



THE UNIVERSITY OF
MELBOURNE

Melbourne Law School

Legal Studies Research Paper
No. 260

Evidence Law Under Victoria's Charter

Jeremy Gans

This paper can be downloaded without charge from the
Social Science Research Network Electronic Library
at: <http://ssrn.com/abstract=10147470>

Evidence Law Under Victoria's Charter

Jeremy Gans*

Senior Lecturer, Faculty of Law, University of Melbourne

INTRODUCTION: INITIATIVES 1 & 18

In May 2004, the Victorian Government issued its *Justice Statement*, a Cabinet-approved 'vision' for the Attorney-General's portfolio's next decade.¹ For evidence lawyers, the most relevant of its twenty-five 'key initiatives' was the very first: to 'review and replace' the *Crimes Act 1958* and *Evidence Act 1958*, which contain the state's main statutory provisions on evidence.² The fine print announced the government's 'proposal to implement legislation consistent with the model Evidence Acts' that apply in five other Australian jurisdictions, which would mean that much of the common law of evidence would be abolished in Victoria.³

Three years down the track, Victoria's new evidence legislation has not yet surfaced; however, a much more radical part of the *Justice Statement* has not only been enacted but is already partially in operation. Key initiative number eighteen proposed community consultation on human rights 'including the examination of options such as a charter of human rights and responsibilities.'⁴ The dourly named *Charter of Human Rights and Responsibilities* was on Victoria's statute books just over two years later.⁵

This paper examines what the new Charter may mean for the future of Victoria's law of evidence, the first in Australia to be subjected to a comprehensive human rights regime.⁶

* Senior Lecturer, Melbourne Law School. A draft of this paper was presented at the *Evidence, Criminal Justice and Adjudication Colloquium*, Faculty of Law, UNSW, Sydney, 21st April 2007. The author's research on DNA identification is funded by the Australian Research Council.

¹ *New Directions for the Victorian Justice System 2004-2014* (Department of Justice, 2004) available at <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Vision/JUSTICE+-+Justice+Statement+and+PDF>> (accessed 3rd May 2007)

² Ibid 24 (also announcing a review of the *Bail Act 1977* (Vic))

³ Ibid 26. See the *Evidence Act 1995* (Cth) (applicable in the ACT: s4), *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas) & *Evidence Act 2004* (Norfolk Island).

⁴ *New Directions for the Victorian Justice System 2004-2014* (Department of Justice, 2004) available at <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Vision/JUSTICE+-+Justice+Statement+and+PDF>> (accessed 3rd May 2007)52-56.

⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'), assented 25th July 2006. Section 1(1) allows the entire Act to be referred to as the *Charter of Human Rights and Responsibilities*. For an account of the progress of the Charter from initiative to bill, see G Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origin and Scope' (2006) 30 Melbourne ULR 880. Most of the Charter's provisions commenced on 1st January 2007. Part 3, Division 3 ('Interpretation of Laws') and Division 4 ('Obligations on Public Authorities') will commence on 1st January 2008: s2. Unless otherwise indicated, all references to statutory provisions are to this Act.

⁶ Evidence law in the Australian Capital Territory is presently mostly contained in a Commonwealth statute (see *Evidence Act 1995* (Cth), s4) beyond the reach of the *Human Rights Act 2004* (ACT): *Fletcher v Harris* [2005] ACTSC 27, [37]. But cf *Pappas v Noble* [2007] ACTSC 26, [44] noting the ACT Attorney-General's intention to 'repatriate' the *Evidence Act 1995*, i.e. re-enacting it as a Territory Act, which would then be subject to the *Human Rights Act* cf s4(6) providing for the Cth Act to cease to apply in an ACT court by 'proclamation'. Territory provisions on evidence law that are presently subject to the *Human Rights Act*

The discussion will proceed in two parts. First, the goals of evidence law will be compared with the rights promoted by the Charter. Second, the potential impact of the Charter's operative provisions on present and future evidence law in Victoria will be considered.

PART A: RIGHTS AND GOALS

The core of the Charter is Part Two, which sets out 'the human rights that Parliament specifically seeks to protect and promote'.⁷ Part Two contains twenty sections of rights, freedoms and protections, modelled on Part III of the 1966 *International Covenant on Civil and Political Rights*.⁸ The list encompasses broad aspects of human life such as life itself, work, movement, privacy, thought, religion, expression, association, families, public affairs, culture, property and liberty. A further provision in Part Two deals with when these rights 'may be limited'.⁹

The law of evidence's scope is much narrower; it is a body of rules and practices about how facts are found by courts and similar bodies. The rules of evidence regulate courtroom process, both physical (people speaking, documents being read, items being displayed) and mental (inferences drawn and conclusions reached by judges and other decision-makers.) Other parts of the law of evidence regulate some non-courtroom matters that can impinge on these things. The main aim of evidence law is to promote accuracy in legally significant fact-finding. However parts of evidence law promote other goals in addition to or even instead of that primary goal.¹⁰

The operative provisions of the Charter are directed to the issue of the 'compatibility' (or otherwise) of Victoria's statutory provisions and the conduct of its public authorities 'with human rights' (or a particular right).¹¹ The question of the compatibility of Victoria's law of evidence with human rights is complex, requiring a painstaking analysis of the pertinent sections of Part Two of the Charter (and the body of international and comparative law jurisprudence that underpins them), the content and purposes of Victoria's evidence statutes (and the domestic and comparative common law jurisprudence that underpins them) and the behaviour and impact of Victoria's courts and people associated with them. There is little point in canvassing these matters in detail before the Charter comes fully into operation, especially as Victoria's law of evidence is likely to be significantly altered in the near future.

Rather, this paper considers a different question of interest to Victoria's evidence lawyers: will promoting the human rights set out in Part Two of the Charter promote the goals of evidence law? This question is essentially an evaluation of the Charter as a means

include the *Evidence Act 1971* (ACT) (but c.f.s8(4)(a) of the Cth Act and *Evidence Regulations 1995* (Cth), s4) and the *Evidence (Miscellaneous Provisions) Act 1991* (ACT). Two other Australian jurisdictions, with locally-based evidence statutes, Tasmania and Western Australia, are presently considering introducing human rights regimes of a similar nature to the Charter: Tasmania Law Reform Institute, *Issues Paper No 11: A Charter of Rights for Tasmania* (2006); Consultation Committee for a Proposed WA Human Rights Act, *Discussion Paper: A WA Human Rights Act* (2007).

⁷ s7(1).

⁸ ss 8-27 cf *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 ('ICCPR'). All references to treaty articles are to this convention, unless otherwise specified.

⁹ s7(2).

¹⁰ See generally J Gans & A Palmer, *Australian Principles of Evidence* (2004, Cavendish), Chapter 1.

¹¹ s28(3); s30; s32(1), s38(1) cf s36(2) referring to whether a statute 'cannot be interpreted *consistently* with a human right' (emphasis added)

of achieving evidence law reform. While this is certainly not the only way that the Charter's impact can or should be felt, it has the advantage of being a means to gauge, at this nascent stage, the possible future impact of the Charter on Victorian evidence law. Questions of whether evidence law's goals are appropriate and the specific reforms the Charter might promote can be left for another day.

It is no idle conceit to ask whether the Charter will promote evidence law's own reform agenda. The law of evidence has a strong association with human rights in two respects. First, evidence law's primary end – accuracy in legally significant fact-finding – is a means to the proper application of the substantive law, including those parts of the law that protect human rights. Second, where evidence law sacrifices its primary goal, it often does so precisely because the search for truth can impinge on others' rights. The first two sections, in turn, will examine whether the Charter promotes each of these imperatives of the law of evidence. The final section will consider whether the various limits on Charter rights suit the compromises that are inherent in the structure of evidence law.

The right to be right

Although most of the Charter's rights are about broad aspects of human existence and society, several of them are largely concerned with the legal system. At the very top of the Charter's list of human rights is a right to the law itself or, at least, 'recognition as a person before the law' and 'equal protection of the law'.¹² The same provision also adds a right to 'effective protection' (presumably including the correct application of protective laws) albeit only 'against discrimination'.¹³ More importantly, the last seven sections are devoted to legal process.

The core provision, s24(1), sets out a right to have a criminal charge or civil proceeding – i.e. the balance of litigated matters – 'decided *by a competent, independent and impartial court or tribunal after a fair and public hearing*.' By requiring that criminal charges and civil proceedings be decided by a 'court or tribunal' (as opposed to, say, a government minister or a community forum), this human right brings all such decisions within the potential domain of evidence law.¹⁴ Moreover, s24(1) goes beyond a mere right to have a decision made by such a body; it, also grants a right to a particular sort of decision: one with conditions whose obvious purpose is to increase the chance that the decision will be correct, including factually correct.¹⁵

Victorian evidence law has inherited a tradition that posits that accurate fact-finding can be largely achieved through a 'rational model of adjudication'.¹⁶ I've previously described that model as comprising a set of four principles:¹⁷

- Fact-finding should be rational

¹² s8(1) & (3).

¹³ s8(3).

¹⁴ Cf. s4 of the uniform evidence legislation, making the legislation applicable in 'all proceedings' in various courts, including bail proceeding, interlocutory proceedings, matters in chambers and (in some circumstances) sentencing decisions. On the application of the rules of evidence in *tribunals*, see J Heydon, *Cross on Evidence* (Butterworths, 7th ed, 2004), [1050]-[1070].

¹⁵ See Human Rights Committee, *Lloydell Richards v. Jamaica*, Communication No. 535/1993, U.N. Doc. CCPR/C/59/D/535/1993 (31 March 1997), Mr Ando, writing that 'the purpose of a criminal trial is to ascertain what actually took place in the case at issue, that is, to find "true facts" of the case, on which conviction and sentence should be based. Of course, "true facts" as submitted by the defendant may differ from "true facts" as submitted by the prosecution, and... various procedural guarantees exist to secure a "fair trial".'

¹⁶ W Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld & Nicholson, 1985),

¹⁷ J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 2-8.

- Irrational fact-finding should be discouraged
- Relevant information should be available to the court or tribunal
- Unreliable information should be treated with caution

The first two of these principles are arguably supported by s24(1)'s requirement that legal decision-makers be 'competent, independent and impartial.' A major part of Victorian evidence law is its antipathy towards potentially 'prejudicial' evidence, such as shocking images or information about a party's moral character, which might cause the decision-maker to become less *competent* in its fact-finding role or to become *partial* to one side.¹⁸ Moreover, the law on opinion evidence aims to ensure that decision-makers don't become overly *dependent* on others' views, notably experts who may be wrong or biased.¹⁹

However, evidence law's goal of accurate fact-finding isn't identical to s24(1)'s right to a sound decision-maker, because a right to a decision with particular characteristics isn't the same as a right to a correct decision.²⁰ An example of the difference is the High Court's decision in *Pfennig v the Queen*.²¹ The police charged Dieter Pfennig, apparently the last person to speak with a boy before he went missing, with the boy's kidnapping and murder. The question for the High Court was whether Pfennig's jury should have been told that Pfennig had later kidnapped and raped another boy, pursuant to a desire that he admitted he had felt for some time. Justice McHugh noted that evidence of bad character is often kept from the jury 'because it might cause a jury to be biased'.²² He observed that, after hearing about Pfennig's other crime and his disposition, 'it would require a superhuman effort by the jury' not to come to regard Pfennig as 'depraved'.²³ Nevertheless, the Court upheld Pfennig's conviction after finding that it didn't matter if Pfennig's jury reasoned irrationally, because there was 'no reasonable view' of the evidence consistent with Pfennig's innocence.²⁴ By thus permitting Pfennig's charge to be decided by a *partial* court, the High Court allowed a course of action that, had the Charter been applicable, would have breached Pfennig's s24(1) right to a decision by an 'impartial court'.²⁵

Section 24(1)'s express requirements also fall short of the rationalist tradition of fact-finding in some respects. There is no express human right that decisions be made by an *informed* court or tribunal, i.e. one that is aware of all relevant information. Decisions must usually follow a 'public hearing', but that condition is directed to informing the

¹⁸ See J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 144-148 and cf. A Palmer, 'The Scope of the Similar Fact Rule' (1994) 16 Adelaide LR 161, 169-172, distinguishing 'reasoning prejudice' and 'moral prejudice.' For applications of the European Convention on Human Rights and Fundamental Freedoms equivalent to s24(1) to jurors potentially biased by pre-trial publicity, see *Montgomery v HM Advocate* [2003] 1 AC 641.

