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) 310 and cases cited at 310 n 174; see also Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 145; Butler and Butler, above n 160, cases cited at 235 [7.11.7] n 105; Gledhill, *Human Rights Acts: The Mechanisms Compared*, above n 84, 401-3. See further Andrew Geddes and M B Rodriguez Ferrere, 'Judicial Innovation under the New Zealand Bill of Rights Act: Lessons for Queensland?' 35(2) *University of Queensland Law Journal* 251, 282.

[162] See *Taylor v Attorney-General* [2016] 3 NZLR 111, 137 [108]-[109] (decision upheld on appeal to the Court of Appeal and Supreme Court).

and in the light of the purpose of the enactment'.[163] But this did not rule out strained constructions. The statutory direction in s 6 may 'entail an interpretation which "linguistically may appear strained"'.[164] Significantly, said her Honour: '[n]or is this heretical. Apparent "linguistic" interpretation is not uncommonly displaced by context. Where fundamental rights are affected … apparent meaning yields to less obvious meaning under common law presumptions protective of bedrock values'.[165] This was a clear reference to the principle of legality. It mirrors the sentiment expressed in *Project Blue Sky* in the Australian context.

The constructional issue itself in *Hansen* was the question of whether a criminal reverse onus provision imposing a legal burden on the accused[166] could be reinterpreted as imposing only an evidential burden, consistently with the human right to presumption of innocence.[167] Chief Justice Elias considered that this was not a tenable meaning.[168] Her Honour's judgment could be taken as saying that this strained construction was strained beyond what could be permitted.

The remaining four justices reached the same constructional outcome.[169] Justice Blanchard rejected the accused's construction as 'overstretching the language of a provision',[170] and being not 'genuinely open in light of both its text and its purpose'.[171]

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[163] [2007] 3 NZLR 1, 16 [25].
[164] Ibid [13]. Rishworth, above n 114, 337, agreed: 'I think Elias CJ is right to say that strained interpretations may on occasion be warranted to avoid rights-infringing meanings'.
[165] [2007] 3 NZLR 1, 11-12 [13].
[166] *Misuse of Drugs Act 1975* (NZ), s 6(6).
[167] *New Zealand Bill of Rights Act 1990* (NZ), s 25(c).
[168] [2007] 3 NZLR 1, 16 [25].
[169] Compare with the United Kingdom cases of *R v Lambert* [2002] 2 AC 545 and *Sheldrake v DPP* [2005] 1 AC 264 – perhaps this is illustrative of the difference in strength between s 6 of the NZ BORA and s 3 of the UK HRA.
[170] [2007] 3 NZLR 1, 26 [56].
[171] Ibid 27 [61].

Justices Tipping held that such a construction was not 'reasonably possible'[172] or 'tenable'.[173] His Honour distinguished the United Kingdom approach which sometimes 'defeat[ed] Parliament's purpose'.[174] Justice McGrath similarly held that the accused's construction was not 'viable', in the sense of being 'reasonably available';[175] 'there is no authority to adopt meanings which go beyond those which the language being interpreted will bear'.[176] Section 6 'adds to, but does not displace' the status quo, being that courts 'ascertain meaning from the text of an enactment in light of the purpose'.[177] Justice Anderson rejected that construction as not 'reasonably possible' and 'strained and unnatural'.[178]

However, Blanchard, Tipping and McGrath JJ[179] arguably did not rule out a strained construction in an appropriate case.[180] Although the terminology used by the three justices differed ('viable', 'reasonably available', 'genuinely open',[181] 'reasonably possible' or 'tenable'[182]), the common theme running throughout was that any human rights-compatible construction needed to be open on the provision's text and consistent with its purpose. This remains aligned with Elias CJ's position, who clearly accepted that applying s 6 could lead to a 'tenable' yet strained meaning.

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[172] Ibid 53 [149], 55-6 [158], 58 [165], 58 [167].
[173] Ibid 55 [158] n 191, [150] citing Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, 1st ed, 2005).
[174] Ibid 56 [158].
[175] Ibid 80 [252], 81 [256]-[257].
[176] Ibid 77 [237].
[177] Ibid 80 [252].
[178] Ibid 89 [290].
[179] Carter, above n 21, 400 cites McGrath J's judgment, before saying the 'rights-consistent meaning may be viable or reasonable [sic] available' because it is 'a strained, but even so available, meaning of words'. See also 374-5, 381.
[180] The position of Anderson J is less clear, given his Honour referred unfavourably to the 'strained and unnatural' construction sought in that case.
[181] Similarly, the notion that a human rights-consistent meaning must be 'properly open' was adopted under the contrasting NZ BORA methodology in *Moonen*: [2002] 2 NZLR 9, 16 [17].
[182] The notion that a human rights-consistent meaning must be 'tenable' was also adopted in *Moonen*: ibid 16 [16].

Two examples of strained constructions being reached pursuant to s 6 of the NZ BORA are of assistance. In the pre-*Hansen* case of *Hopkinson v Police*,[183] Ellen France J of the High Court (as her Honour then was) considered the proper interpretation of the criminal offence of using, displaying, destroying or damaging the New Zealand flag 'with the intention of *dishonouring* it.'[184] Although it was accepted that the 'natural meaning' of dishonour meant to disrespect,[185] this was not a meaning compatible with the right to freedom of expression. Given this, the Court applied s 6 of the NZ BORA so as to depart from the natural meaning,[186] such that dishonour imposed a higher threshold of 'vilifying' the flag.[187] Mere symbolic flag burning in protest did not amount to dishonouring, and the conviction was overturned.

In the post-*Hansen* case of *Re Application by AMM and KJO to adopt a child* (*AMM and KJO*),[188] the constructional issue was whether a de facto couple of opposite genders could adopt a child. The legislation provided: 'An adoption order may be made on the application of two spouses jointly in respect of a child'.[189] The New Zealand High Court (Wild and Simon France JJ) acknowledged that the ordinary meaning of 'spouse' was a married person.[190] This was inconsistent with the right to be free from discrimination under the NZ BORA.[191] The question was whether s 6 of the NZ BORA 'allowed a more expansive meaning'[192] of the word 'spouse', 'so as to include a man

[183] [2004] 3 NZLR 704.
[184] *Flags, Emblems, and Names Protection Act 1981* (NZ), s 11(1)(b).
[185] [2004] 3 NZLR 704, 709-11 [29]-[39].
[186] Ibid 710 [35], 711 [38]-[39].
[187] Ibid 717 [81].
[188] [2010] NZFLR 629.
[189] *Adoption Act 1955* (NZ), s 3(2).
[190] [2010] NZFLR 629, [17]-[18].
[191] Ibid [19].
[192] Ibid [10].

and a woman who are unmarried but in a stable and committed relationship'.[193] The Court considered that it should take an 'aggressive'[194] and 'more proactive'[195] approach under s 6. It accepted that the alternative construction pursuant to s 6 'will not be the ordinary or primarily intended meaning'.[196] Nevertheless, it found in favour of this 'non-ordinary'[197] meaning.[198] It was 'more consistent with the right to freedom from discrimination'.[199] The Court rightly accepted that '[s]ome resulting awkwardness in language must be an inherent consequence of adopting a s 6 alternative meaning'.[200]

Despite the above, according to the Court this 'de facto relationship' meaning of 'spouse' was not strained.[201] This is particularly curious. The non-literal construction reached in *AMM and KJO* would seem precisely to be a strained construction. Maybe the Court was seeking to avoid allegations of judicial activism by asserting that the construction was not strained (perhaps mirroring the phenomenon in the Australian jurisprudence on the principle of legality, where is it not always acknowledged when a strained construction is reached).[202] Paul Rishworth has observed that *AMM and KJO* 'illustrates the scope for interpretive arguments even after *Hansen*'[203] and its 'eschewal of the strong United Kingdom approach to the interpretive mandate'.[204] The same potential arguably lies in s 32(1) of the Charter.

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[193] Ibid [7], [8].
[194] Ibid [28] citing Geiringer, above n 114, 86-91 and J F Burrows, *Statute Law in New Zealand* (LexisNexis, 4th ed, 2009, 367).
[195] Ibid [30] citing Burrows, above n 194, 367.
[196] Ibid [31].
[197] Ibid [66].
[198] Ibid [70]-[73].
[199] Ibid [50].
[200] Ibid [31]; see also [34].
[201] Ibid [50].
[202] See, for example, *Lacey* (2011) 242 CLR 573 and *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569.
[203] Rishworth, above n 114, 339.
[204] Ibid 340; see also Butler and Butler, above n 160, 244.

Moreover, while these two cases adopted approaches akin to the NZ BORA methodology, it ought not matter which methodology is applied. The NZ BORA methodology from *Hansen* is associated with s 6 of the NZ BORA allowing for 'reinterpretation' of a statutory provision.[205] Notably though, Elias CJ dissenting did not subscribe to this methodology. Yet her Honour expressly acknowledged that s 6 may still give rise to strained constructions. There are cases in which a strained construction was reached applying the *Hansen* methodology,[206] as well as those which do not.[207]

Furthermore, as reflected in Elias CJ's judgment in *Hansen*, application of the principle of legality may require a strained construction. Justice Glazebrook of the New Zealand Supreme Court has also said, extra curially, in 'applying the principle of legality (and indeed [s 6] in the Bill of Rights) the Courts are not shackled by a strict interpretation of the language of an enactment'.[208] In other words, they are not always bound to apply the literal and grammatical meaning.

[205] *Hansen* [2007] 3 NZLR 1, 36-7 [88]-[92] (Tipping J); 26-7 [57]-[60] (Blanchard J); 65-6 [190]-[192] (McGrath J).
[206] See, for example: *Hopkinson v Police* [2004] 3 NZLR 704; *AMM and KJO* [2010] NZFLR 629.
[207] See, for example, *Schubert v Wanganui District Council* [2011] NZAR 233; *R v Harrison* [2016] 3 NZLR 602.
[208] Glazebrook, above n 160, 81. See also Carter, above n 21, 375: '[i]t would perhaps be surprising … if the courts accorded [human rights] any less protection than they accorded similar rights at common law'.