¹⁹ See generally J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 228, 244. For a holding that a statutory provision requiring a court to comply with the opinions of an expert committee is a disproportionate intrusion into the presumption of innocence, see *Hansen v The Queen* [2007] NZSC 7, [278]-[279].

²⁰ See Human Rights Committee, *B. d. B. et al. v. The Netherlands*, Communication No. 273/1989, U.N. Doc. Supp. No. 40 (A/44/40) at 286 (1989), [6.4], observing that the ICCPR equivalent to s24(1) 'cannot be interpreted as guaranteeing... absences of error on the part of the competent tribunal'

²¹ (1995) 182 CLR 461

²² *Ibid* 513.

²³ *Ibid*.

²⁴ *Ibid* 490.

²⁵ Cf D Mathias, 'Probative value, illegitimate prejudice and the accused's right to a fair trial' (2005) 29 Crim LJ 8.

public, not the court.²⁶ Nor does s24(1) require that the court or tribunal be *cautious*, e.g. about unreliable information. Section 25(2) of the Charter mandates specific processes that allow new information and bad information to be exposed: time to prepare, legal assistance and calling and examining witnesses. However, evidence law's commitment to these trial procedures is much more comprehensive than the express words of s25. Not merely defence lawyers, but also prosecutors, judges and (in the giving of cautions) police are co-opted to the process of gathering relevant evidence and avoiding potential dangers.²⁷ Moreover, court processes must permit full scrutiny, not only of witnesses, but also documents, real evidence and demonstrations.²⁸

Processes of this sort are likely to flow from s24(1)'s broadest requirement – one considered sufficiently important that it forms the provision's title – that decisions on criminal charges and civil proceedings can only come after a 'fair hearing'. A hearing lacking in either relevant information or due caution about unreliable information is one that is also, at least arguably, an unfair hearing.²⁹ However, s24(1)'s right to a fair hearing is still narrower than evidence law's commitment to correct decision-making in one fundamental respect: the Charter's right is only given to parties to civil proceedings and to criminal defendants. By contrast, evidence law's goal of correct decision-making is for everyone's benefit or, more precisely, everyone who is factually on the right side of the law.³⁰

Limiting the right to a fair hearing in civil proceedings to *parties* to those proceedings recognises only the interests promoted by the adversarial system of justice. However, the substantive law enforced by the civil courts is often aimed at promoting others' interests too. Indeed, in cases involving children, the substantive law has long upheld the principle that the best interests of the child are paramount, even when the proceedings are between others, such as the child's parents. However, in *Northern Territory v GPAO*, the High Court, held that the paramountcy provisions of the *Family Law Act 1975* (Cth) do not apply to 'anterior' rules used to establish what facts a court considers, including state

²⁶ Public awareness might bring relevant information to light, for example when a public trial in Queensland in 2003 of an alleged serial killer caused one of his alleged murder victims to emerge from hiding: see *R v Fraser* [2004] QCA 92, [2].

²⁷ See generally J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 339-342, 344-353 cf Human Rights Committee, *Peart v. Jamaica*, Communications Nos. 464/1991 & 482/1991, U.N. Doc.CCPR/C/54/D/464/1991 & 482/1991 (1995), [11.5] holding that a failure to provide a defendant with a prior statement made by the prosecution's sole eyewitness, contradicting that witness's trial testimony, 'seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants' in breach of the ICCPR equivalent to s25(2)(g).

²⁸ See generally J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), Chapters Five and Six cf Human Rights Committee, *José Luis García Fuenzalida v. Ecuador*, Communication No. 480/1991, U.N. Doc. CCPR/C/57/D/480/1991 (1996), [9.5] holding that a court's failure to order the examination of the defendant's blood and semen in a rape case where the defendant disputed evidence of samples compulsorily taken from him violated the ICCPR equivalents of s25(2)(g) and s25(4).

²⁹ See Human Rights Committee, *Wright v. Jamaica*, Communication No. 349/1989, U.N. Doc. CCPR/C/45/D/349/1989 (1992), holding that a judge's failure in a capital case to bring to the jury's attention that the defendant was in custody at the unchallenged time when the victim died 'must... be deemed a denial of justice and as such constitutes a violation of the ICCPR equivalent to s24(1) cf *Rove & Davis v United Kingdom* (2000) 30 EHRR 1, [60]; *R v A* [2001] UKHL 25; *R v Connor*; *R v Mirza* [2004] UKHL 2; *R v Le* [2004] SCC No 181 (Unreported, ACT Supreme Court, Connolly J, 13 August 2004); *Pappas v Noble* [2006] ACTSC 39, [14].

³⁰ *McKinney v The Queen*; *Judge v The Queen* (1991) 171 CLR 468: 'Fairness involves the even-handed submission of the issues of fact for consideration by the jury as constitutional arbiters of fact' (per Brennan J) and 'a fair trial is one which is fair to both sides' (per Dawson J; Cf. *R v MSK & MAK* [2004] NSWCCA 308, [70]. *R v Handy* (2002) 213 DLR (4th) 385, [150].

and territory provisions on discovery that are ‘picked up’ in Family Court proceedings.³¹ As Kirby J pointed out in a vigorous dissent from this ruling, this approach could produce incorrect factual findings, for example if a court made an interlocutory ruling in a parenting matter based on the fact that one parent was suspected of abuse, without access to files that revealed the reliability of the basis for that suspicion. Such wrong fact-finding, in turn, creates ‘an obvious risk that a significant injustice would have been done, not only to the parents, *but to the child*’, thus failing to accord children the rights due to them under international conventions.³² Section 24(1), by failing to recognise the interests of non-parties to a fair hearing, leaves the Charter’s promotion of their interests to its substantive, rather than procedural, rights provisions.³³

The limited nature of s24(1) is starkest in criminal proceedings, where the Charter gives just one person associated with such proceedings – the person facing criminal charges – the right to have the charges decided by a qualified decision-maker after a fair hearing. So s24(1) doesn’t promote the interests of the many other people with a stake in the correct application of the criminal law, including victims, the state and the wider community.³⁴ This matters where those interests diverge from the defendant’s, i.e. when a law or practice of Victorian evidence law is overly favourable to a defendant. Such a criticism has long been made of common law rape trial processes, including recent criticisms of modern High Court jurisprudence on warnings about forensic disadvantage.³⁵ In the abstract, laws that deserve such criticisms might be labelled ‘unfair’; however, it would be odd if that label rendered them incompatible with s24(1)’s right for *defendants* to have charges decided following a fair hearing; the unfairness, if any, from rape trial procedures is one that favours rape defendants.³⁶

It might be objected that criminal defendants, who face punishment and lack the State’s resources, need stronger rights than others with an interest in the outcome of legal proceedings. While that’s undoubtedly correct – and is entirely reflected in the law of criminal evidence – it doesn’t provide any reason not to protect the rights of others, relatively limited as they may be. Rights jurisprudence recognises that rights can conflict and the greater needs of criminal defendants will play a great role in striking a balance.³⁷ Moreover, the Charter can – and indeed, does – specify that, at least for some processes,

³¹ (*Northern Territory of Australia v GPAO* [1999] HCA 8, [65]-[73], [139], [198], [254]. See *Judiciary Act 1903* (Cth), s79 and *Community Welfare Act 1975* (NT), s97 compare *Child Wellbeing and Safety Act 2005* (Vic), s40.

³² *Northern Territory of Australia v GPAO* [1999] HCA 8, [224]-[233] (emphasis added), citing *Re Z* [1996] FLC ¶92-694, 83,232 and referring to the *United Nations Convention on the Rights of the Child*, Article 9, clause 2 of which requires that, in any proceedings concerning a child’s potential separation from its parents, ‘all interested parties shall be given an opportunity to participate in the proceedings and make their views known.’ (emphasis added).

³³ See, e.g. s17, entitling families ‘to be protected by society and the State’ and giving ‘[e]very child... the right... to such protection as is in his or her best interests’. Query whether, in light of the majority view in *Northern Territory v GPAO*, these provisions are applicable to the ‘adjectival’ aspects of legal proceedings.

³⁴ *Doorson v The Netherlands* [1996] ECHR 14, [70] noting the European Convention on Human Rights and Fundamental Freedoms’s equivalent to s24(1) ‘does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration’. cf J Spigelman, ‘The truth can cost too much: The principle of a fair trial’ (2004) 78 ALJ 29, 44 noting the interests of non-defendants in a criminal trial and stating that the terminology of ‘principle of a fair trial’ is preferable to ‘right to a fair trial’.

³⁵ *R v BWT* (2002) 129 A Crim R 153, 197.

³⁶ For an apparent instance of a lower court decision to the contrary of the argument put here, see *DPP v Cash* [2007] IEHC 108, [45]-[50] holding that a rule automatically excluding illegally obtained evidence is contrary to the accused’s right to a fair trial under the *European Convention on Human Rights and Fundamental Freedoms* equivalent to s24(1), which as held to encompass ‘rights and obligations of the entire community’.

³⁷ *Doorson v The Netherlands* [1996] ECHR 14, [70]

defendants have more rights than others and mustn't have less. Notably, only those facing criminal charges have 'the right to be presumed innocent until proved guilty according to the law.'³⁸ And the Charter guarantees defendants the right to call and examine their own witnesses 'under the same conditions as witnesses for the prosecution.'³⁹

Unfortunately, in several instances, the Charter mistakes the superiority of the defendant's claim to procedural protections with the exclusivity of that claim. Only defendants are guaranteed processes like time to prepare and witness examination, not to mention to review 'by a higher court.'⁴⁰ People seeking to enforce the civil law, including those seeking remedies that flow from the Charter, are not given express rights to these processes, arguably even though they are no less necessary in civil cases to the goal of getting the facts right. Civil litigants must instead base their arguments solely on their s24(1) right to a fair hearing.⁴¹ As already pointed out, in criminal cases, non-defendants, including prosecutors and victims of crime, can't even do that.

The result is that flaws in procedural law that undermine the interests of non-parties in civil cases and non-defendants in criminal ones cannot be criticised as incompatible with the Charter's rights that deal with legal process. Rather, any criticism must be based on more distant substantive rights that those proceedings aim to enforce, for example the right to 'security of person' that underlies the criminalisation of rape.⁴² The coverage of these rights may not be as wide as Victoria's criminal and civil law. The Charter's drafters deliberately omitted a number of candidate rights from the *International Covenant on Economic, Social and Cultural Rights*, so some people with an interest in enforcing parts of the criminal law associated with those omitted rights (or no rights at all) will have no recourse under the Charter.⁴³ While there may be sound political reasons not to provide legal protection for all human rights, or to deny rights to some specific groups (e.g. corporations), there does not appear to be any reason to give only a limited set of people a right to the correct enforcement of laws that Victoria's parliament has chosen to adopt.