3 Second Proposition: Departing from or overriding legislative intention

(a) Consistency with actual legislative intention

The next issue is whether s 32(1) can result in departures from or the overriding of legislative intention. The Court of Appeal has said post-*Momcilovic*[209] that s 32(1) does not require or authorise a court to depart from 'the intention of Parliament *in* enacting the provision'[210] or 'the intention of the parliament *which* enacted the statute'.[211] These are references to actual legislative intention.[212] They express the view that legislative intention at the time of enacting the statute matters. Moreover, the proposition that s 32(1) does not permit an interpretation which '*overrides* the intention of Parliament in the Act'[213] has a pejorative connotation but the same message.

When it comes to the principle of legality, some commentators have argued that its rationale is concerned with actual legislative intention – that is, legislative intention at the time of enacting a statute.[214] Parliament must have 'directed its attention to the rights or freedoms in question, and … consciously decided upon abrogation or curtailment'.[215] The focus is on Parliament's state of mind when enacting the legislation. Although, whether this link is necessary is presently hotly contested.[216]

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[209] See also *R v Momcilovic* (2010) 25 VR 436, 457 [74], 458 [77], 459 [82].
[210] *Slaveski v Smith* (2012) 34 VR 206, 214 [20] (emphases added).
[211] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (emphases added).
[212] See also *DPP v Kaba* (2014) 44 VR 526, 589 [216] where the Victorian Supreme Court said that post-*Momcilovic*, 's 32(1) of the Charter did not permit an interpretation to be adopted which was contrary to parliament's intention *when originally enacting the provision* in question' (emphasis added); cited with approval in *Kuyken v Chief Commissioner of Police* [2015] VSC 204, [77].
[213] *Nigro* (2013) 41 VR 359, 382 [82] (emphasis added); see also *R v Momcilovic* (2010) 25 VR 436, 457 [74].
[214] Chen, above n 126; Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 *Law Quarterly Review* 598, 605; Jeffrey Goldsworthy, 'The Principle of Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46.
[215] *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ, dissenting, but not on this point).
[216] See, for example, Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372; Brendan Lim, 'The Rationales for the Principle of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 2; French, above n 21, 41, 51-2; cf Goldsworthy, above n 252, 42-5; Goldsworthy, above n 214.

Ironically, strict adherence to actual legislative intention has not transpired in practice. For example, a fundamental common law protection has been applied to interpretation of a statute pursuant to the principle of legality, despite that protection being understood as more restrictive in scope at the time the statute was enacted.[217] Accordingly, the caution of adhering to Parliament's actual intention pursuant to the Charter does not seem to apply to the principle of legality.

In any event, the difference between the principle of legality and s 32(1) is that the former is *meant* to be concerned with actual legislative intention, whereas the latter will not always be. The terms of s 32(1) apply to 'all statutory provisions', regardless of whether they were enacted before or after the Charter.[218] The text is clear – s 32(1) must apply to pre-existing legislation. It is legitimate for s 32(1) to do so, for the reasons discussed below.

(b) The Charter as a new standing commitment

Jeffrey Goldsworthy has described Parliament as having standing commitments. For example, the principle of legality exists because Parliament 'is deemed to have a standing commitment to preserve basic common law rights and freedoms, which it should not be taken to have repudiated absent very clear evidence such as express words or necessary implication'.[219] Crucially for present purposes, Goldsworthy recognises that 'Parliament's standing commitments need not be confined to those implicit in past practice; it can make them explicit, and even subscribe to new ones'.[220] Section 32(1)

[217] In the context of legal professional privilege: see discussion in Chen, above n 126, 351-2.
[218] Moreover, a transitional provision provides that the Charter 'extends and applies to all Acts, whether passed before or after the commencement': Charter, s 49(1).
[219] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 305.
[220] Ibid.

of the Charter, and the human rights to which it applies, is an example of a new standing commitment. Parliament's intention in enacting the Charter, including s 32(1), was to create a new standing commitment to 'protect and promote' human rights, which it deemed to be of high importance.

(c) Post-Charter legislation

For post-Charter legislation, Charter rights considerations form part of Parliament's actual intention when enacting that legislation.[221] With the principle of legality, Parliament is taken to be aware of the principle and committed to the fundamental common law protections falling within its scope. Moreover, the principle is said to be 'known to both the Parliament and the courts as a basis for the interpretation of statutory language'.[222] The same may be said of s 32(1) of the Charter and the human rights protected by the Charter. Parliament can be presumed to be aware of and committed to protecting and promoting Charter rights, and the courts will apply s 32(1) accordingly. Where Parliament does not wish for the legislation to be interpreted compatibly with Charter rights, it retains the ability to make this unambiguously clear in the drafting of incompatible statutory provisions,[223] or by way of an 'override declaration' pursuant to the Charter.[224]

In any event, the concept of actual legislative intention has been undermined in relatively recent times by the High Court, although not in a way which adversely affects s 32(1)'s operation (see below).

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[221] See Gledhill, above n 160, 314 in the New Zealand context; Gledhill, 'Rights-Promoting Statutory Interpretive Obligations and the "Principle" of Legality', above n 84, 112.
[222] *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ).
[223] Most likely accompanied by the Minister's statement of *in*compatibility under Charter, s 28.
[224] Charter, s 31.

(d) Pre-Charter legislation

As to pre-Charter legislation, Parliament at the time of enacting a statute could not have known that the statute would be interpreted compatibly with human rights. Further, the justification for adopting strained constructions is predominantly viewed as giving effect to the purpose of the legislation by the Parliament which enacted it. It is perhaps these reasons which have led the Victorian courts to say that s 32(1) does not permit departure from, or overriding of, legislative intention. It might be argued that using s 32(1), enacted by a later Parliament, to impact on earlier actual legislative intention is a break from traditional statutory interpretation practices. However, there are several potential ways to justify this departure from (or more pejoratively, overriding of) actual legislative intention.

(i) Implied amendment or harmonious construction?

On one view, the enactment of the Charter and s 32(1) could be taken as having 'impliedly amended' prior legislation.[225] That is, pre-Charter legislation is impliedly amended by the subsequent Charter, such that the pre-Charter legislation is interpreted compatibly with human rights where possible. In the United Kingdom context,[226] this justification is closely associated with the doctrine of implied repeal, which provides that '[i]f a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed'.[227] During argument in *Momcilovic*, the High Court queried whether the operation of the Charter to pre-

[225] See *RJE v Secretary, Department of Justice* (2008) 21 VR 526, 556-7 [114] (Nettle JA) quoting *Poplar Housing Association Ltd v Donoghue* [2002] QB 48, 72: 'It is as though legislation which predates the Human Rights Act 1998 and conflicts with the Convention has to be treated as being subsequently amended to incorporate the language of section 3'. Cf Sir Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 467-8.
[226] David Feldman, *English Public Law* (Oxford University Press, 2nd ed, 2009) 342.
[227] Francis Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5th ed, 2008) 304.

Charter legislation was analogous to the doctrine of implied repeal, but that was left undecided.[228]

To be clear, the exercise of impliedly amending legislation is undertaken *by Parliament* in enacting the subsequent legislation (ie. the Charter), and it is then the task for the courts to construe the earlier legislation in light of the subsequent legislation (the Charter). That is similar to how the doctrine of implied repeal works. It is a matter of a later parliament exercising legislative power with respect to earlier legislation, and not a matter of conferring legislative power on the courts to amend the earlier legislation.[229] The former is considered legitimate and democratically sanctioned, whereas the latter is not.

However, the so-called doctrine of implied repeal is actually a 'comparatively rare phenomenon'.[230] It is more accurately expressed as a presumption *against* implied repeal.[231] The latter statute would take precedence only as a 'measure of last resort'[232] – implied repeal will only occur if the two statutes 'cannot stand together';[233] they 'cannot be reconciled'.[234]

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[228] See Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 015 (8 February 2011) 2260-80, 3435, 4160-4245.
[229] That seemed to be the subject of some confusion during the *Momcilovic* hearing: see ibid 4215-4220.
[230] *Butler v A-G (Vic)* (1961) 106 CLR 268, 275 (Fullagar J), cited in *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, 14.
[231] Bennion, above n 227, 305. See also Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, 2009) 36-7.
[232] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 298.
[233] *Hack v Minister for Lands* (NSW) (1905) 3 CLR 10, 23 (O'Connor J), quoting *Kutner v Phillips* [1891] 2 QB 267, 271–2. See further *Butler v A-G (Vic)* (1961) 106 CLR 268, 276 (Fullagar J), 280 (Kitto J).
[234] *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 61 [87] (French CJ and Kiefel J).

One of the techniques in reconciling apparently conflicting statutes, before implied repeal is considered, is applying a principle of harmonious construction. That principle involves 'adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions'.[235] This might involve 'determin[ing] which is the leading provision and which the subordinate provision'[236] and 'reading the one as subject to the other'.[237] In the Charter context, s 32(1) would be the leading provision where it is 'possible' to adopt a human rights-compatible interpretation. The statute being interpreted would be the leading provision where it is not 'possible' to do so, including because of inconsistency with purpose. By 'determining the hierarchy',[238] 'the apparent conflict between the language of the provision and the mandate of the Charter'[239] is resolved. The answer lies within the terms of s 32(1) itself. The operation of s 32(1) is consistent with the principle of harmonious construction[240] – before the implied repeal stage is even reached.

(ii) Composite or compound legislative intention

Another way of conceptualising s 32(1)'s application to pre-Charter legislation is that s 32(1) is a statutory overlay on actual legislative intention. Legislative intention is

[235] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [70]; see also *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 28 [78] (Crennan, Kiefel and Bell JJ), 33 [98] (Gageler J).
[236] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [70] citing *Institute of Patent Agents v Lockwood* [18941 AC 347, 360.
[237] *Butler v A-G (Vic)* (1961) 106 CLR 268, 276.
[238] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [70].
[239] *Momcilovic* (2011) 245 CLR 1, 250 [684] (Bell J).
[240] In the UK HRA context, see Young, above n 231, 52-3; and Nicholas Bamforth, 'Parliamentary Sovereignty and the *Human Rights Act 1998*' [1998] *Public Law* 572, 575. In the NZ BORA context, see *R v Pora* [2001] 2 NZLR 37, 48 [39]-[40] (Elias CJ and Tipping J) who go further in dismissing the merits of the doctrine of implied repeal, but they say: 'The proper approach is that … [w]here there is inconsistency the court must determine which is the leading provision. The matter is one of statutory interpretation, applying in the first place the legislative directions contained in the *Interpretation Act* and the *New Zealand Bill of Rights Act* where they are relevant.' See also 69 [140], 70 [146] and 71 [149] (Thomas J); cf 63 [110]-[111] (Gault, Keith and McGrath JJ).

these days 'composite'[241] or 'compound'[242] in nature. The effect of s 32(1) is that 'all statute law is a composite of what was intended by the Parliament that actually passed the statute in question and the Parliament that passed' s 32(1).[243] What the exercise requires is 'squaring two statutory purposes, one in [s 32(1) of the Charter] and the other in the law'.[244] The courts are 'servants striving to make sense of the multiple demands of their sovereign master', namely Parliament.[245]

Interpretation Acts, such as the *Interpretation of Legislation Act 1984* (Vic) (ILA), provide a helpful point of reference here. The purpose of such Acts, which have been enacted across the Commonwealth, State and Territory jurisdictions, is to provide guidance for the interpretation of legislation. Interpretation Acts 'set out the working assumptions according to which legislation is framed by Parliament, and applied by the courts'.[246] The provisions in these Acts 'restate [many] existing common law presumptions but some of them are expressly intended to overrule the common law'.[247] Like the Charter, Interpretation Acts generally apply to all statutes, regardless of whether the statute was passed before or after the Interpretation Act.[248]

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[241] Gledhill, above n 160, 322 in the NZ BORA context; Gledhill, above n 84, 112.
[242] *Hansen* [2007] 3 NZLR 1, 27 [61] (Blanchard J).
[243] Gledhill, above n 160, 321-2; see also Aileen Kavanagh, 'Unlocking the Human Rights Act: The "Radical" Approach to Section 3(1) Revisited' [2005] 3 *European Human Rights Law Review* 259, 269; *Ghaidan* [2004] 2 AC 557, 570 [26], 571 [30] (Lord Nicholls).
[244] Conor Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford University Press, 2016) 89.
[245] Ibid.
[246] The Hon Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 28; see also Murray Gleeson, 'Legal Interpretation: The Bounds of Legitimacy' (Speech delivered at the Sydney University Law School, 16 September 2009) 13.
[247] Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 262.
[248] See, for example, *Interpretation of Legislation Act 1984* (Vic), s 4(1); *Acts Interpretation Act 1901* (Cth), s 2(1).

Thus, upon the enactment of Interpretation Acts, in some aspects they would have 'changed the way in which certain pre-existing provisions should be interpreted, and hence changed their legal effect'.[249] So it would seem that similar concerns about departures from actual legislative intention would arise, where the Interpretation Acts do overrule the common law. However, issue is rarely taken that the Interpretation Acts depart from or override legislative intention. If it is legitimate for Interpretation Acts, it is no less legitimate for the Charter. The notion of a statutory overlay on actual legislative intention is not unprecedented. Legislative intention is now composite or compound in nature – comprising of actual legislative intention, the ILA and the Charter.

Therefore, s 32(1) was intended to and can legitimately apply to pre-Charter legislation. At the time the Charter was enacted, and any subsequent time, it remains open to Parliament to amend existing legislation if concerned about their human rights compatibility and s 32(1)'s potential application. Indeed, following the Charter's commencement, the Victorian government reviewed existing legislation and enacted the *Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009* (Vic) to amend some Acts which were potentially incompatible with the Charter.[250]

It was therefore correct for Bell J in *Momcilovic* to say that pre-Charter legislation may legitimately 'yield different, human rights compatible, meanings in consequence of s 32(1)'.[251] If the courts could not revisit previously settled constructions, s 32(1)

[249] Dale Smith, 'Is the High Court Mistaken About the Aim of Statutory Interpretation?' (2016) 44 *Federal Law Review* 227, 242.
[250] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 March 2009, 781 (Rob Hulls, Attorney-General).
[251] (2011) 245 CLR 1, 250 [684]; see also Beatson et al, above n 225, 490-1 in the UK HRA context; Butler and Butler, above n 160, 272-77 in the NZ BORA context.

would have no work to do with respect to a whole swathe of legislation. The subsequent post-*Momcilovic* references to s 32(1) not requiring or authorising departure from legislative intention requires clarification. As will be seen below, applying the interpretive obligation to reach a new construction is not uncommon in the New Zealand experience.

(iii) Legislative intention as a product of statutory interpretation

There is another conceptualisation, but which does not rely on any actual intention of Parliament at the time legislation is enacted. In relatively recent times, the High Court has brought the notion of actual legislative intention into doubt. In *Lacey*, a joint judgment of six justices treated legislative intention as a product of the statutory interpretation process itself.[252] Rather, '[a]scertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.'[253]

This conception of legislative intention has been disputed with significant force,[254] including on the basis that it undermines the foundational basis of principles of statutory interpretation. However, if it is indeed correct, then there should be *even less* difficulty in applying s 32(1) of the Charter to either pre-Charter or post-Charter legislation. Section 32(1) is itself a rule of construction. To adopt the words used in *Lacey*, it can

[252] *Lacey* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); see Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39, 41. Subsequently in *Momcilovic* (2011) 245 CLR 1, 141 [341], Hayne J said: '"Intention" is a conclusion reached about the proper construction of the law in question and nothing more'.
[253] *Lacey* (2011) 242 CLR 573, 592 [43].
[254] Ekins and Goldsworthy, above n 252; *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, [77] (Gageler J).

be ‘applied to reach … preferred results’ and as a statutory rule it is ‘known to parliamentary drafters and the courts’. If legislative intention is merely a product of the statutory interpretation process itself, then s 32(1) contributes to ascertainment of that intention. It makes no sense to say that s 32(1) cannot require or authorise departures from legislative intention, when its application forms part of it. Therefore, departing from previously settled constructions pursuant to s 32(1) can, within limits discussed below, be perfectly consistent with this new conception of legislative intention.

(iv) Avoiding a human rights-incompatible interpretation as manifestly absurd, inconvenient, irrational or illogical

This article has proceeded on the basis that adopting strained constructions to ensure consistency with purpose, and adopting strained constructions pursuant to s 32(1), are two distinct notions. But what if the application of s 32(1) to reach strained constructions can itself be described as a purposive construction? Since Parliament is presumed unlikely to have intended a manifestly absurd, inconvenient, irrational or illogical outcome, can it not be said that a human rights-*in*compatible interpretation is manifestly absurd, inconvenient, irrational or illogical? After all, through enacting the Charter, Parliament has created this new and important standing commitment to protect and promote human rights, and the starting point is that legislation is to be interpreted compatibly with human rights.

There is a corollary with the principle of legality here. Some commentators have drawn a connection with the presumption that Parliament acts rationally, on the basis that

Parliament does so by having regard to fundamental common law protections; the principle of legality is therefore an expression of that presumption.[255]

If that is the case, the same could be argued for s 32(1). If s 32(1) is an expression of the 'Parliament acts rationally' presumption, this supports the argument that a human rights-*in*compatible interpretation would be irrational and potential grounds for reaching a strained construction on purposive grounds.

(e) Comparisons with NZ BORA

Unlike the muted effect that s 32(1) of the Charter has had post-*Momcilovic* on the interpretation of legislation, '[t]he New Zealand law reports are replete with examples of cases in which s 6 of the [NZ BORA] has had determinative, and sometimes transformative, effect'.[256] It includes an effect which might depart from what Parliament had intended at the time of enactment.

In *Hansen*, Tipping J acknowledged that s 6 of the NZ BORA required examination of the statutory words 'to see if a meaning different from Parliament's intended meaning … can tenably be found in them'.[257] In other words, a meaning which departs from actual legislative intention. Elias CJ also recognised that s 6 of the NZ BORA may 'require a meaning to be given to a provision which was not envisaged at the time of its enactment'.[258] Her Honour cited in support the following passage from Lord Hoffman in *R (Wilkinson) v Inland Revenue Commissioners*:[259]

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[255] Kenny, 'Current Issues in the Interpretation of Federal Legislation', above n 132, n 24 and accompanying text; Kenny, 'Constitutional Role of the Judge', above n 132, 12.
[256] Geiringer, above n 156, 229.
[257] [2007] 3 NZLR 1, 53 [149].
[258] Ibid 12 [14]
[259] [2005] 1 WLR 1718, 1724 [18].

> It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in the *Ghaidan* case that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the 'intention of Parliament'. But that is not normally what one means by the intention of Parliament. One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with convention rights.

Justice Blanchard similarly cited Lord Hoffman in *R (Wilkinson)* when describing the need 'to give effect to what appears to be the overall parliamentary intention'.[260] His Honour adopted a 'compound'[261] approach to legislative intention as described above, 'involving the specific intention to be discerned from the provision in issue read in light of the general overriding directions in' the NZ BORA.[262]

The significance of the above references to Lord Hoffman's judgment in *R (Wilkinson)* should not be understated, because that judgment is widely considered to represent a retreat by the House of Lords from its far-reaching approach in *Ghaidan* to s 3(1) of the UK HRA (although as time has passed, it has not ultimately resulted in a change of approach – *Ghaidan* remains the leading case). But even Lord Hoffman recognises that, on a more conservative approach to the interpretive obligation under the UK HRA, it is permissible to depart from what Parliament had intended at the time of passing the statute.

[260] [2007] 3 NZLR 1, 27 [61].
[261] Ibid.
[262] Ibid.