The limited nature of s24(1) and associated provisions of the Charter can mostly be sourced to wording of the ICCPR.⁴⁴ However, the equivalent provision of the *Human Rights Act 2004* (ACT) was drafted in a way that appears to recognise the potential interest of everyone in proper decision-making processes:⁴⁵

³⁸ s25(1).

³⁹ s25(h).

⁴⁰ ss 25(2) & (4).

⁴¹ Cf Human Rights Committee, *IP v Finland* (450/91) [cited in Joseph et al, *The International Covenant on Civil and Political Rights*, Oxford UP, 2000, 331] that 'the ICCPR does not guarantee a right of appeal in civil proceedings.'

⁴² s21 (short title), though the phrase 'of person' do not appear in the actual provision. For an example of a similar argument, see *X & Y v Netherlands* [1985] ECHR 4, [28]-[30] where a rule barring rape prosecutions unless the alleged victim personally makes a complaint was held to violate a mentally handicapped person's right to private life under s8 of the *European Convention on Human Rights and Fundamental Freedoms*.

⁴³ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 27-29.

⁴⁴ See Article 14 and cf Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

⁴⁵ *Human Rights Act 2004* (ACT), s21(1) but cf *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* [2006] ACTSC 122, [25] holding that s21(1) extends, in a planning dispute, to 'the class of persons whose rights and obligations are affected by a development approval' but does not extend to objectors and third parties. See also Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), Draft: p15 and the different, albeit narrower, approach taken in the *New Zealand Bill of Rights Act 1990* (NZ), s27 (right to justice).

A person has a right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

A broader way of putting this fundamental point, consonant with the primary goal of the law of evidence, would be to add the following right to the Charter's list: *every person has the right to have the laws of Victoria applied correctly.*⁴⁶

The right to be left

During the 1920s, ex-police officer Roy Olmstead was one of many Americans who made enormous amounts of money because he was prepared to break the law on prohibition. His former colleagues gathered evidence of his bootlegging without breaking any law themselves because Olmstead negotiated sales of alcohol by telephone, which the police tapped outside of his property. In 1928, a majority of the United States Supreme Court held that the police's conduct did not violate the US Constitution's Fourth Amendment, because nothing had been searched or seized.⁴⁷

The case of *Olmstead v United States* is now most famous for the dissent by Louis Brandeis who, with Oliver Wendell Holmes agreeing, held that the Fourth Amendment protected more than just physical intrusions:

The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the *right to be let alone* – the most comprehensive of rights and the right most valued by civilized men.⁴⁸

Brandeis (not to mention Olmstead!⁴⁹) would be well pleased with much of s13(a) of Victoria's Charter, which provides:

A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

While the words 'home or correspondence' cover the interests protected by the common law of trespass and constitutional protections against 'search or seizure', the word 'privacy' is much broader.⁵⁰ An example is the ubiquitous modern investigative technique of DNA identification. The common law only regulates this process at the point of

⁴⁶ The distinct question of when those people can seek a remedy for any breach of this right would depend on the Charter's operative provisions in Part 3.

⁴⁷ *Olmstead v United States*, 277 U.S. 438 (1928). Olmstead was pardoned by F. D. Roosevelt in 1935. The precedent was overruled in *Katz v United States*, 389 U.S. 347 (1967), a year after Olmstead's death. See D McClary, 'Olmstead, Roy (1886-1966) -- King of King County Bootleggers' (2002) *The Online Encyclopedia of Washington State History* at < http://216.254.10.116/essays/output.cfm?file_id=4015> (accessed 4th May 2007)

⁴⁸ *Olmstead v United States*, 277 U.S. 438 (1928), 478.

⁴⁹ Cf Human Rights Committee, *Concluding Observations of the Human Rights Committee*, Russian Federation, U.N. Doc. CCPR/C/79/Add.54 (1995), [19] noting concerns 'that the mechanisms to intrude into private telephone communication continue to exist, without clear legislation setting out the conditions of legitimate interferences with privacy and safeguards against unlawful interferences.' See also Human Rights Committee, *General Comment 16*, (Twenty-third session, 1988), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994), [8] holding that '[s]urveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-trapping and recording of conversations should be prohibited.'

⁵⁰ See also s13(b)'s 'right' of a person 'not to have his or her reputation unlawfully attacked.'

contact between police officers and people's bodies and the manner in which DNA evidence is dealt with in court. Statutes in Victoria now regulate both these matters and an additional area: the use, retention and disclosure of some DNA profiles on official databases.⁵¹ By contrast, s13(a)'s ambit extends to aspects of the use of DNA identification that are presently largely unregulated in Victoria: mass DNA screenings, the gathering of people's DNA from objects they have touched, the use and retention of victims' DNA profiles on DNA databases, the off-database storage of DNA profiles and the detection of links between an unsolved crime and the close blood relatives of a person who has been DNA sampled.⁵²

Section 13(a), like the ICCPR provision it is drawn from, doesn't protect against all interferences in privacy, but rather only *unlawful* or *arbitrary* interferences.⁵³ As interpreted by the ICCPR's Human Rights Committee, the ban on unlawful interferences includes conduct governed by legislation that fails to:

specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.⁵⁴

If s13(a) is interpreted in this way, then current or proposed legislative provisions authorising blanket collection of DNA profiles from offenders or suspects, or giving broad authority to police or database authorities to collect, match or transfer DNA profiles may be incompatible with it.⁵⁵ The further ban on arbitrary interferences might capture statutes that permit DNA profiles taken from suspects to be retained permanently, matched to all other DNA profiles and transferred to interstate and overseas databases.⁵⁶

In contrast to DNA profiling and other aspects of criminal investigations, the use of evidence in court proceedings is closely regulated and subject to case-by-case decision-making by the presiding judge, so any interferences in privacy in accordance with the law of evidence will rarely be unlawful.⁵⁷ This limits s13(a)'s main operation in court

⁵¹ *Crimes Act 1958* (Vic), Division 30A, ss464R-464ZL.

⁵² J Gans, 'DNA identification, privacy and the irrelevance of Australian law' (2007) 3 *Privacy Law Bulletin* 110. See generally Human Rights Committee, *General Comment 16*, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994), [10]; *Van der Velden v Netherlands* (Application no. 29514/05, European Court of Human Rights (3rd section)); cf *Attorney-General's Reference (No 3. of 1999)* [2001] 2 AC 91; *R (on the application of S) v Chief Constable of South Yorkshire Police* [2004] UKHL 9 (application to the European Court of Human Rights declared admissible on 16th January 2007: *S & Marper v United Kingdom* [2007] ECHR 110).

⁵³ Cf Article 17 but note the absence in s13(a) of Article 17.2's requirement that 'Everyone has the right to the protection of the law against such interference or attacks.'

⁵⁴ Human Rights Committee, *General Comment 16*, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994), [8].

⁵⁵ E.g. the Crimes Amendment (DNA Database) Bill 2007, presently before the Victorian Parliament, clause 8, inserting a new s464ZGI(1) into the *Crimes Act 1958* (Vic) that would authorise all profile matching that doesn't involve 'limited purpose' volunteer profiles; and clause 11, inserting a new s464ZGN that would authorise the Minister to enter arrangements for the transmission of all information to other DNA databases for the purposes of investigation or prosecution of an offence against any law. For a claim that these 'streamlined' arrangements for inter-jurisdictional DNA profile database matching are compatible with s13(a), see the 'statement of compatibility' at *Hansard*, Legislative Assembly of Victoria, 2nd May 2007, 51.

⁵⁶ See, e.g., the *Criminal Law (Forensic Procedures) Act 2007* (SA).

⁵⁷ Likewise, s13(b)'s right of a person 'not to have his or her reputation *unlawfully* attacked' (emphasis added) does not bar questions or evidence whose use is permitted by evidence law, e.g. *Crimes Act 1958* (Vic), s37.

proceedings to its condemnation of *arbitrary* interferences in privacy and related interests. As already observed, while much of evidence law is aimed at maximising the chance of correct fact-finding, some parts of evidence law have the opposite effect.⁵⁸ The law provides privileges and immunities to protected relationships and interests, including legal communications and negotiations, confidential relationships and information whose disclosure would harm the public interest.⁵⁹ It also limits the impact of trial processes on ordinary people by sometimes barring the exploration of peripheral matters in court.⁶⁰ However, while s13(a)'s concepts of 'privacy' and 'correspondence' encompass many of these interests, its bar on '*arbitrarily* interfer[ing]' with these things is narrower than the protections that evidence law provides.⁶¹

A notorious example is the questioning of witnesses about their sexual history, particularly in rape trials. In the past, the courts permitted routine cross-examinations about witnesses' acts, experiences, propensities and reputations on the theory that these things would shed light on the events in dispute or even the witness's credibility. While these practices are now discredited, there is continuing controversy about whether or not the present law – which varies considerably from jurisdiction to jurisdiction across Australia – strikes the right balance between witnesses' privacy and the defendant's right to a fair trial.⁶² At stake is not whether rape complainants' privacy has been 'arbitrarily interfered with' – which s13(a) opposes⁶³ – but rather whether *non*-arbitrary but nevertheless gross intrusions are permissible.

The difference is illustrated by a recent case in the Northern Territory. A man facing charges that he indecently photographed a woman while she was asleep sought to show the jury a video, which he claimed he and the complainant had watched as a prelude to consensual photographing. The trial judge barred the defendant from adducing evidence about the video because it was an explicit film of the complainant having sex with her boyfriend. However, the Court of Criminal Appeal held that, so long as the defendant testified that he and the complainant had watched the video together, the jury must see it so that they could assess the defendant's claim that the photos he took were prompted by specific scenes in the video.⁶⁴ If these rulings were the subject of Charter analysis, then obviously the defendant's rights under s24(1) would feature in the arguments in favour of admissibility of the video;⁶⁵ however, s13(a) couldn't be used to argue against admissibility, as the interference in the complainant's privacy, despite being so massive,

⁵⁸ *Pearse v Pearse* (1846) 63 ER 950, 957: 'Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.'

⁵⁹ See J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), Chapter 7.

⁶⁰ See J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), Chapters 13 & 14.

⁶¹ See Human Rights Committee, *General Comment 16*, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994), [8], holding that the ICCPR equivalent to s13(a) requires '[s]earches of a person's home should be restricted to a search for *necessary evidence* and should not be allowed to amount to harassment.' (emphasis added)

⁶² See J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 295-302.

⁶³ See Human Rights Committee, *General Comment 28, Equality of rights between men and women (article 3)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000). [20] noting that an 'interference arises when the sexual life of a woman is taken into consideration to decide the extent of her legal rights and protections, including protection against rape.'