The proposition that a statutory bill of rights can require departure from actual legislative intention is illustrated in *AMM and KJO*. The High Court held that it could extend the meaning of 'spouses', 'although not the meaning that was intended at the time of enactment', being in 1955.[263] The legal meaning of a statute 'may not be an originally intended meaning'.[264]

It logically follows that applying s 6 of the NZ BORA can involve departures from settled constructions previously reached by the courts.[265] As Elias CJ has said (extra curially), '[i]nterpretation of legislation in authorities which predate the [NZ BORA] should always be looked at critically'.[266] In *Hansen*, Anderson J stated that s 6 'may result in the finding of a meaning different from that which would have been found prior to the [NZ BORA]'.[267]

(f) First and Second Propositions unclear or unwarranted

Summarising the discussion so far, the First Proposition cannot on any understanding be clearly derived from a majority in *Momcilovic*. The assertion that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, however 'ordinary meaning' can be understood, is unwarranted. It should be properly

[263] [2010] NZFLR 629, [50].
[264] Ibid [31] citing *Hansen* [2007] 3 NZLR 1, 53 [149] (Tipping J).
[265] See Rishworth et al, above n 161, 154-5; and Butler and Butler, above n 160, 272ff although they raise the complicating factor of s 4 of the NZ BORA; see further ibid 225-6. NZ BORA, sub-s 4(a) provides that: 'No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights … hold any provision of the enactment to be impliedly repealed or revoked … by reason only that the provision is inconsistent with any provision of this Bill of Rights'. However, the Charter has no equivalent to s 4(a), and so the revisiting of previously settled constructions is less problematic.
[266] The Rt Hon Dame Sian Elias, 'Address at the Occasion of the Bill of Rights Seminar for the New Zealand Bar Association' (Speech delivered at Russell McVeagh, Wellington, 20 August 2015) 7.
[267] [2007] 3 NZLR 1, 89 [289].

recognised that if the principle of legality can lead to a non-literal or non-grammatical meaning, then so too can s 32(1) of the Charter. This would also be consistent with how s 6 of the NZ BORA operates, which is more modest than s 3(1) of the UK HRA.

As to the Second Proposition, the Victorian Court of Appeal's reference to s 32(1) not requiring or authorising departures from legislative intention requires clarification. First, s 32(1) would undoubtedly form part of Parliament's actual intention with respect to statutes enacted post-Charter. Second, for pre-Charter statutes, it is not unprecedented for Parliament to make new standing commitments and enact interpretive presumptions which depart from actual legislative intention. There are ways in which this might be justified. Third, even the principle of legality, whose rationale is conceptually dependent on actual legislative intention, has in practice allowed for departures from it. Fourth and in the alternative, one could argue that s 32(1)'s application is consistent with the High Court's contemporary conception of legislative intention, or that a human rights-compatible construction is itself a purposive construction.

4 Proposition three: Permissibility of techniques for strained constructions

As outlined earlier, the overarching message from the post-*Momcilovic* jurisprudence is that s 32(1) will not usually permit the 'reading in' or 'reading down' of words. Section 32(1) 'does not allow the reading *in* of words which are not explicit or implicit in a provision, or the reading *down* of words so far as to change the true meaning of a provision.'[268] These statements are critiqued below, and the possibility is also raised that s 32(1) may allow for reading *up* of words. The legitimacy of each of these

[268] *Slaveski v Smith* (2012) 34 VR 206, 219 [45].

statutory interpretation techniques is variable, with some more contested than others. Ultimately, the labelling of such techniques may be of limited utility, and have a tendency to obfuscate rather than clarify. Nevertheless, it is necessary to engage with them, given the post-*Momcilovic* jurisprudence. Comparisons with the principle of legality can also be drawn here.

(a) Reading down

Reading down a statutory provision means 'giving general words a more specific meaning';[269] or 'a narrower meaning than that of which they are literally capable'.[270] Chief Justice Spigelman has described reading down as 'a well-established means of statutory interpretation';[271] going so far as to say it has 'a rich legal history. It is an acceptable, indeed essential, technique of interpretation'[272] and 'one of the most frequently recurring tasks in statutory interpretation'.[273] It is the least controversial of the techniques for adopting a strained construction.

The principle of legality is most closely associated with the technique of reading down. Former Solicitor-General for Victoria, Richard Niall (as his Honour then was) said: '[p]erhaps because the application of the principle means that the legislation is read down, it is not seen as producing a legislative rather than judicial outcome'.[274] Others

[269] Pearce and Geddes, above n 247, 72.
[270] James Spigelman, The McPherson Lecture Series: Statutory Interpretation and Human Rights (University of Queensland Press, 2008) vol 3, 123.
[271] Ibid 124; see also *R v Young* (1999) 46 NSWLR 681, 689 [25], *R v PLV* (2001) 51 NSWLR 736, 743 [86]; Janet McLean, 'Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act' [2001] *New Zealand Law Review* 421, 431, 432.
[272] Spigelman, above n 270, 128.
[273] J J Spigelman, 'The Poet's Rich Resource: Issues in Statutory Interpretation (2001) 21 *Australian Bar Review* 224, 232.
[274] Richard Niall, 'The Principle of Legality in Administrative Decision-Making' (Speech delivered at the Australian Institute of Administrative Law, Melbourne, 16 August 2016) 10.

have described reading down as a 'time-honoured technique' pursuant to the principle of legality.[275]

So much is evident from the principle of legality's rights-protective rationale. In the influential High Court case of *Potter v Minahan*,[276] O'Connor J quoted approvingly from *Maxwell on the Interpretation of Statutes*, which said:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[277]

As discussed below, the principle of legality does not require textual ambiguity before it is triggered. Thus, 'general words' will not usually suffice to abrogate or curtail fundamental common law protections. 'General words' are often not textually ambiguous, and their literal meaning in the 'widest, or usual, or natural sense'[278] may 'authorise almost any action'[279] – it might very well infringe a fundamental common law protection. The principle of legality may therefore require a reading down which

[275] Joseph, above n 161, 311; Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers Ltd, 4th ed, 2014) 1275. See also The Hon J J Spigelman, 'Statutory Interpretation: Identifying the Linguistic Register' (1999) *Newcastle Law Review* 1, 11; see also Spigelman, above n 270, 128 who said the principle of legality has 'often been applied in this way'.
[276] (1908) 7 CLR 277.
[277] Ibid 304. Subsequently quoted with approval by six members of the High Court in *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[278] *Potter v Minahan* (1908) 7 CLR 277, 304.
[279] Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' (1992) *Public Law* 397, 405.

potentially avoids or minimises such an infringement. The principle 'limit[s] the domain within which statutory provisions apply'.[280]

It would seem then[281] that s 32(1) of the Charter can also be utilised to read down statutes[282] which are incompatible with Charter rights.[283] Yet post-*Momcilovic*, the Court of Appeal has said that s 32(1) does not allow 'the reading down of words so far as to change the true meaning of a provision'.[284]

What can be made of the words 'true meaning of a provision'? As outlined earlier, s 32(1) may change the legal effect of pre-Charter legislation – that is legitimate and not unprecedented. For post-Charter legislation, the legislature must be taken to have borne the Charter in mind when passing the statute. Without clear and unambiguous words to the contrary, or an 'override declaration' pursuant to the Charter, the true meaning is presumably a rights-compatible one. Accordingly, application of s 32(1) is vital to ascertain the true meaning of the provision. The post-*Momcilovic* jurisprudence is arguably too tentative in this regard. The courts should clarify that s 32(1) does allow for reading down to ensure compatibility with Charter rights.

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[280] Jim Evans, 'Reading Down Statutes' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ Ltd, 2004) 123, 128.

[281] But as to broad statutory discretions, see Bruce Chen, 'Section 32(1) of the Charter: Confining discretions compatibly with Charter rights?' (2016) 42(3) *Monash University Law Review* 608; and Bruce Chen, 'How Does the Charter Affect Discretions? The Limits of Section 38(1) and Beyond' (2018) 25(1) *Australian Journal of Administrative Law* 28.

[282] For early commentary in the NZ BORA context, see Paul Rishworth, 'Affirming the Fundamental Values of the Nation: How the Bill of Rights and the Human Rights Act Affect New Zealand Law' in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's, 1995) 71, 100-7. For more recent discussion, see Rishworth, 'The Supreme Court and the Bill of Rights', above n 160, 169; Carter, above n 21, 370.

[283] See the pre-*Momcilovic* case of *RJE v Secretary, Department of Justice* (2008) 21 VR 526, where the Victorian Court of Appeal departed from precedent in reading down the scope of a statutory power to make post-sentence supervision orders. Justice Nettle did so on the basis of s 32(1) of the Charter and the right to freedom of movement (s 12), right to privacy (s 13(a)), and the right to liberty (s 21): 554 [106], 558 [119]; whereas Maxwell P and Weinberg JA did so on other grounds, including the principle of legality and the fundamental common law right to liberty: 537 [37].

[284] *Slaveski v Smith* (2012) 34 VR 206, 219 [45].

(b) Reading up

'Reading up' involves giving the words of a statute 'a broad meaning';[285] 'enlarg[ing] the scope of particular words'.[286] Chief Justice Spigelman considered this technique to be contentious. His Honour was:

> unaware of any authority in which a court has … *expand[ed]* the sphere of operation that could be given to the words actually used …. There are many cases in which words have been *read down*. I know of no case in which words have been *read up*.[287]

Chief Justice Spigelman considered that such an approach was not 'permissible'[288] or 'possible',[289] without providing much further explanation. His Honour's views are not shared across the judiciary. The Victorian Court of Appeal in *DPP v Leys*[290] disagreed[291] and considered there was 'little utility'[292] in Spigelman CJ's distinction.

The High Court in *Taylor v The Owners - Strata Plan No 11564* weighed in on this judicial debate. The Court implied that Spigelman CJ's approach was too rigid.[293] For example, French CJ, Crennan and Bell JJ said:

> it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words)

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[285] Beatson, above n 225, 501.
[286] Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (LawBook Co, 1st ed, 2008) 226.
[287] *R v PLV* (2001) 51 NSWLR 736, 743-4 [88]; see also Spigelman, above n 273, 232-3.
[288] *R v PLV* (2001) 51 NSWLR 736, 744 [89].
[289] Spigelman, above n 273, 232.
[290] (2012) 44 VR 1.
[291] Ibid 34-5 [98]; see further 35-8 [99]-[109].
[292] Ibid 38 [107].
[293] (2014) 253 CLR 531, 548 [37] (French CJ, Crennan and Bell JJ); 556 [65] (Gageler and Keane JJ) (dissenting, but not on this point).