⁶⁴ *AM v The Queen* [2006] NTCCA 18, [66]-[75]

⁶⁵ As discussed earlier, s24(1) could not be used to argue that the admission of the video rendered the trial unfair to the complainant, prosecution or the wider public., although those interests might be taken into account in assessing the defendant's claim.

wasn't *arbitrary*.⁶⁶ Instead, the complainant's (not to mention the prosecutor's, the jury's and the wider public's) interest in not having the complainant suffer a much greater intrusion into her privacy than the one the defendant was accused of perpetrating⁶⁷ could only be promoted through more tangential Charter rights, including s10, whose ban on torture includes a right not to be 'treated... in a cruel, inhuman or degrading way'.⁶⁸

A more fundamental example of the significance of the limit on s13(a) is the privilege against self-incrimination, one of the core principles of Victoria's evidence law and practice. The privilege against self-incrimination protects the privacy of everyone's thoughts and memories about their own wrong conduct.⁶⁹ Importantly, the privilege applies even when – indeed, especially when – officials think this information is relevant to a criminal investigation or proceeding. So, section 13(a)'s restriction to *arbitrary* interferences means that its protection ceases precisely in those circumstances when the privilege against self-incrimination matters most.⁷⁰

The ICCPR, which had to straddle a number of different legal systems,⁷¹ mentions neither the privilege nor the related right to silence, so neither does the Charter.⁷² A number of other Charter rights, like s13(a), touch on but fall short of protecting the privilege against self-incrimination:

- Section 10 bars the use of 'torture', 'inhuman' or 'degrading' treatment and non-consensual 'experimentation or treatment'. However, the privilege against self-incrimination is aimed at much more subtle pressures to divulge incriminating thoughts including oppressive conduct, certain forms of trickery, drawing inferences from some conduct and failing to caution or provide legal assistance.⁷³
- Section 14 grants 'freedom of thought, conscience, religion or belief', while s15(1) grants a 'right to hold an opinion about interference', but these are directed to the freedom to think as you choose, rather than keeping those thoughts to yourself. Likewise, while s15(2) grants 'freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kind', it's not clear that this covers a right not to do those things. Moreover, this freedom is subject to an express limitation 'for the protection of national security, public order, public health or public morality.'

⁶⁶ Cf M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, 2005, N.P. Engel), 383 claiming that arbitrary means that a law must be reviewed as to 'whether it was reasonable (proportional) in relation to the purpose to be achieved.'

⁶⁷ Indeed, the video was watched by the Court of Criminal Appeal, prompting the Chief Justice to state in his reasons that the video was 'distasteful in the extreme' (at [55]) and to describe aspects of it (at [56]).

⁶⁸ Cf *Smith & Grady v United Kingdom* [1999] ECHR 72, [117]-[123] holding that intimate questioning of soldiers about their sexual orientation, while 'undoubtedly distressing and humiliating', did not reach 'the minimum level of severity which would bring it within the scope of Article 3 of the' *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

⁶⁹ See *R v Director of Serious Fraud Office; ex parte Smith* [1993] AC 1, 30-31.

⁷⁰ Query whether modern legislation regulating custodial interrogations, e.g. *Crimes Act 1958* (Vic), ss 464-464], means that s13(a)'s constraint on 'unlawful' interferences is also inapplicable at this stage.

⁷¹ See M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, 2005, N.P. Engel), 306-307 on the '*problematique of detailed procedural guarantees* in international human rights treaties.'

⁷² Contrast *Canadian Charter of Rights and Freedoms*, s13; *Constitution of the Republic of South Africa*, s35(1)(a)-(c) & (3)(h),(j).

⁷³ Cf the rejection of a proposal to forbid 'a confession from being obtained by a promise or reward or immunity' from the draft of the ICCPR: M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, 2005, N.P. Engel), 345.

- Section 22(1) provides that people ‘deprived of liberty must be treated with humanity’ and ‘dignity’. This provides protection beyond s10, but still falls short of the protection provided by the privilege.⁷⁴ Notably, it only applies to people in custody. Many of the notorious instances where the privilege against self-incrimination has been breached involve people who were consensually in the company of the police or were the subject of a covert operation.
- Section 25(2)(k) provides ‘a person charged with a criminal offence’ with a guarantee ‘not to be compelled to testify against himself or herself or to confess guilt.’ This certainly accords with the privilege against self-incrimination⁷⁵, but its wording appears limited to the application of the privilege during the defendant’s own trial.⁷⁶ Even if it was read more broadly to cover interrogation by the police,⁷⁷ it is nevertheless restricted to events after a person is charged, whereas the key period when the privilege against self-incrimination is at risk in practice is between suspicion and charge.⁷⁸

So, the above sections fall short of protecting the privilege against self-incrimination in many cases, ranging from mundane tricks or pushiness during a consensual policing interview to complex undercover operations.

But what about the catch-all protection for defendants’ rights, s24(1)? Comparative judgments on international human rights regard the privilege against self-incrimination as a core characteristic of a ‘fair hearing’.⁷⁹ Nevertheless, this provision’s promotion of the privilege is limited in three respects. First, as discussed above, s24(1) only applies to criminal defendants and parties to a civil proceeding, so that it would not protect other

⁷⁴ Cf *New Zealand Bill of Rights Act 1990* (NZ), s23(4), expressly giving detainees ‘the right to refrain from making any statement and to be informed of that right.’

⁷⁵ M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, 2005, N.P. Engel), 345: ‘The term ‘to be compelled’ (‘être forcée’) refers to various forms of direct or indirect physical or psychological pressure...’ but cf Human Rights Committee, *Antonio Sánchez López (represented by José Luis Mazón Costa) v. Spain*, Communication No. 777/1997, U.N. Doc. CCPR/C/67/D/777/1997 (25 November 1999), [6.4] holding that the ICCPR equivalent to s25(g) does not prevent the owner of a vehicle from being prosecuted for refusal to cooperate with authorities in identifying the driver of a speeding vehicle.

⁷⁶ M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, 2005, N.P. Engel), 345, asserting that Article 17.3(g) ‘relates only to the accused. Witnesses, on the other hand, may not refuse to testify.’

⁷⁷ See Human Rights Committee, *General Comment 13, Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994), [14]-[15], noting a link between the ICCPR equivalent to s25(2)(k) and the rights not to be tortured and to humanity while detained and holding that ‘In order to safeguard the rights of the accused under’ the ICCPR equivalents to s24(1) and s25(2), ‘judges should have the authority of violations of the rights of the accused during *any stage of the prosecution*’ (emphasis added) cf the US Constitution’s Fifth Amendment provision that ‘No person... shall be compelled in any criminal case to be a witness against himself’, which the Supreme Court held in *Miranda v Arizona* 384 US 436, (1966), 460-466 extended to custodial interrogations.

⁷⁸ The same point could be made about s25(1), which gives a right to be presumed innocent to ‘[a] person charged with a criminal offence’ but cf M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, 2005, N.P. Engel), 318-319 asserting that a ‘charge’ under Article 17 commences ‘on the date on which State activities substantially affect the situation of a person concerned. This is usually the first official notification of a specific accusation, but in certain cases may be as early as arrest.’ (citations omitted.)

⁷⁹ *Funke v France* [1993] ECHR 7, [44]; *Saunders v United Kingdom* [1996] ECHR 65, [68]; *Serves v France* [1997] ECHR 82, [46]; *JB v Switzerland* [2001] ECHR 234, [64] cf *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd* [2000] 2 AC 483; *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 1 AC 681.

witnesses called at those proceedings.⁸⁰ Second, s24(1) only comes into play if the things a person says in breach of the privilege are adduced at a later trial of a criminal charge or during a civil proceeding, as opposed to being used for other purposes (which may in turn lead to proceedings that rely on other evidence.⁸¹) Third, s24(1) only applies to breaches of the privilege that have an actual impact on the fairness of a trial.⁸² In 1998, the High Court of Australia held that police misconduct in gaining an admission could only render a trial *unfair* if there was either a risk that the admission was unreliable or if the way the admission was obtained left the defendant ‘disadvantaged in the conduct of his defence.’⁸³

A practical example of the gap in the Charter, currently before the High Court of Australia⁸⁴, is a modern technique used by Victorian police to investigate cold cases where suspects have refused to be interviewed. The scheme involves the suspects being invited by undercover operatives to join fake gangs, with membership conditioned on confessing all past crimes to a ‘crime boss’ (whose cross-examination of the suspect is, of course, covertly recorded.) Typically, confessions would only emerge through extensive contrived scenarios, ranging from the initial contact to staged visits by overt police officers to a promise that corrupt police officers will protect the confessors from punishment.⁸⁵ Victorian courts have so far held that the law of evidence permits the admission of confessions obtained through these schemes.⁸⁶ Would the Charter’s version of the ‘right to be left alone’ protect Victorians (including Victorian criminals) from the ‘crime boss scenario’?

The answer is: almost certainly, no, because of the gaps in the Charter’s rights outlined above. The Victorian police’s complex ruse is obviously designed to overcome the ‘privacy’ of the defendant’s own knowledge about committing a crime; however, the carefully targeted nature of these expensive operations means that any intrusion is anything but arbitrary under s13(a).⁸⁷ The tactics used by the police fall far short of torture or other degrading treatment and intrude neither on suspects’ freedom to think or talk or their liberty (prior to any trial.) They also occur before (sometimes immediately before) any suspect is charged, rendering s25(2)(k) inapplicable. The only right that is arguably infringed is s24(1) and – if the High Court’s approach to fairness is applied – it only arises to the extent that the police’s tactics might produce unreliable admissions or leave the defendants at a forensic disadvantage when prosecuted. The Charter provides

⁸⁰ Cf J Gans & A Palmer, *Australian Principles of Evidence* (2004, Cavendish), 105-106.

⁸¹ Eg. alleged terrorism offender Joseph ‘Jihad’ Thomas’s upcoming second trial, founded on a television interview he gave after his first torture-tainted trial: *R v Thomas (No 3)* [2006] VSCA 300

⁸² *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26: ‘[T]he question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him ... Unfairness, in this sense, is concerned with the accused’s right to a fair trial...’

⁸³ *R v Snaffield; Pavic v The Queen* [1998] HCA 1, [70]-[92]. Other factual issues that might engage the presumption of innocence, including coercion and trickery by the police, were to be addressed through other requirements of evidence law, including the common law requirement of voluntariness and the public policy discretion. See A Palmer, ‘Police deception, the right to silence and the discretionary exclusion of confessions’ (1998) 22 Criminal LJ 325.

⁸⁴ *Tofilau, Marks, Hill & Clarke v The Queen* [2007] HCATrans 81

⁸⁵ See, e.g. *R v Tofilau* [2003] VSC 188; *DPP v Ghiller* [2003] VSC 350; *R v Favata* [2004] VSC 7; *R v Clarke* [2004] VSC 11; *R v Marks* [2004] VSC 476.

⁸⁶ *R v Tofilau* [2006] VSCA 40; *R v Hill* [2006] VSCA 41; *R v Marks* [2006] VSCA 42; *R v Clarke* [2006] VSCA 43; *R v Favata* [2006] VSCA 44.

⁸⁷ Whether the interference is ‘unlawful’ would depend upon the adequacy of legislative and administrative supervision of the police’s operation cf *Crimes (Controlled Operations) Act 2004* (Vic).

no basis for arguing that any other aspect of Victorian law, to the extent it falls short of protecting the privilege against self-incrimination, is incompatible with human rights.⁸⁸

As in the case of the Charter's partial promotion of the goal of correct fact-finding, the failure of the Charter to comprehensively promote evidence law's protections for privacy flows directly from the limitations of the ICCPR. The Consultation Committee was alive to the failure of the ICCPR to respect the core values of Victorian evidence law. For example, it added free assistance and tools to people with communication difficulties to the list of minimum guarantees for criminal proceedings.⁸⁹ So, it is surprising that it didn't add a broad privilege against self-incrimination or right to silence, given that they are rights so strongly associated with Victoria's law of evidence.

One remedy for the above gaps in the Charter would be to add additional rights, such as the privilege against self-incrimination, the right to silence and a bar on *disproportionate* intrusions into privacy. However, there is a simpler solution: simply broaden the Charter's right to privacy to cover *all* interferences, rather than simply arbitrary or unlawful ones.⁹⁰ As will be discussed in the next section, appropriate limits on this right are supplied by the Charter's general provision on the limitation of rights, rendering specific limitations in s13(a) unnecessary. A simple 'right to privacy'⁹¹ would cover all the interests valued or threatened by evidence law, including the privilege against self-incrimination, giving all Victorians the benefit of Brandeis's 'most comprehensive of rights'.

The right to wrong

So far, this article has argued that the Charter's list of human rights falls short of promoting the goals of evidence law. Purely from that perspective, the list would be improved through the addition of two simple rights: a right to the correct application of Victorian law and a right to be left alone, i.e. an unencumbered right to privacy. However, evidence law is by no means the sum of these two rights. Rather, the goals of accurate decision-making and protecting people's privacy are often sacrificed to other significant interests, such as the courts' own legitimacy and the public interest. Even in the absence of any such overriding interests, many of the rules of evidence fall short of these goals simply because pursuing them would make the justice system unworkable or too costly. Such compromises, familiar in all parts of the law, are essential to making evidence law both just and effective.⁹²

Compromise is a core element of the Charter, too. Part Two's first section regulates when the law can limit the rights it sets out.⁹³ Section 7(2) provides that those limits must

⁸⁸ This includes the arguments, accepted by the Victorian Court of Appeal, that an undercover police officers' promise to corruptly prevent a person from being prosecuted is not grounds for the automatic exclusion of all the admissions as involuntary; and that the community would not be shocked by the police's behaviour, given the results: see *R v Tofilan* [2006] VSCA 40, [177]-[178], [187]

⁸⁹ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 44.

⁹⁰ Cf the view that the limitation to 'arbitrary or unlawful interference' is 'far too broad in terms of rule of law', rendering the ICCPR's Article 17 'worthless': M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, 2005, N.P. Engel), 381, citing H Guradze, 'Die Menschenrechtskonventionen der Vereinten Nationen vom 16. Dezember 1966', *Jahrbuch für internationales Recht* (JIR) 1971, 242.

⁹¹ Cf *Constitution of the Republic of South Africa*, s14

⁹² See J Gans & A Palmer, *Australian Principles of Evidence* (2004, Cavendish), 8-11.

⁹³ On the issue of the role s7(2) plays in the Charter's interpretation regime, see J Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30 Melbourne ULR 906, 918-920 cf. *Hansen v The Queen* [2007] NZSC 7.

be ‘reasonable’ and ‘demonstrably justified’. It also lists factors that must be taken ‘into account’:

- (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.

If ‘goal of evidence law’ was substituted for ‘right’, then this provision would describe how evidence law deals with conflicts between its various goals (or other exigencies), or at least how it should.

The structure of much of evidence law consists of rules (e.g. *relevant evidence is admissible*) with exceptions (e.g. *but not evidence about a witness’s credibility*) and exceptions to exceptions (e.g. *unless it’s that witness’s prior conviction*) and more exceptions (e.g. *but not if the witness is the defendant*) and still more (e.g. *unless the defence attacks the character of a prosecution witness*) and more (e.g. *but not if a judge refuses leave*).⁹⁴ Every rule and exception represents a compromise between the goals of accuracy and privacy, or between these goals and a further one (e.g. constraining the length of trials or a ‘tit for tat’ idea of fairness.) However, not all these compromises are resolved by the present law in a sound way.⁹⁵ Rather, many of the current rules of evidence are a product, not of parsimonious balancing between competing priorities, but rather poorly-evidenced empirical claims, handed-down traditions, overdrawn rules and the prioritising of one goal to the expense of others.⁹⁶

In my view, applying s7(2) to every rule and every exception in evidence law has the potential to significantly improve the law applied by Victoria’s courts and tribunals. That is how the Charter, in addition to – or in the course of – promoting human rights may also promote sound evidence law reform. Hence, my interest in whether or not evidence law’s main purposes are covered in the Charter’s list of rights. Unfortunately, in addition to the broad gaps in coverage already discussed in this article, the Consultation Committee that transposed the ICCPR rights into the draft Charter included or created unnecessary gaps in Part Two’s scope.

The worst example is s25(2)(g)’s right to examine witnesses:

- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—
 - (g) to examine, or have examined, witnesses against him or her, *unless otherwise provided for by law*; and

The addition of the words ‘unless otherwise provided by law’, which do not appear in the equivalent article of the ICCPR, are explained in a brief part of the Committee’s report

⁹⁴ See J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 131-134, 305-307, 310-313, 399-401, 402, 403-405.

⁹⁵ Cf *Palmer v R* (1998) 193 CLR 1, [51]-[53] (McHugh J) and *Phillips v R* (1985) 159 CLR 45 (Deane J, dissenting).

⁹⁶ See C Harvey, *The Advocate’s Devil* (Stevens, 1958), 79: ‘Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builders’ debris.’

that listed a grab bag of alterations to the ICCPR's language. Of s25(2)(g), the Committee wrote:

The Committee considers that this qualification is necessary to ensure that the special rules in relation to the cross-examination of children or of victims of sexual assault would continue to apply.⁹⁷

This explanation of the limitation on the right to examine witnesses is wrongheaded in many respects:

First, there is no risk that Victoria's laws on examining rape victims and children won't 'continue to apply.' The Charter doesn't invalidate any laws (see the next Part of this paper.) Second, mere inconsistency with s25(2) or any other right in Part Two isn't a problem in and of itself, as s7(2) permits lawmakers to pass laws that are reasonable and demonstrably justifiable limits on human rights. Victoria's special laws on examinations of kids and rape victims are the product of an extensive law reform process that ought to produce precisely the sort of limit that s7(2) allows. Indeed, there are numerous comparative judgments upholding similarly rules like a bar on defendants personally examining rape complainants or the use of CCTV or pre-recorded interviews for child testimony.⁹⁸ Third, if Victoria's current laws can't satisfy s7(2) – i.e. they aren't reasonable or demonstrably justified – then why should they be preserved from such remedies as reading down or a declaration of inconsistent interpretation? Fourth, if it was necessary to protect those laws from such consequences, then parliament could enact an 'override' that preserves selected Victorian laws from such consequences, however, unlike the limitation on s25(2)(g), this requires specific parliamentary deliberation and scrutiny, 'exceptional' circumstances and a five-year sunset clause.⁹⁹ Moreover, if the Committee's intention was to prevent Victoria's rules on examining children and rape victims from being criticised under the Charter, then it won't succeed; those rules can and will be challenged under the s24(1) right to a decision following a fair hearing.

Worst of all, the Committee's exception is vastly overbroad. It isn't limited to protections for rape victims and children, but can cover as many witnesses (and as many aspects of their examination) as Parliament wants. The impact on evidence law's values is especially painful, because the provision implements a basic right recognised by evidence law: the right to confrontation. That right guarantees that criminal defendants (and their lawyers) can hear what witnesses have to say and can cross-examine them about that. Evidence law's most famous commitment to this right is the hearsay rule, although there are a number of exceptions to that rule (and, if the uniform evidence legislation was adopted in Victoria, there would be many more.) The effect of the Committee's tinkering with the ICCPR right is to bar *all* of evidence law's exceptions to the hearsay rule (present and future¹⁰⁰) from analysis for their consonance with the minimum guarantees for criminal procedure in s25 (and, if that isn't bad enough, the government's redraft also removes

⁹⁷ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 44.

⁹⁸ E.g. *R v L(DO)* (1993) 85 CCC (3d) 289; *R v Levogianis* (1993) 85 CCC (3d) 327; *K v The Regional Magistrate* (1996) 1 SACR 434; *SN v Sweden* [2002] ECHR 551; *R v Camberwell Green Youth Court ex parte D* [2005] UKHL 4 cf *R v MSK & MAK* [2004] NSWCCA 308, [40], [48]-[49].

⁹⁹ s31. Contrast s48, exempting 'any law applicable to abortion or child destruction', which is clearly designed to preserve Victoria's laws and is narrowly confined to particular ones.

¹⁰⁰ Query whether the limitation in s25(2)(g) should be read down (under the Charter's interpretations regime) to existing Victorian laws, noting the explanatory memorandum's statement that the limitation 'is intended to make it clear that *current* rules in relation to the cross-examination of certain witnesses, such as children and victims of sexual assault, continue to apply.' (emphasis added)

the ICCPR's requirement that any exceptions apply equally to prosecution and defence.¹⁰¹)

To see just how unfortunate this is, consider David Hicks's aborted trial at Guantanamo Bay, whose liberal rules of evidence are often cited as a reason why Victorians need a human rights regime.¹⁰² Section 25(2)(g)'s exemption would exclude from protection precisely the procedures in Hicks's trial that attracted strongest criticism: the prosecution's right to present evidence that was kept secret from the defendant on national security grounds; and the very broad hearsay rule exceptions.¹⁰³ Allowing such procedures a free pass under s25(2)'s guarantees of minimum standards for criminal proceedings is quite a high price to pay just to exempt Victoria's sensible laws on examining rape victims and children from the unlikely possibility of adverse court decisions under those same provisions. The best that can be said for any of this is that defendants could still challenge all laws limiting their right to examine witnesses under s24(1).

Section 25(2)(g) is a particularly egregious instance of a broader problem in the way the ICCPR's provisions were incorporated into Victoria's Charter. The ICCPR's description of human rights is verbose and complex, because each right incorporates caveats limiting its operation. These caveats represent not merely the compromises that are inevitable when a multilateral treaty is drafted but also an outdated approach to human rights law, which regarded human rights as inalienable. This contrasts with contemporary rights documents, including the Charter, which wholeheartedly adopt the modern notion that nearly all rights can be properly limited to meet narrowly defined, proportionate objectives. The Consultative Committee was well aware of this difference and recommended that the ICCPR's caveats be 'not included in the Charter as the Committee considers that it is preferable to rely on a general limitation clause', i.e. s7(2).

Unfortunately, the Committee, in formulating its draft, failed to identify and excise many of those caveats (in addition to adding its own misguided ones.) These include (relevantly to evidence law):

- (as already noted), restricting the rights to 'privacy, family, home or correspondence' to non-arbitrary or non-lawful interferences¹⁰⁴
- restricting the protection on attacks on reputation to 'unlawful' attacks¹⁰⁵

¹⁰¹ See Article 14(e) but cf M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, 2005, N.P. Engel), 342, asserting that this 'restriction' only applies to the right to call and examine defence witnesses, not prosecution witnesses.

¹⁰² J Burnside, 'It's time to uphold our rights' (The Age, 14th December 2006) cf The Chief Executive Officer of Victoria's Equal Opportunity and Human Rights Commission's statement that: 'The Victorian Charter of Human Rights and Responsibilities is a law that protects Victorians from the human rights abuses that David Hicks has been subjected to.' at <http://www.humanrightscommission.vic.gov.au/news%20and%20events/media%20releases/2007/20070226.asp> (accessed 4th May 2007)

¹⁰³ *Military Commissions Act of 2006* (USA), inserting 10 USC 47A, §§ 949a(b)(2)(E) [hearsay evidence] & 949d(f) [introduction of classified information]

¹⁰⁴ s13(a) but cf Human Rights Committee, *General Comment 16*, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994). [8] holding that the bar on 'unlawful' interferences in the ICCPR equivalent means that 'relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.' See also [3] holding that the legislation must also 'comply with the provisions, aims and objectives of the' ICCPR.