> with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. … the question of whether a construction 'reads up' a provision, giving it an extended operation, or 'reads down' a provision, confining its operation, may be moot.[294]

It has been suggested that using the technique of reading up is contrary to the established rationale of the principle of legality. As seen above, the principle is focused on reading down general words. In *DPP v Kaba*, Bell J of the Victorian Supreme Court stated that 'the rights-protecting rationale of the principle of legality prevents it from ever being employed to read up legislation whose meaning is ambiguous'.[295] This strict distinction between reading down and reading up seems unlikely to survive the High Court's observations in *Taylor*. While rarer, there are instances in which the principle of legality has arguably been applied to read up statutory provisions – extending their scope of operation.[296] Nevertheless, given the existing case law and commentary, it seems likely that the principle of legality will continue to be most strongly associated with reading down.

Section 32(1) has no such associations. There is nothing in the text of s 32(1) that interpretation must be done in a particular way, only the express qualification that it be possible consistently with the purpose of statutory provisions. Section 32(1) does not

[294] Ibid 548 [37].
[295] *DPP v Kaba* (2014) 44 VR 526, 580 [186].
[296] See, for example, *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 608 [5]-[6], 619-20 [43]-[45] (French CJ); *Anglican Care v NSW Nurses and Midwives' Association* (2015) 231 FCR 316.

speak only of reading down general words. If reading up is considered an acceptable technique of interpretation, then it should be available when applying s 32(1). No mention of reading up is made in the post-*Momcilovic* jurisprudence. The ability to read up statutory provisions may render an Act compatible with human rights – for example, where it is enlarging the scope of a rights-*beneficial* provision or an exception to an otherwise rights-*infringing* provision.

There is support for such an approach in the New Zealand jurisprudence (as well as the United Kingdom).[297] On the NZ BORA, it has been said that '[s]ometimes the Courts may give to statutory provisions a liberal and expansive interpretation, if this is what is required to achieve a reconciliation' with human rights.[298] *AMM and KJO* is such an example.[299]

(c) Reading in

'Reading in' involves reading in missing words or 'filling the gaps'.[300] This is often considered a controversial technique of statutory interpretation. It will ordinarily involve 'some level of disconformity between the literal meaning of the words actually used and the statutory scheme'.[301] One commentator suggested that 'reading in' is 'always likely to be regarded as a legislative rather than an interpretative technique'.[302]

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[297] Pound and Evans, above n 286, 226-7; Beatson et al, above n 225, 501.
[298] Joseph, above n 161, 311; Rishworth, above n 114, 339-40; Carter, above n 21, 371; *Flickinger v Hong Kong* [1991] 1 NZLR 439, 441 (in obiter).
[299] See also *R v Harrison* [2016] 3 NZLR 602, where a sentencing exception was read broadly, so that the phrase 'it would be manifestly unjust to do so' was interpreted such that the requisite circumstances 'need not be rare or exceptional'.
[300] The Honourable Justice Susan Glazebrook, 'Filling the Gaps' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ Ltd, 2004) 153.
[301] *DPP v Leys* (2012) 44 VR 1, 33 [96].
[302] Feldman, above n 226, 342. See also Spigelman, above n 273, 233, who said that reading in 'offend[s] a fundamental principle of constitutional law', as the task of the court 'is one of construction'; see further Spigelman, above n 270, vol 3, 132, 134; *R v Young* (1999) 46 NSWLR 681, 686 [5].

Similarly, another said that 'gap-filling' has a 'pejorative connotation'.[303] The High Court of Australia considers that filling in gaps is 'no function of the courts'.[304] Others prefer the phrases 'implying words in legislation',[305] or 'constru[ing] the words actually used in the legislation *as if* certain words appeared in the statute'.[306] These statements seek to avoid the perception that the judiciary is transgressing the constitutional separation of powers from interpretation into legislation.

In the United Kingdom, the technique of reading in is considered acceptable under the UK HRA within certain limits. In *Ghaidan*, Lord Nicholls said that s 3(1) of the UK HRA was 'apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant'.[307] His Lordship's statement was cited in *Momcilovic* by French CJ and Heydon J. But French CJ did so to distinguish s 32(1) of the Charter from s 3(1) of the UK HRA;[308] and Heydon J used

[303] Glazebrook, above n 300, 153. See also Sanson, above n 24, 85 n 15: '"Gap filling" may be as emotionally charged as "reading in".'
[304] *Minogue v Victoria* (2018) 356 ALR 363, 373 [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); see also *HFM043 v The Republic of Nauru* (2018) 92 ALJR 817, 820 [24]. The High Court in Minogue cited *Marshall v Watson* (1972) 124 CLR 640, 649 (Stephen J): 'it is no power of the judicial function to fill gaps disclosed in legislation'; *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1, 12 (Gibbs J): 'it is for the legislature and not for the courts to fill any gap that may unintentionally have been left in the statute'; *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 548 [38]: 'The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. … It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature"' (footnotes omitted).
[305] Pearce and Geddes, above n 247, 69.
[306] Spigelman, above n 270, vol 3, 133-4; see also 132; Spigelman, above n 273, 233; *R v PLV* (2001) 51 NSWLR 736, 742-3 [80]-[87]; *R v Young* (1999) 46 NSWLR 681, 686-688 [5]-[16], cited with approval in *Victorian Workcover Authority v Vitoratos* (2005) 12 VR 437, 442 [18], 443 [21] (Buchanan JA). Cf *DPP v Leys* (2012) 44 VR 1, 31 [92].
[307] *Ghaidan* [2004] 2 AC 557, 571-2 [32]. But *Ghaidan* may also be characterised as a case of reading up. The legislation being interpreted provided that where a tenant died, a person who was living with the tenant as his or her wife or husband succeeds as the tenant. However, a 4:1 majority of the House of Lords applied s 3(1) to reinterpret 'as his or her wife or husband', so as to broaden this beneficial provision to homosexual relationships.
[308] (2011) 245 CLR 1, 49 [47].

it to aligned s 32(1) to s 3(1), but finding the former invalid for crossing constitutional bounds.[309]

Moreover, in *Momcilovic* Crennan and Kiefel JJ referred to the technique of reading in, but noted that this was only available to correct a drafting 'defect or omission which had been overlooked by Parliament' and 'the application of the literal or grammatical meaning would lead to a result which would defeat the clear purpose of a statute'.[310] Their joint judgment reflects the oft-stated position that reading in is only available to adopt a purposive construction.[311]

However, it is arguably not so simple. Like the lack of utility in distinguishing between reading down and reading up, there is difficulty in distinguishing between reading in and reading down/up. That is because '[r]eading down a statute can be seen as involving the addition of words by the reading in of an exception, just as an expansive interpretation can involve adding words'.[312] Arguably, it is a distinction without a

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[309] Ibid 179-80 [447], 182 [451].

[310] Ibid 221 [580] citing *Wentworth Securities Ltd v Jones* [1980] AC 74, 105 (Lord Diplock) and *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53, 81 [73] (Kirby J).

[311] See Lord Diplock's three conditions in *Wentworth Securities Ltd v Jones* [1980] AC 74, 105 (sometimes cited as *Jones v Wrotham Park Estates*), applied in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113-6 (McHugh J); *Bermingham v Corrective Services Commission* (1988) 15 NSWLR 292, 299-300 (Hope JA), 302 (McHugh JA); *Victorian Workcover Authority v Vitoratos* (2005) 12 VR 437, 441-4 [18]-[24] (Buchanan JA), 446 [39]-[42] (Nettle JA dissenting), cf 439 [5] (Callaway JA); *Victorian Workcover Authority v Wilson* (2004) 10 VR 298, 300 [3] (Winneke P), 305-7 [23]-[28] (Callaway JA), cf 307 [31]-[32] (Nettle JA dissenting); *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275, 281-3 (Mahoney JA, McHugh and Clarke JJA agreeing); *Mills v Meeking* (1990) 169 CLR 214, 243-4 (McHugh J dissenting), see also 235 (Dawson J dissenting). A fourth condition was added by the Victorian Court of Appeal in *DPP v Leys* (2012) 44 VR 1 – whether the read in construction is 'reasonably open': 33-4 [96]-[97], 38 [109]. However, in *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 549 [39] (French CJ, Crennan and Bell JJ) the High Court left open the question of whether Lord Diplock's conditions 'are always, or even usually, necessary and sufficient'. See further Stephen Lumb and Sharon Christensen, 'Reading Words into Statutes: When Homer Nods' (2014) 88 *Australian Law Journal* 661, 661-2.

[312] Glazebrook, above n 300, 161. For example, there is debate in Australia over whether *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297 and *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 – well-known authorities on strained constructions – involved application of the technique of reading down or reading in. On *Cooper Brookes*, see: Spigelman CJ in *R v Young* (1999) 46 NSWLR 681, 688 [18], 689 [22]; Spigelman, above n 270, vol 3, 135; Spigelman,

difference. The same could be said in the rights-based context.[313] There is no bright line between the interpretive techniques. They are 'overlap[ping] rather than being entirely separate'.[314]

In the New Zealand context, it has been said that gap-filling or reading in is 'not necessarily new or revolutionary'.[315] Justice Glazebrook referred (extra-curially) to how the principle of legality, in respect of the right of access to the courts, has been deployed to gap-fill legislation.[316] Janet McLean noted the same with respect to the principles of natural justice.[317] One can point to similar cases in the Australian context (again, depending on whether they are characterised as reading in or reading down).[318] In Glazebrook J's view, the existence of a requirement under the NZ BORA to interpret legislation consistently with human rights is one reason why '[j]udges do and should

above n 273, 234; *R v PLV* (2001) 51 NSWLR 736, 743 [86]; cf Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (Butterworths, 4th ed, 1996) 38 [2.16]. On *Tokyo Mart*, see: *R v Young* (1999) 46 NSWLR 681, 689-90 [26]-[29]; cf *Bermingham v Corrective Services Commission* (1988) 15 NSWLR 292, 299-300 (Hope JA), 302 (McHugh JA).