¹⁰⁵ s13(b)

- limiting the ‘public hearing’ requirement by allowing exclusion of the media or the public if a non-Charter law permits¹⁰⁶
- permitting non-publication of judgments if ‘the best interests of a child otherwise requires’¹⁰⁷
- limiting the defendant’s right to call witnesses to ‘the same conditions as witnesses for the prosecution’¹⁰⁸
- limiting the defendant’s right to appeal to review ‘in accordance with law’¹⁰⁹

Even putting aside any substantive objections to these limitations, they are objectionable as *ad hoc* duplications of the much more nuanced s7(2).¹¹⁰ Their presence may reduce the chance that a court will perform the detailed analysis of the proper limits of a law that s7(2) would otherwise demand. To this extent, opportunities for improvement of Victoria’s law of evidence will be neglected.

PART B : RESPONSIBILITIES AND REMEDIES

The Consultative Committee chose the Charter’s full name ‘in recognition of the views expressed by many people that rights and responsibilities go hand in hand.’¹¹¹ This Part considers whether the rights in the Charter are accompanied by responsibilities that promote Victoria’s evidence law. It first analyses the amenability of evidence law to the Charter’s operative provisions. Then it considers the Charter’s impact (or lack of impact) on the courts’ application of the rules of evidence. Finally, it will address evidence law’s amenability to the dialogue on human rights, which is the Charter’s *raison d’être*.

The right to a remedy

Part Two of the Charter is not self-enforcing. Rather, its legal effect depends on the Charter’s ‘application’ provision, which applies Part Two to various bodies via the

¹⁰⁶ s24(2) contrast *Human Rights Act 2004* (ACT), s21(2).

¹⁰⁷ s24(3) cf Human Rights Committee, *Gordon v. Jamaica*, Communication No. 237/1987, U.N. Doc. CCPR/C/46/D/237/1987 (1992), [6.3], contrast *Human Rights Act 2004* (ACT), s21(3).

¹⁰⁸ s25(2)(h)

¹⁰⁹ s25(4) but cf Human Rights Committee, *Consuelo Salgar de Montejo v. Colombia*, Communication No. R.15/64, U.N. Doc. Supp. No. 40 (A/37/40) at 168 (1982), holding that ‘the expression “according to law” in’ the ICCPR equivalent to s25(4) ‘is not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined “according to law” is the modalities by which the review by a higher tribunal is to be carried out.’

¹¹⁰ The s13(a) right to privacy exemplifies this, because exactly the same right is partially enforced under a Commonwealth law (as it relates to adult sexual conduct): *Human Rights (Sexual Conduct) Act 1994* (Cth), s4. The Commonwealth statute, necessarily modelled on the ICCPR for its constitutional validity, contains the ‘arbitrary interference’ limitation, but contains no further exception for reasonable or demonstrably justified limits. So, Victoria’s Charter actually provides a narrower right to privacy for sexual conduct than the Commonwealth statute, even though both are purportedly implementations of the same international provision. (Query the effect of Australia’s reservation to the ICCPR’s privacy provision for ‘laws which... are necessary in a democratic society in the interests of national security, public safety, the economic well being of the country, the protection of public health or morals or the protection of the rights and freedoms of others’ (extracted at M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, 2005, N.P. Engel), 935.) but cf the Cth statute’s lack of reference to any reservations and its reference to the ICCPR in Schedule 2 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) rather than the definition of ‘Covenant’ in that Act which restricts the reference to the Covenant as it ‘applies in relation to Australia’.)

¹¹¹ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 22-23.

functions they are given in the Charter's Part Three.¹¹² The contents of Part Three reflect the Consultative Committee's and government's preference for a so-called 'parliamentary rights model' for the promotion of human rights.¹¹³ That model leaves Parliament's enactments untouched, but changes the procedural and regulatory spaces that surround them, by promoting human rights when bills are considered, when Acts are interpreted and when governments do things that statutes don't forbid.

Part Three of the Charter sets out four ways that Part Two's rights can operate in Victoria:

- a regime for 'Scrutiny of New Legislation' requiring that bills be accompanied by a 'declaration of compatibility' and that their compatibility with Part Two be examined by the Standing Committee on the Scrutiny of Acts and Regulations¹¹⁴
- a regime for 'Interpretation of Laws', requiring that Victorian statutes be interpreted compatibly with human rights and giving the Supreme Court a power to make a declaration when that isn't possible¹¹⁵
- a regime for 'Obligations on Public Authorities', requiring that public authorities act compatibly with human rights unless a non-Charter law requires otherwise¹¹⁶
- a regime for 'legal proceedings', providing that breaches of the obligations regime can be remedied or relieved by certain non-Charter laws.¹¹⁷

In accordance with the parliamentary rights model, caveats are built into all these regimes to preserve parliament's sovereign role in enacting legislation as it sees fit. Unsurprisingly, the Charter's legal impact on evidence law is restricted in some important respects:

First, the scrutiny regime applies only to future changes to the law.¹¹⁸ The only non-judicial scrutiny of existing law (including the current law of evidence) that flows from the Charter is a provision for the Victorian Equal Opportunity and Human Rights Commission to 'review the effect of' Victorian laws 'on human rights; however, such reviews can only occur 'when requested by the Attorney-General.'¹¹⁹ (On the other hand, the proposal to 'replace and re-enact' Victoria's core evidence law statutes will mean that much of Victoria's law of evidence will eventually pass through the scrutiny regime.)

¹¹² s6(2), applying the Charter to various bodies 'to the extent that' those bodies have 'functions under' one or more of the divisions of Part 3 but compare s6(2)(b), which also refers to courts' and tribunals' 'functions under Part 2' and s6(3) which preserves other any other functions 'conferred by this Charter' on these and other entities: cf *R v Williams* [2007] VSC 2, [54]-[55] querying whether s6(2)(b) means that courts must refer to s25(2) whenever they make a determinations about whether or not a trial is fair and whether this was the effect Parliament intended.

¹¹³ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 21-22 cf Chapter Four; J Heibert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern LR* 7.

¹¹⁴ Part 3, Division 1, ss 28 & 30. See also the requirement for a 'human rights certificate' to be issued by the responsible Minister for a 'proposed statutory rule': s12A, *Subordinate Legislation Act 1994* (a consequential amendment of the Charter, see clause 7 of the Schedule.)

¹¹⁵ Part 3, Division 2, ss 32(1) & 36

¹¹⁶ Part 3, Division 3, s38

¹¹⁷ s39.

¹¹⁸ s28(1), referring to the introduction of a bill, and s29, protecting the validity of legislation where s28 wasn't followed. Query whether the scrutiny regime applies to those parts of the law that re-enact existing statutes or the common law: cf the 'statement of compatibility' of the Crimes (DNA Databases) Amendment Bill 2007, at *Hansard*, Legislative Assembly of Victoria, 2nd May 2007, 51, characterising the bill as 'streamlining' existing arrangements and assessing its impact only on that basis.

¹¹⁹ s41(b)

Second, the interpretation regime is for statutes only.¹²⁰ So, while evidence legislation, old and new, will be subject to the Charter's new rule on interpretation, the common law of evidence – which is presently the bulk of Victoria's evidence law and which will survive, at least in part, if uniform evidence legislation is introduced – will not be affected. Moreover, the Supreme Court has no jurisdiction to declare existing rules of the common law – or new common law rules announced, say, by the High Court of Australia – to be incompatible with human rights. (However, the Commission will be able to review the compatibility of the common law with human rights if the Attorney-General requests.¹²¹)

Third, the obligations regime only affects the conduct and decisions of public authorities where non-Charter law (including Victorian statutes, Commonwealth statutes and the common law) leaves those authorities a choice on how to act.¹²² The courtroom – the domain of much of evidence law – is a highly regulated space, where a lot of what happens is the result of the obligations set out in statutes, common law or rules of practice imposed by the courts themselves. In particular, the admissibility of all evidence is comprehensively authorised by the common law rule that relevant evidence is admissible unless other parts of the common law or statutory provisions provide otherwise.¹²³ (On the other hand, many of those exceptions have discretionary aspects. Moreover, the obligations regime will have a significant impact on pre-trial process, because Victorian law leaves many police and prosecutorial decisions to the discretion of police and prosecutors. In particular, much of what is done to investigate crimes is unregulated by non-Charter laws.¹²⁴)

Fourth, the availability of legal proceedings to challenge the acts of public authorities that are contrary to the Charter (i.e. breaches of the Charter's obligations regime) depends entirely on the content of non-Charter law. The adequacy of remedies provided by Victoria's law does not raise any issues of compatibility with the human rights listed in Part Two, which largely omit language from the ICCPR requiring that effective remedies be provided for breaches of human rights.¹²⁵ In particular, any statutory change to the rules on the admissibility of unlawfully obtained evidence – even the complete repeal of all such rules – would raise no issues under the scrutiny regime, would not be affected by the interpretation regime and would not be subject to a declaration of inconsistent interpretation by the Supreme Court.¹²⁶

In short, the direct effect of the Charter on evidence law is limited to how parliament will scrutinise future evidence law statutes, how all evidence law statutes will be interpreted and how public authorities can act when evidence law otherwise permits, with consequences for the admission of evidence only to the extent that existing evidence law remedies are retained by parliament. These limitations of course reflect the scope of the

¹²⁰ s32(1), referring to 'all *statutory* provisions' (emphasis added) cf s32(3)(b) on the impact of the interpretation regime on subordinate instruments.

¹²¹ s41(b)

¹²² s38(2) cf the Charter's *Explanatory Memorandum*, noting that the provision covers the common law.

¹²³ Cf ss 55, 56 of the uniform evidence legislation.

¹²⁴ See J Gans & A Palmer, *Australian Principles of Evidence* (2004, Cavendish), 416-418.

¹²⁵ See Articles 2.2, 2.3, 14.6, 17.2, & 23.4, but cf ss 8(3) & 17. If this language hadn't been omitted, then it is possible that the Charter's remedies regime itself could be subject to a declaration of inconsistent interpretation! cf the omission of Article 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* from the schedule to the *Human Rights Act 1998* (UK).

¹²⁶ Query the possible incompatibility of some statutory removals of remedies with the few remedy requirements from the ICCPR that were included in Part Two: s8(3) ('effective protection against discrimination') & s17 (protection of families and children).

Victorian government's preferred model for the protection of human rights. However, there are two devils in the details of how the government's preferred model was implemented in the Charter's operative provisions that, in the case of evidence law, greatly reduce the Charter's impact in legal proceedings. The remainder of this section will discuss these two details in turn.

Section 32(1), the linchpin of the interpretation regime, requires that 'all statutory provisions... be interpreted in a way that is compatible with human rights'. However, it has a significant gloss: the imperative to interpret statutes in this way only extends '[s]o far as it is possible to do so *consistently with their purpose*'. An example of the constraining effect of this purposive limitation can be seen by considering how Queensland's courts resolved an ambiguity in that state's legislation authorising a mass DNA sampling of its prisoners. Legislation introduced in 2000 authorised the compulsory sampling of people 'serving a term of imprisonment for an indictable offence'.¹²⁷ However, the legislation's application to people convicted of an indictable offence via a summary trial procedure was unclear, as a separate provision of Queensland's *Criminal Code* deemed such people to be guilty of a simple offence.¹²⁸ This ambiguity would seem to be a straightforward case for applying the common law rule to interpret statutes that interfere with rights narrowly, which in some ways operates analogously to the Charter's s32(1).¹²⁹ However, the Court of Appeal found that the DNA sampling statute's purpose was to establish a 'comprehensive DNA database', i.e. to gather as much DNA as possible.¹³⁰ Applying Queensland's interpretation statute, which mandates a purposive approach to interpretation above all other interpretative rules¹³¹, the Court held that the common law presumption was displaced and that the broader interpretation of the DNA sampling statute should be preferred.¹³²

The purposive constraint on s32(1) has its origins in the often-criticised early behaviour of the UK courts when interpreting legislation under their *Human Rights Act 1998* (UK) (where a similar provision omits the last four words.¹³³) Interestingly, the judgment that has attracted the strongest condemnation is an evidence law decision.¹³⁴ In *R v A*, the House of Lords considered whether England's (then) strict rape shield law was compatible with the fair trial provision of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*.¹³⁵ The complainant alleged that A raped her beside the Thames as they drunkenly walked to a hospital to see the complainant's lover. The rape

¹²⁷ *Police Powers and Responsibilities Act 2000* (Qld), s311(1).