[313] For example, in *Lacey* (2011) 242 CLR 573 the majority's construction could arguably be characterised as either reading down the unfettered discretion to vary and replace a sentence on appeal, or reading a qualification into that unfettered discretion – being that there must be a demonstrated error before the discretion is enlivened.

[314] Feldman, above n 226, 342.

[315] Glazebrook, above n 300, 156; see also McLean, above n 271, 431.

[316] Glazebrook, above n 300, 156 citing J F Burrows, 'The Changing Approach to the Interpretation of Statutes' (2002) 33 *Victoria University of Wellington Law Review* 981, 997. See also *Hamilton City Council v Fairweather* [2002] NZAR 477, 491 [44]-[45] (Baragwanath J): 'It is now trite that both Parliament and the Judiciary create law: Parliament by enacting our statutes, necessarily in language of some generality; the Courts not only by developing the common law but by construing statutes — making decisions as to detail by filling in the areas that Parliament has inevitably left blank. In doing so the Court apply certain well-settled presumptions …'. His Honour went on to refer to the principle of legality: ibid 492 [47].

[317] McLean, above n 271, 431.

[318] For the right of access to the courts, see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30], 492-3 [32] (Gleeson CJ), 505 [72], 516 [111] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Bare v IBAC* (2015) 48 VR 129, 237-239 [330]-[337], 249-50 [373] (Tate JA), 318 [590] (Santamaria JA); and particularly *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17, 124 [433] (Bromberg J) where the Court clearly had in mind the technique of reading in. For the principles of natural justice (or procedural fairness), see *Kioa v West* (1985) 159 CLR 550, 609, 615 (Brennan J); cited in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), and *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352 [74], 354 [78] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

fill gaps'.[319] For if it can be done under the principle of legality, then it can also be done under a bill of rights. Similarly, McGrath J in *Hansen* noted that while 'limited by its function of interpretation', courts do have the power 'to fill identified gaps in a statute', 'so that it accords with' the NZ BORA.[320]

The Victorian Court of Appeal has said post-*Momcilovic* that s 32(1) of the Charter 'does not allow the reading in of words which are not explicit or implicit in a provision'.[321] These are quite significant words of limitation.[322] But to the contrary, it has been recognised that '[s]ometimes matters external to the statute, and not so obviously deriving from the intention of the lawmakers, constrain or influence its interpretation'.[323] As discussed earlier, they form part of the *context* of the legislation to be interpreted. For example, the principle of legality has effect not because there are words already explicit or implicit in a provision which *protect* fundamental common law protections. Rather, the starting point is the other way around. There must be words already explicit or implicit which *infringe* fundamental common law protections. As to s 6 of the NZ BORA, an example is *Ministry of Transport v Noort*,[324] where the Court interpreted a statutory regime for testing drink driving so as to preserve the right

[319] Glazebrook, above n 300, 153; see further 154, 168.
[320] [2007] 3 NZLR 1, 80 [253].
[321] *Slaveski v Smith* (2012) 34 VR 206, 219 [45]. Applied in *XX v WW & Middle South Area Mental Health Service* [2014] VSC 564, [96]; and *Daniels v Eastern Health* [2016] VSC 148, [6]-[8]. Cf the pre-*Momcilovic* case of *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, where Warren CJ read words into a statutory provision which abrogated common law privilege against self-incrimination, pursuant to s 32(1) and the right to a fair hearing (s 24(1)) and right against self-incrimination (s 25(2)(k)): 454 [169]. Her Honour's construction thereby retained a form of derivative use immunity: 451 [156], 455 [177].
[322] The statement is also curious – how does one read in words when they are already 'explicit … in a provision'?
[323] Carter, above n 21, 335.
[324] [1992] 3 NZLR 260.

to legal counsel. There were no words explicit or implicit in the statutory regime which *overrode* that human right.

While the Australian courts recoil from the term 'gap-filling', ultimately the question of whether words can be read in is a 'judgment of matters of degree';[325] 'too great a departure [from the text] may violate the separation of powers in the Constitution'.[326] Therefore, '[t]he essential difference is that the ambit of judicial law-making is narrower than that of parliamentary law-making'.[327] The 6:1 majority in *Momcilovic* recognised that s 32(1) is concerned with interpretation, not legislation. The limits of s 32(1) post-*Momcilovic* is the issue to which we now turn.

E LIMITATIONS OF SECTION 32(1)

For the reasons already argued, what is required is acknowledgement that s 32(1) can potentially allow for departures from ordinary meaning, and for pre-Charter legislation, departures from actual legislative intention. However, there are limits to s 32(1). The admittedly difficult questions are: what is meant by '[s]o far as it is possible to do so'?; how strained a construction is too strained?; and '[w]here does the constitutionally permissible territory of judicial "interpretation" end and the constitutionally impermissible territory of judicial "legislation" begin?'[328] These are not straightforward boundaries to draw. It is a separation of powers issue. But this reflects

[325] *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 548 [38].
[326] Ibid 549 [40].
[327] Joseph, above n 340, 338.
[328] Geiringer, above n 114, 64; see also 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(1) *Monash University Law Review* 9, 11; Paul Rishworth, 'Interpreting and Invalidating Enactments under a Bill of Rights: Three Inquiries in Comparative Perspective' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ Ltd, 2004) 251, 252.

the interpretation of statutes more generally. Statutory interpretation is principled, but has never been an exact science.[329]

The discussion below provides some remarks on two areas for exploration as to what is 'possible' under s 32(1). Firstly, the High Court in relatively recent times has emphasised the primacy of the text in statutory interpretation;[330] it is a 'text-based activity'.[331] While a strained construction may be possible, the High Court has said that 'any modified meaning must [still] be consistent with the language in fact used by the legislature'.[332] Secondly, s 32(1) as noted above is expressly qualified in its reach by reference to consistency with the purpose of statutory provisions. This was considered by the High Court in *Momcilovic* to be one of the features which distinguished it from s 3(1) of the UK HRA.

(a) Primacy of the text

It is often said that a strained construction must be 'reasonably open' on the text.[333] For example, Spigelman CJ said (extra curially): 'A strained construction is sometimes

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[329] See, for example, Rt Hon Lord Justice Sales, 'Modern Statutory Interpretation' (2017) 38(2) *Statute Law Review* 125, 130; Lord Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5, 8; Stephen Gageler (Speech delivered at the Australia-New Zealand Scrutiny of Legislation Conference, Canberra, July 2009).

[330] See above n 131.

[331] Phrasing which Kirby J often used – see, for example, *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271, 285 [59]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273, 306 [87]; and *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 590 [133]. But see also *Northern Territory v Collins* (2008) 235 CLR 619, 623 [16] (Gummow ACJ and Kirby J); and *Alphapharm Pty Ltd v H Lundbeck A-S* (2014) 254 CLR 247, 265 [42] (Crennan, Bell and Gageler JJ).

[332] *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 549 [39]. Cited in *HFM043 v The Republic of Nauru* (2018) 92 ALJR 817, 820 [24] (Kiefel CJ, Gageler and Nettle JJ).

[333] See, for example, Spigelman, above n 270, vol 3, 122-3; see also 143; *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ); *R v Young* (1999) 46 NSWLR 681, 687 [12]; *Victorian Workcover Authority v Vitoratos* (2005) 12 VR 437, 442 [20] (Buchanan JA); *DPP v Leys* (2012) 44 VR 1, 31-2 [93], 32 [94]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 607 [117] (Gummow J dissenting). A 'reasonably open' test is also applied in the context of the presumption of constitutionality: see *Residual Assco Group v Spalvins* (2000) 202 CLR

permissible, but the process must be able to be characterised as genuine not spurious interpretation. The overriding test is that the meaning must be reasonably open'.[334]

This is not inconsistent with recent phraseology, led by French CJ, that in statutory interpretation a 'constructional choice must be open'.[335] Indeed, in *North Australian Aboriginal Justice Agency v Northern Territory* ('*NAAJA*'),[336] a High Court majority (including French CJ) stated that the principle of legality 'is properly applied in such a case to the choice of that construction, if one be *reasonably open*, which involves the least interference with that liberty'.[337] They applied the principle to reach an arguably strained construction.[338]

To be reasonably open on the text does not require textual ambiguity. Ambiguity 'in the strict sense',[339] literal or grammatical, ought not be required to trigger s 32(1)'s operation. That is also how the principle of legality[340] and s 6 of the NZ BORA

629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); cited with approval in *Wainohu v New South Wales* (2011) 243 CLR 181, 226-7 [97] (Gummow, Hayne, Crennan and Bell JJ); *Momcilovic* (2011) 245 CLR 1, 155 [390] (Heydon J dissenting); *NAAJA* (2015) 256 CLR 569, 604 [76] (Gageler J dissenting).

[334] Spigelman, above n 270, vol 3, 123.

[335] Particularly in cases involving the principle of legality: see *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47], 521 [49]; *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [43]; *South Australia v Totani* (2010) 242 CLR 1, 28 [31]; *Hogan v Hinch* (2011) 243 CLR 506, 535 [27]; *Momcilovic* (2011) 245 CLR 1, [43] 46; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 30 [42]; *Tajjour v NSW* (2014) 254 CLR 508, 545 [28]. See in the context of s 32(1): *Momcilovic* (2011) 245 CLR 1, [50] 50. This phraseology has persisted with the retirement of French CJ: see *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 375 [38] (Gageler J); *SAS Trustee Corporation v Miles* (2018) 361 ALR 206, 207 [1], 214 [17] (Kiefel CJ, Bell and Nettle JJ), 221 [41] (Gageler J); *Minogue v Victoria* (2018) 356 ALR 363, 381 [85] (Gageler).

[336] (2015) 256 CLR 569.

[337] Ibid 582 [11] (French CJ, Kiefel and Bell JJ) (emphasis added).

[338] See further Chen, above n 16, 414-5.

[339] Browne-Wilkinson, above n 279, 406.

[340] Chen, above n 126, 340-1, n 76; see further Philip A Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 *King's College Law Journal* 321, 340; Hanna Wilberg, 'Interpretive Presumptions Assessed against Legislators' Understanding, in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (2018) 193, 208; Glazebrook, above n 160, 80.

operate.[341] Under the 'modern approach'[342] to statutory interpretation, ambiguity in statutory interpretation can arise having regard to not only text, but also context and purpose.[343] The Hon James Spigelman describes ambiguity in a broad sense as 'any situation in which the scope or application of a provision is, for whatever reason, doubtful'.[344] As Jeffrey Barnes has put it, 'the notion of a textual "limit" … does not mean that … the ordinary meanings of the text read in isolation are the only choices for interpreters. Strained (non-grammatical) readings are possible'.[345]

Only 'general guides are available to assist in determining whether a construction is reasonably open or text-based'.[346] Although s 32(1) does not require textual ambiguity before it is triggered, ultimately if the statutory language is 'intractable' or 'clear and unambiguous'[347] then it can have no effect. Post-*Momcilovic*, if the statutory language is clear and unambiguous (through express words or necessary implication),[348] s 32(1) should be displaced. This differs from s 3(1) of the UK HRA which, within certain

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[341] *Hansen* [2007] 3 NZLR 1, 12 [13] (Elias CJ dissenting); *AMM and KJO* [2010] NZFLR 629, [25]; *Ngaronoa v Attorney-General of New Zealand* [2017] 3 NZLR 643, 653 [27]; Butler and Butler, above n 160, 231.

[342] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ)

[343] Ibid; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Monis v The Queen* (2013) 249 CLR 92, 202 [309] (Crennan, Kiefel and Bell JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 31 [4] (French CJ); *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39]; *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); Gleeson, 'Legal Interpretation', above n 246, 12; Gleeson, 'The Meaning of Legislation', above n 246, 28; Steyn, above n 329, 6.

[344] Chief Justice J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 772.

[345] Jeffrey Barnes, 'Contextualism: "The Modern Approach to Statutory Interpretation"' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1100.

[346] Ibid.

[347] See *Victorian Workcover Authority v Vitoratos* (2005) 12 VR 437, 439 [4] (Callaway JA); cf 444 [29] (Nettle JA dissenting); see also *Al-Kateb v Godwin* (2004) 219 CLR 562 in the context of the principle of legality and the presumption of consistency with international law, including international human rights treaties: 581 [33], 581 [35] (McHugh J), 643 [241] (Hayne J), 661 [298] (Callinan J).

[348] Bruce Chen, 'Delegated Legislation and Rights-based Interpretation' in Janina Boughey and Lisa Burton-Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 90, 101-2; Sir Anthony Mason, 'Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power' (2011) 9 *New Zealand Journal of Public and International Law* 1, 8-9.

limits, allows a court to 'depart from the unambiguous meaning the legislation would otherwise bear';[349] 'disregard an unambiguous expression of Parliament's intention'.[350]

It has also been said that a strained construction must not be 'unreasonable or unnatural'[351] or, in addition, 'incongruous'.[352] However, the limitation that it cannot be 'unnatural' seems inapt, given that a non-literal or non-grammatical meaning, even where justified, clearly would still give rise to a degree of 'awkwardness'[353] or 'disconformity'.[354] Specifically on reading in, the High Court has approved the statement that generally such a technique will not be permissible where it 'makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".'[355] Similarly, one commentator said in the human rights context: '[t]he more elaborate the additions …, the more they drifted beyond what the law in which they appeared was all about, then the more they were likely to be simply not tenable [or] not "possible".'[356]

(b) Consistently with purpose

Much has been made of the qualification in s 32(1) requiring human rights-compatible meanings consistent with purpose. On one view, this was intended to replicate the

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[349] *Ghaidan* [2004] 2 AC 557, 571 [30] (Lord Nicholls).
[350] *A v HM Treasury* [2010] 2 AC 534, 647 [117] (Lord Phillips).
[351] Pearce and Geddes, above n 247, 50-1 and the judgments cited therein by McHugh J; *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J); *WBM v Chief Commissioner of Police (Vic)* (2012) 230 A Crim R 322, 333 [39] (Warren CJ). See also *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 557 [66] (Gageler and Keane JJ): 'Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural'.
[352] *DPP v Leys* (2012) 44 VR 1, 34 [97], 38-9 [109]-[110].
[353] *AMM and KJO* [2010] NZFLR 629, [31].
[354] *DPP v Leys* (2012) 44 VR 1, 33 [96].
[355] *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 548 [38] citing *Western Bank Ltd v Schindler* [1977] Ch 1, 18 (Scarman LJ), cited by *Inco Europe Ltd v First Choice Distribution* [2000] 2 All ER 109, 115 (Lord Nicholls).
[356] Gearty, above n 244, 88 albeit in the UK HRA context; see also Rishworth, above n 282, 105 in the NZ BORA context.

effects of s 3(1) of the UK HRA as established in its jurisprudence[357] – the construction cannot be 'inconsistent with a fundamental feature' of the legislation/legislative scheme;[358] 'must be compatible with the underlying thrust of the legislation';[359] and must 'go with the grain of the legislation'.[360] On another view, the inclusion of reference to purpose was intended to distinguish s 32(1) from the UK HRA approach, which had no such qualification *explicit* on the face of s 3(1).[361] That was the view taken by the High Court in *Momcilovic*.[362]

Where there is a conflict between the purpose of statutory provisions being interpreted, and a human rights construction which would not be consistent with that purpose, it is the former which takes precedence under the Charter. However, to say that a construction must be consistent with purpose is 'deceptively simple',[363] both with respect to statutory interpretation generally and s 32(1) specifically. This is for several reasons.

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[357] See Human Rights Consultation Committee, above n 37, 82-3; Debeljak, above n 46; *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 54-5 [214]-[216]; The Right Honourable The Lord Walker, 'A United Kingdom Perspective on Human Rights Judging' (2007) 8 *The Judicial Review* 295, 297.
[358] *Ghaidan* [2004] 2 AC 557, 572 [33] (Lord Nicholls); 586 [68] (Lord Millett dissenting, but not on this point).
[359] Ibid 572 [33] (Lord Nicholls).
[360] Ibid; see also 601 [121] (Lord Rodger).
[361] Michael McHugh, 'A Human Rights Act, the Courts and the Constitution' (2009) 11 *Constitutional Law and Policy Review* 86, 91-2; Gleeson, 'Legal Interpretation', above n 246, 20; Jim South, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretive Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (2009) 28(1) *The University of Queensland Law Journal* 143, 157-9; Spigelman, above n 270, vol 2, 84-5; Dan Meagher, 'The Significance of *Al-Kateb v Godwin* for the Australian Bill of Rights Debate' (2010) 12 *Constitutional Law and Policy Review* 15, 18-19.
[362] (2011) 245 CLR 1, 50 [50] (French CJ); 92 [170] (Gummow J); 210 [544], 217 [565] (Crennan and Kiefel JJ); 250 [684] (Bell J); cf 181-2 [450]-[451] (Heydon J dissenting). See also the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, 457 [74].
[363] Gleeson, 'The Meaning of Legislation', above n 246, 32.

First, '[m]uch depends on the level of abstraction'.[364] That is because '[w]here a purpose has to be implied, there is often a choice between broader and narrow options';[365] 'this zone of judicial discretion remains – and it can be a wide one'.[366] It is not entirely clear how tightly the focus of the requirement in s 32(1) is on the purpose of the immediate statutory provision being interpreted. 'Statutory provision' is defined by the Charter as including *an Act or* a provision of an Act. Surely the reference to purpose of 'statutory provisions' under s 32(1) could extend to the purpose underlying a set of associated statutory provisions,[367] or an entire division or part of an Act in which the statutory provision is contained. Moreover, the purpose of a statutory provision would in any event need to be read by reference to the purpose of the Act as a whole.[368]

Secondly, members of the judiciary have sometimes spoken candidly that it may be 'difficult, if not impossible'[369] to identify the purpose of a statutory provision or an Act, or it may provide 'no rational assistance'.[370] There are numerous possibilities why, but they include: where the purpose of a statutory provision 'cannot be defined more precisely than by reference to its immediate function';[371] because '[l]egislation rarely pursues a single purpose at all costs';[372] and 'there may be uncertainty about the extent

[364] Gearty, above n 244, 89. See also Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities (2006) 17 *Public Law Review* 264, 268.

[365] Wilberg, above n 340, 206. Compare, for example, the Canadian case of *Carter v Canada* [2015] 1 SCR 331, 372-3 [74]-[78] with the New Zealand case of *Seales v Attorney-General* [2015] 3 NZLR 556, 586 [127], 587 [132] on the purpose underlying prohibitions on assisted suicide.

[366] Gearty, above n 244, 89.

[367] Gleeson, 'The Meaning of Legislation', above n 246, 32.

[368] Interpretation of Legislation Act 1984 (Vic), s 35(a) refers to preferring a construction that would promote the purpose or object *underlying the Act*. See Debeljak, above n 46, 27; *Re Application for Bail by Islam* (2010) 175 ACTR 30, 38-9 [33]-[41] in the context of the *Human Rights Act 2004* (ACT).

[369] Chief Justice Robert French, 'Bending Words: The Fine Art of Interpretation' (Speech delivered at the Guest Lecture Series, University of Western Australia Faculty of Law, Perth, 20 March 2014) 14.

[370] Gleeson, 'The Meaning of Legislation', above n 246, 32, 33; John Dyson Heydon, 'The "Objective" Approach to Statutory Construction' (Speech delivered at the Current Legal Issues Seminar Series, Supreme Court of Queensland, Brisbane, 8 May 2014) 17.

[371] French, above n 369, 14.

[372] *Carr v Western Australia* (2007) 232 CLR 138, 143 [5] (Gleeson CJ); see also Gleeson, 'The Meaning of Legislation', above n 246, 32; Gleeson, 'Legal Interpretation', above n 246, 11.