¹²⁸ *Criminal Code* (Qld), s659

¹²⁹ See *Coco v The Queen* (1994) 179 CLR 427

¹³⁰ *Brogden & Ors v. Commissioner of the Police Service* [2001] QCA 18, [11]

¹³¹ *Acts Interpretation Act 1954* (Qld), s14A(1). This provision, requiring a court to prefer the interpretation that 'best' achieves the statute's purpose, is less flexible than s32(1)'s requirement of consistency with the statute's purpose. Query, however, whether a narrow construction of the DNA database statute would be 'consistent with' the purpose of achieving a 'comprehensive' DNA database.

¹³² *Brogden & Ors v. Commissioner of the Police Service* [2001] QCA 18, [20] (de Jersey CJ, MacKenzie J agreeing cf [35]). The High Court granted special leave to the prisoners to appeal this decision; however, the appeal was dismissed by consent after the Queensland parliament amended its DNA legislation to resolve the ambiguity in favour of the broader reading: transcript of proceedings, *Brogden & Ors v Commissioner of the Police Service* B24/2002 (24 June 2002) (High Court of Australia) cf *Police Powers & Responsibilities (DNA) Amendment Act 2002* (Qld), s3.

¹³³ *Human Rights Act 1998* (UK), s3.

¹³⁴ See S Evans & C Evans, 'Legal redress under the Victorian *Charter of Human Rights and Responsibilities*' (2006) 17 Public LR 264, 268, describing it as '[t]he most notorious case' cf J Spigelman, 'The truth can cost too much: The principle of a fair trial' (2004) 78 ALJ 29, 48.

¹³⁵ *R v A* [2001] UKHL 25; *Youth Justice and Criminal Evidence Act 1999* (UK), s41

shield law barred A, who claimed that the sex was consensual, from calling evidence to the effect that he and the complainant had been having casual sex for weeks, as those acts were neither contemporaneous with the alleged rape nor strikingly similar to it.¹³⁶ The Law Lords found that this evidence was highly relevant and that the defendant had therefore been denied a fair trial. The most controversial part of their judgment was the majority's ruling that the statute's exception for strikingly similar acts should be read, under the UK's interpretations regime, as including all acts that are 'so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.'¹³⁷ The House of Lords's new rule had no connection to either the statutory provision's words (which centred on acts that were linked by similarity, not cause-and-effect) nor their purpose (which was to permit a narrow exception for acts that formed part of an unusual pattern, such as a history of riverbank sex or claims of rape.)¹³⁸

As the dissenting judge pointed out, in adding this gloss to the UK rape shield law, the judges appear to be legislating, not interpreting.¹³⁹ The inclusion of a purposive constraint in Victoria's interpretation regime is clearly designed to prevent this from occurring here. However, the problem with a purposive constraint in an evidence law context is that the 'purpose' of many statutory provisions that regulate the fact-finding process is, at least at on one level¹⁴⁰, to limit rights, such as the right to a fair trial. This is especially true of statutory modifications of the common law of investigation, procedure and evidence. Statutory changes to the rules of evidence are typically designed to limit whatever procedural rights those rules entail, notably the right to a fair trial. Statutory powers to gather information are almost always designed to limit whatever privacy the holders of that information may have had. And yet, many of these provisions are ambiguously worded, with judges playing a crucial role in deciding the extent of any intrusion. Will the Charter play a significant role in such situations, given the limit on s32(1)?

An straightforward instance where s32(1) might have been thought to have a role to play in Victoria's evidence law in the future is the proposed model evidence legislation's exception to its hearsay rule for statements made 'when or shortly after' the events they describe.¹⁴¹ The obvious question that this provision raises is: how long is 'shortly after'? The NSW Court of Criminal Appeal, interpreting these words, has permitted the prosecution to adduce evidence of a person's statement about being assaulted a day after the incident (and shortly before he fell into a fatal coma)¹⁴²; in another case, a trial judge held that, in the right circumstances, the words 'shortly after' can encompass a two week gap between event and statement!¹⁴³ Once this provision is enacted in Victoria, 32(1) would, at first blush, appear to demand a narrower reading given the impact of the admission of such hearsay evidence on defendants' right to a fair hearing.¹⁴⁴ But, would such a narrower reading be consistent with the purpose of the model evidence legislation,

¹³⁶ *Youth Justice and Criminal Evidence Act 1999* (UK), s41(3)(b), (c)

¹³⁷ *Ibid* [46] (Steyn LJ; Slynn LJ, Clyde LJ & Hutton LJ agreeing)

¹³⁸ *Youth Justice and Criminal Evidence Act 1999* (UK), s41(3)(c)

¹³⁹ *Ibid* [108]-[109] (Hope LJ)

¹⁴⁰ Cf S Evans & C Evans, 'Legal redress under the Victorian *Charter of Human Rights and Responsibilities*' (2006) 17 Public LR 264, 268

¹⁴¹ See *Evidence Act 1995* (NSW), s65(2)(b).

¹⁴² *Harris v R* [2005] NSWCCA 432, [40] (special leave refused by the High Court: *Harris v The Queen* [2006] HCATrans 247)

¹⁴³ *R v Kuzmanovic* [2005] NSWSC 771

¹⁴⁴ As already observed, s65 and, indeed, all the UEL hearsay exception are automatically compatible with s25(2)(g) because of that provision's exception for limitations 'otherwise provided by law.'

which was a comprehensive attempt to modernise and liberalise the admission of hearsay evidence?¹⁴⁵ Arguably, a narrower reading that was closer to the old common law requirement of strict or near contemporaneity would be inconsistent with the statute's purpose of freeing the courts from the restrictions of the doctrine of *res gestae*.¹⁴⁶

A complex but much more important example is the UEL's equivalent to the common law's discretion on the exclusion of illegally or improperly obtained evidence:

(1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law, or
- (b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

- (a) the probative value of the evidence, and
- (b) the importance of the evidence in the proceeding, and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
- (d) the gravity of the impropriety or contravention, and
- (e) whether the impropriety or contravention was deliberate or reckless, and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.¹⁴⁷

This provision is rife with ambiguity.¹⁴⁸ What is 'impropriety'? What does 'in contravention of' mean? What does 'in consequence of' mean? What is 'an Australian law'? More broadly, how do the various matters in sub-s (3) affect the court's decision? Does the seriousness of an offence count for or against admissibility? Why does the ease of otherwise obtaining the evidence matter at all? Can evidence ever be admitted that the police could not have obtained without acting unlawfully? In what circumstances should evidence be admitted despite a person's rights being breached? In what circumstances should evidence obtained as the result of a deliberate breach be admitted? Should evidence that falls within (1)(a) be treated differently to evidence that falls within (1)(b)? When this provision is enacted in Victoria, the answer to all these questions could have a significant effect on the protection of Victorians' rights, especially their Charter rights. However, despite s32(1), I am doubtful that Victorian courts will be compelled to resolve these ambiguities in favour of broader protection for human rights for two reasons. First, as already pointed out, it is doubtful that remedies that Parliament chooses to provide for

¹⁴⁵ See Australian Law Reform Commission, *Report No 26: Evidence* (1985), Chapter 13.

¹⁴⁶ *Conway v The Queen* [2000] FCA 461, [123], [133]

¹⁴⁷ *Evidence Act 1995* (NSW), s138

¹⁴⁸ See generally J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), Chapter 17.

Charter breaches can ever be incompatible with the Charter. Second, the courts may regard the apparent purpose of s138 – to strike a balance between defendants’ privacy rights and the public interest in convicting them – as barring them from interpretations that shift that balance greatly towards the defendant.

The effect of the Charter on the law of evidence is also greatly limited by the drafting of s39(1), the Charter’s complex provision governing legal proceedings. The purpose of this provision is to ensure that the only legal consequences of a breach of the Charter’s obligations regime are the collateral use of remedies that exist in non-Charter law.¹⁴⁹ This reflects the Consultative Committee’s and the Victorian government’s concern that the obligations regime would otherwise lead to excessive litigation and imposts on the government.¹⁵⁰ However, s39(1)’s terms go further than is necessary to achieve that end, as they the collateral proceedings available for breaches of the obligations regime to ‘any relief or remedy’ in non-Charter law for conduct ‘on the *ground* that [the conduct] was *unlawful*’.¹⁵¹

In the law of evidence, unlawful conduct is, on its own, a side issue in decisions about how to find facts. Indeed, the original common law approach to unlawfulness was that it had no consequences in and of itself; ‘It matters not how you get it; if you steal it even, it would be admissible.’¹⁵² Rather, evidence law’s strongest remedies are triggered by conduct that might affect the fairness of trials or the propriety of the verdict. Pre-trial illegality, while never determinative of that issue, might nevertheless affect how such conduct is characterised and influence the court’s decision on whether or not to provide relief. Very recently, the Supreme Court of Norfolk Island had to determine whether to admit statements made by the defendant while in the custody of New Zealand police awaiting extradition to Australia. The Court held that any breaches by New Zealand police of the requirements of that country’s bill of rights would be relevant to the question of whether the statements should be excluded as unreliable, unfair or improperly obtained.¹⁵³ In Victoria, a breach of an applicable human rights regime would presumably be similarly relevant to common law remedies based on assessments of voluntariness, oppression, unfairness, prejudice, abuse of process or conduct in breach of

¹⁴⁹ For a contrary view, see *R v Williams* [2007] VSC 2, [54], applying s6(2)(b) and s24(1) to conclude that a Court must apply s25(2) when responding to a claim that a trial is or will be unfair, but note the judge’s view that this may not be consistent with parliament’s intentions: [55].

¹⁵⁰ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 114

¹⁵¹ Emphasis added. Cf *Human Rights Act 1998* (UK), s7(1)(b), permitting ‘victims’ of a breach of its obligations regime to ‘rely on the Convention right or rights concerned *in any legal proceedings*’ & s8(1), empowering a court to ‘grant such relief or remedy, or make such order, within its powers as it considers appropriate’ ‘*i>n relation to any act... of a public authority which the court finds is... unlawful*’ under the UK obligations regime (emphasis added). The argument put in this paper would still have been applicable to the different provision drafted by the Consultation Committee at cl 40(1) of its draft, as it was also limited to a ‘relief or remedy [that] would have been *available had the act or decision been unlawful* apart from this Charter’ (emphasis added.)

¹⁵² *R v Leatham* (1861) 8 Cox CC 498, 501, approved in *Kuruma v The Queen* [1955] AC 197, 203. The High Court of Australia rejected this approach in the 1970s, citing Holmes J’s dissent in *Olmstead v United States* (1927) 277 US 438, 470 that it may be ‘a less evil that some criminals should escape than that the Government should play an ignoble part’: *Bunning v Cross* (1978) 141 CLR 54, 78.