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to which it has been pursued',[373] including where the purpose is to limit human rights or fundamental common law protections.[374] For example, in *Monis v The Queen*, French CJ considered that the identifiable purpose of a criminal offence – which prohibited the use of a postal or similar service in a way that was menacing, harassing or offensive – was to prevent offensive uses of such services.[375] But this 'does not aid in the construction' of the provision.[376] Rather, the provision 'can only be given content by the construction of the section applying other criteria',[377] which in this instance included the fundamental common law freedom of speech and the principle of legality.[378]

Thirdly, there is debate about the sources from which purpose may be ascertained – whether it must come from within the Act itself, or whether it is permissible to refer to extrinsic material (and the weight given to them). In *Lacey*, six justices said that: 'The purpose of a statute is not something which exists outside the statute. It resides in its text and structure'.[379] This notion has been strongly contested.[380] Although this has not led to complete exclusion of consideration of extrinsic materials,[381] if the principle of legality's operation is any guide, this approach de-emphasises the significance of

[373] Gleeson, 'The Meaning of Legislation', above n 246, 33; see also Gleeson, 'Legal Interpretation', above n 246, 11; *Carr v Western Australia* (2007) 232 CLR 138, 143 [5] (Gleeson CJ).
[374] See the example of police powers of questioning: Gleeson, 'The Meaning of Legislation', above n 246, 33.
[375] (2013) 249 CLR 92, 112 [20].
[376] Ibid.
[377] Ibid.
[378] Ibid 113 [20].
[379] (2011) 242 CLR 573, 592 [44]; see also French, above n 369, 14-15. But strangely, the Court still said that 'identification of a statutory purpose … may appear from an express statement in the relevant statute, by inference from its terms *and by appropriate reference to extrinsic materials*': (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added). See also *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389-90 [25] (French CJ and Hayne J).
[380] See Goldsworthy, above n 214, 62; Ekins and Goldsworthy, above n 252, 57-8.
[381] See *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 405 [70] (Crennan and Bell JJ), 412 [89] (Kiefel J); *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

such materials for identifying statutory purpose.[382] There will be instances in extrinsic materials (particularly in statements of compatibility for Bills) which reveal a rights-limiting intention. But this on its own is unlikely to be enough to displace the operation of s 32(1) of the Charter – for they represent the subjective intention of a Minister or parliamentarian introducing a Bill, rather than any actual intention of Parliament.[383]

Fourthly, in any event, 'an interpretation that is compatible with human rights will often be consistent with the purpose of the legislation',[384] and it has been suggested that the identifiable purpose can be viewed in light of its impact on fundamental common law protections or human rights.[385] Chief Justice French's approach in *Monis* is one example. Another is *NAAJA*, where the High Court majority said the principle of legality 'is not to be put to one side as of "little assistance" where the purpose of the relevant statute involves an interference with the liberty of the subject'.[386] Where the identifiable purpose gives room to move as to the extent to which the statutory provision limits human rights, then s 32(1) could potentially still have work to do.[387]

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[382] See Chen, above n 16, 433-7.
[383] See *R v A (No 2)* [2002] 1 AC 45, 75 [69] (Lord Hope) in the context of the UK HRA.
[384] McHugh, above n 361, 94; see also Glazebrook, above n 160, 80.
[385] Barnes, above n 345, 1108, 1109. In the New Zealand context see, McLean, above n 271, 432: 'It is a short step to find the objects and purposes in an Act confined by the [NZ BORA]'; Carter, above n 21, 380-1: 'purpose [is] presumed to be intended to be rights-consistent'; Ross Carter, '"Spouses" in the Adoption Act' [2010] *New Zealand Law Journal* 271, 273: 'A rights-inconsistent purpose can therefore be constrained by text able to be given a rights-consistent meaning'.
[386] (2015) 256 CLR 569, 582 [11]. Cf ibid 605-6 [81] (Gageler J) who did not adopt such an approach; see also *Lee v NSW Crime Commission* (2013) 251 CLR 196, 249-50 [126] (Gageler and Keane JJ). The approach of French CJ, Kiefel and Bell JJ in *NAAJA* is associated with a 'least infringing' approach to the principle of legality, which not all members of the High Court apply.
[387] In the Charter context, see *WBM v Chief Commissioner of Police (Vic)* (2012) 230 A Crim R 322, 351 [123] (Warrren CJ), which does not adopt a 'least infringing' approach; cf *R v Momcilovic* (2010) 25 VR 436, 464 [103] which does. In the NZ BORA context, the New Zealand Court of Appeal similarly has not adopted a 'least infringing' approach: *Terranova Homes v Service and Food Workers Union* [2015] 2 NZLR 437, 470 [212]-[214]; *Ngaronoa v Attorney-General of New Zealand* [2017] 3 NZLR 643, 655-6 [35]-[38]; although the Supreme Court has yet to rule on the issue: *Ngaronoa v Attorney-General* [2018] NZSC 123, n 79, cf [106]-[114] (Elias CJ dissenting) who disagreed with the Court of Appeal. See further Wilberg, above n 111, 45, 46-7. Nevertheless, even if the 'least infringing' approach is not adopted, s 32(1) can have work to do where there is doubt as to the intended extent of the limitation on human rights. On one possible construction, the extent of the limitation may be such that the statutory

(c) Comparisons with NZ BORA

Similar textual and purposive limits were placed on s 6 of the NZ BORA regarding when a human rights-consistent meaning 'can' be given. According to *Hansen*, the meaning must be 'genuinely open in light of both its text and its purpose'; 'tenable on the text and in the light of the purpose of the enactment'; and a 'reasonably possible' or 'reasonably available' meaning.[388] The New Zealand High Court has also said it 'would be plainly wrong' if pursuant to s 6 there were 'too much manipulation of the language' and the statutory provision were read 'outside its statutory context'.[389] As recognised in *AMM and KJO*, 'there are no definitive criteria which will provide a clear formula against which to conduct this analysis'.[390]

F EIGHT-YEAR CHARTER REVIEW

The Charter mandates that a review take place after four[391] and eight[392] years of operation. The eight-year review of the Charter, undertaken by Mr Michael Brett Young, made certain findings and recommendations which are relevant to the issue of strained constructions.

The report expressed the view that the characterisation of s 32(1) 'as a codification of the common law principle of legality', as the Victorian Court of Appeal has predominantly done, 'is an oversimplification'.[393] Rather s 32(1), as it presently stands,

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provision is compatible, whereas on another possible construction, the extent of the limitation may tip the statutory provision into incompatibility. Where that is the case, the former is to be preferred.

[388] See also *Moonen*, which similarly requires that a human rights-consistent meaning be 'tenable' and 'properly open': [2002] 2 NZLR 9, 16 [16]-[17].

[389] *Te Moananui v The Queen* [2017] NZCA 88, [38]. Interestingly, the High Court was constituted with two of the same judges who decided *AMM and KJO* [2010] NZFLR 629.

[390] [2010] NZFLR 629, [32].

[391] Charter, s 44.

[392] Ibid s 45.

[393] Brett Young, above n 6, 144.

is a 'stronger rule of interpretation than the principle of legality, because it is a direction from Parliament to interpret its laws compatibly with human rights'.[394] Pursuant to s 32(1), 'it is permissible to depart from the literal or grammatical meaning of the words in the provision'.[395] The report recommended various amendments to s 32(1), bearing these clarification in mind.[396] This included clarifying the proper methodology for s 32(1) and s 7(2) of the Charter.

The Victorian Government responded by saying that the recommendations on amending s 32(1) as proposed by the report were 'supported in principle'.[397] Their implementation remains 'pending'.[398] If these recommendations are implemented, it remains to be seen how the above observations would be reflected in legislative amendments, and what impact this might have on the courts applying s 32(1) to reach strained constructions.

G CONCLUSION

The Victorian Court of Appeal was placed in an unenviable position in deciphering what ratio could be salvaged from *Momcilovic*. Yet while *Momcilovic* clearly dispelled the 'very strong and far reaching'[399] approach under s 3(1) of the UK HRA, the courts are not always bound to apply the literal and grammatical meaning of a statutory provision. There may be good reason for not doing so. This article argues that s 32(1)

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[394] Ibid 146; see also 144, 147.
[395] Ibid 146; see also 147.
[396] Ibid recommendation 28, 148, 146.
[397] Department of Justice and Regulation (Vic), *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* <https://www.justice.vic.gov.au/justice-system/laws-and-regulation/human-rights-legislation/government-response-to-the-2015-review>.
[398] Victorian Equal Opportunity and Human Rights Commission, *2018 Report on the Operation of the Charter of Human Rights and Responsibilities* (2019) 103.
[399] *Sheldrake v DPP* [2005] 1 AC 264, 303 [28] (Lord Bingham).

can still – like the principle of legality and s 6 of the NZ BORA – give rise to strained constructions. For pre-Charter legislation, s 32(1) can also require departure from what Parliament intended at the time of enactment. For post-Charter legislation, s 32(1) forms part of Parliament's intention at the time of enactment. Section 32(1) can allow for reading down, reading up and reading in of words.

It has been suggested that the Charter 'may well be functioning as an invisible hand that pushes the courts towards reliance on common law presumptions'[400] such as the principle of legality, discussed throughout this article. But that role is not enough. The normative impact of the Charter is 'given force' by, amongst other things, 'the interpretive clause in s 32'.[401] Instead, the generally rare and conservative use of s 32(1) diminishes the significance of the Charter's enactment. It lessens s 32(1)'s normative force as a democratically-sanctioned statutory directive, reduces its visibility of impact, and discourages litigants from seeking to raise it. The jurisprudence on s 32(1)'s ability to reach strained constructions is framed in weaker terms than the principle of legality. This is entirely inconsistent with s 32(1) being at least equal to the principle of legality. The judiciary should better embrace s 32(1) to uphold the courts' role as one of the three branches of government under the Charter framework, responsible for protecting and promoting human rights.

[400] Geiringer, above n 158, 173; see further Claudia Geiringer, 'Moving Beyond the Constitutionalism/Democracy Dilemma: "Commonwealth Model" Scholarship and the Fixation on Legislative Compliance' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 301, 316-7 and n 90 regarding *Castles v Secretary, Department of Justice* (2010) 28 VR 141as a potential example.
[401] *Bare v IBAC* (2015) 48 VR 129, 181 [152] (Warren CJ).