¹⁵³ *R v McNeill (Ruling No 1)* [2007] NFSC 2, [189]-[198], considering alleged breaches of s23(1)(a), (b) and (c) of the *New Zealand Bill of Rights Act 1990* (NZ), as well as the New Zealand approach to admissibility of evidence obtained in breach of that Act (see *R v Shabeed* [2002] 2 NZLR 377), when making rulings on admissibility under s85 (cf [251]-[252]), s90 (cf [289]-[290]) & s138 (cf [309]-[310], [322(d)]) of the *Evidence Act 2004* (Norfolk Island). Section 138’s provisions on illegality were not applicable, as they are limited to breaches of Norfolk Island law (cf [190]). See also [322(f)] briefly dismissing any breach of the ICCPR.

community standards.¹⁵⁴ However, the Charter's remedies provision would not pick up any of these remedies, as illegality is neither a necessary nor sufficient condition for any of them.¹⁵⁵ So, paradoxically, when considering evidence obtained through a joint operation in New Zealand and Victoria, a Victorian court could take account of any breaches of New Zealand's bill of rights when applying these remedies, but not any breaches of the Charter's obligations regime.

Australian evidence law does have a remedy specifically for unlawful conduct – the so-called 'public policy discretion' – but it is a weak remedy in many respects; however, the exclusionary rule developed by the High Court, unlike its counterpart in the United States, does not aim to either promote people's rights or deter unlawful behaviour. Rather, its purpose is to ensure that 'the reception of the evidence thus provided does not demean the court as a tribunal whose concern is in upholding the law'.¹⁵⁶ While in theory Australian courts can exclude illegally obtained evidence on the grounds that to do otherwise would leave them tainted, in practice they often choose to admit the evidence on the grounds that to do otherwise would leave them exposed to public criticism for freeing a criminal 'on a technicality'.¹⁵⁷ The result is that exclusions, especially in serious criminal trials where the illegally obtained evidence was important (e.g. DNA evidence in murder or rape trials), are rare.¹⁵⁸ The same is true under the slightly stricter statutory rule under the uniform evidence legislation.¹⁵⁹ Both rules, but especially the common law one, are also hedged by limitations, such as the requirement of a causal link between the illegality and the evidence obtained and the common law rule that the illegal conduct must be by a 'law enforcement authority'.¹⁶⁰

A simple example of the restricted way the Charter's remedies regime operates in relation to evidence law is a Western Australian case, presently before the High Court, where a foolish man being investigated for armed robbery boasted about his criminal prowess to his guards while in the lockup.¹⁶¹ His admissions were caught on a surveillance camera, supplying a precondition for admissibility under the state's evidence law.¹⁶² If the Charter applied, the decision to place to install the camera would arguably be in breach of the police's obligations to act compatibly with detainees' right to privacy.¹⁶³ However, a

¹⁵⁴ See J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 142-144, 335-342, 421-423, & 476-498.

¹⁵⁵ Compare S Evans & C Evans, 'Legal redress under the Victorian *Charter of Human Rights and Responsibilities*' (2006) 17 Public LR 264, 280 suggesting that the remedy of staying proceedings would be available 'where there has been an impropriety by the Crown' under in the obligations regime. Query whether the stay remedy is one that arises 'on the ground that [an] act or decision was unlawful', as opposed to when the court determines that permitting further proceedings would be an abuse of process, a ground for which illegality is neither a necessary nor sufficient condition.

¹⁵⁶ *Bunning v Cross* (1978) 141 CLR 54, 78-81.

¹⁵⁷ See J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 430-435.

¹⁵⁸ B Presser, 'Research Note: Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 Melbourne ULR 757, 776-781 finding exclusion in only 15% of studied cases, noting courts' willingness to downplay unlawful conduct as accidental and unwillingness to exclude evidence in serious or drug cases. See also the studies cited at notes 6 & 7 of Presser's article.

¹⁵⁹ *Ibid* 782-783 cf *R v Caruso* [2006] ACTSC 45, [38]-[39].

¹⁶⁰ *R v Lobban* [2000] SASC 48, [39]-[41] (special leave refused by the High Court; transcript of proceedings, *Lobban v The Queen* A21/2000 (1 June 2001)), affirmed *Police v Halll* [2006] SASC 281 cf *R v Caruso* [2006] ACTSC 45, [37]

¹⁶¹ *Carr v WA* [2006] WASCA 125.

¹⁶² *Criminal Code* (WA), s570D(2)(a)

¹⁶³ One argument could be that the legislative authority (relied on by the Crown at *Carr v The Queen* [2007] HCATrans 143) to install the surveillance device, s6(3)(b)(i) of the *Surveillance Devices Act 1998* (WA) (a

Victorian court applying the most relevant evidence law remedy – the exclusionary rule for admission obtained at a price that the community would find unacceptable¹⁶⁴ – could not take account of the fact that the camera was installed unlawfully under the Charter in determining whether the community’s standards – which differ from legal standards¹⁶⁵ – were breached. The ‘public policy discretion’ would be available, but the admissions would be unlikely to be excluded, given the seriousness of the crime being investigated, the importance of the admissions and the investigating officers’ lack of involvement in the installation of the camera.¹⁶⁶

A more complex example is a recent South Australian case where a driver, after testing positive to a random breath test, went to the emergency room of the Royal Adelaide Hospital to have a blood test taken but was kept waiting so long that his negative result was incapable of rebutting the result of the earlier breath test. A majority of the Court of Criminal Appeal rejected the defendant’s argument that the breath test should have been excluded at the defendant’s subsequent trial for drink driving. The Court held that the public policy discretion was inapplicable, because the police had complied with all applicable laws, which only required them to supply the defendant with a blood-testing kit.¹⁶⁷ The defendant also argued that the breath test results should be excluded on the ground of unfairness, given that he was unable to test the results through the only mechanism allowed to him – a timely blood test – through no fault of his own. A majority of the Court held that this remedy was unavailable to the defendant, absent any reason to doubt the reliability of the breath test, because no-one else was at fault.¹⁶⁸

If this same series of events occurred in Victoria under the Charter, it could be argued that the hospital – a public authority¹⁶⁹ – in deciding to prioritise other patients over the defendant, failed to take account of his right to a fair hearing under s24(1)¹⁷⁰; however, even if a court found that the hospital’s delay was therefore illegal under s38(1), there would be no consequences for the admissibility of the breath test. The public policy discretion would still not apply for three reasons: (1) the illegal conduct was not by a ‘law enforcement authority’; (2) the illegal conduct came after the breath test; and (3) the

blanket exemption for all law enforcement officers from the statutory requirement of a warrant, where the law enforcement is a party to the activity recorded cf *Surveillance Devices Act 1999* (Vic), s6(2)(c) is too broad to prevent unlawful or arbitrary interferences with privacy: cf Human Rights Committee, *General Comment 16*, (Twenty-third session, 1988), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994), [3], [8].

¹⁶⁴ *R v Swaffield; Pavić v The Queen* [1998] HCA 1, [69]-[70].

¹⁶⁵ J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 488.

¹⁶⁶ cf *Carr v WA* [2006] WASCA 125, [52]-[56].

¹⁶⁷ *Road Traffic Act 1961* (SA), s47G(2a) [now re-numbered as s47K(2a)] (compare *Road Safety Act 1986* (Vic), s55(10), which requires a police officer, on request, ‘to arrange’ for a blood sample to be taken: *Police v Hall* [2006] SASC 28, see [100]-[112] on the change in the SA provisions.)

¹⁶⁸ *Police v Hall* [2006] SASC 28, [78].

¹⁶⁹ s4(1)(b), including ‘an entity established by a statutory provision that has functions of a public nature’ (cf *South Australian Health Commission Act 1976*, s27, providing for the incorporation of hospitals, one of which is the Royal Adelaide Hospital: see <http://www.rah.sa.gov.au/aboutrah/aboutrah.php> (accessed 13th May 2007) (Royal Melbourne Hospital, for example, is also likely to be within the definition of public authority as ‘an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority’ (s4(1)(c)), as it is owned by Melbourne Health, which is funded (cf s4(2)(d)) and, it appears, wholly owned by the State (cf s4(2)(e)).

¹⁷⁰ This would depend on why the delay occurred. One possibility is that the staff relegated the defendant to the end of the waiting list as a person without any health issues, something that arguably fails to consider his needs as a person facing criminal charges. See *Police v Hall* [2006] SASC 28, n26 to the effect that the delays experienced by the defendant are a regular occurrence in South Australia.

breath test was too important and the illegality too mild to warrant exclusion. Moreover, the unfairness discretion, which isn't limited in any of these respects, could not be used either, even though the hospital's breach of s38(1) would supply the necessary fault in another's conduct that was lacking in South Australia. A Victorian court would be forbidden from taking a breach of the Charter's obligations regime into account when applying the unfairness discretion, because unlawfulness is merely relevant to that remedy, but is neither a necessary or sufficient ground for its application.

The common flaw in s32(1) and s39(1) is that each provision, in attempting to constrain the Charter's legal effect within the boundaries of non-Charter laws, actually confines the courts to a narrower approach than that objective requires. Section 32(1), in stopping Victoria's courts from rewriting legislation, actually limits them to one particular sort of interpretation – purposive interpretation – which leaves too little room for the human rights in Part Two to operate, at least for many evidence law statutes. Section 39(1), when limiting the remedies for breaches of the Charter to those provided by non-Charter laws, actually confines the available remedies to those for unlawful conduct *per se*, excluding evidence law's more nuanced and stronger remedies where illegality is merely a factor – perhaps a significant one – amongst many. In these respects, Victoria is better off than the ACT, where the purposive restraint entirely overwhelms its interpretation regime¹⁷¹ and the statute is silent as to obligations and remedies.¹⁷² However, it is also worse off than the United Kingdom, where the current law is consonant with the Victorian government's intentions for the legal effects for its Charter but is unconstrained by the narrow drafting of the Charter's operative provisions.

The House of Lords has now stepped back from its approach in *R v A*, instructing courts not 'to cross the constitutional boundary' set by the words 'so far as it is possible'; however, the new test is not tied to the narrow question of a statutory provision's purpose, but rather a broader formulation that requires fidelity to the 'fundamental features of the legislative scheme', which permits courts to use the full panoply of interpretative tools, including 'reading in', 'reading down' and 'supplying missing words.'¹⁷³ The *Human Rights Act 1998* (UK) also permits 'victims' of a breach of its obligations regime to '*rely on* the Convention right or rights concerned in any legal proceedings', a formulation that permits courts to take account of a public authority's breach of a person's human rights when applying remedies on grounds other than unlawfulness.¹⁷⁴ In my view, s32(1) and s39 should be altered to fit these approaches,

¹⁷¹ Section 30(2) of the *Human Rights Act 2004* (ACT) requires ACT courts to choose the interpretation 'that would *best* achieve the purpose of' a statute, by making the interpretation provision subject to *Legislation Act 2001* (ACT), s139. Victorian courts are merely constrained to interpretations that are *consistent* with the purpose of a statute (s32(1) cf *Interpretation of Legislation Act 1984* (Vic), s35(a) which only requires courts to prefer an interpretation that will *promote* the purpose of a statute over one that wouldn't). So, Victorian courts, at least in theory, will still have a choice of possible interpretations, unlike their ACT counterparts (but cf *Kingsley's Chicken Pty Ltd v Queensland Investment Corporation* [2006] ACTCA 9, [49]-[52]; ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-month Review: Report* (2006), Recommendation 5.)

¹⁷² Query though whether the uncertainty of the ACT legislation may ultimately leave Territory citizens with an appropriately wider range of remedies. A Butler, 'The ACT *Human Rights Act*: A New Zealander's View' at <<http://www.jcs.act.gov.au/HumanRightsAct/publicationsbor.htm>> (accessed 18th May 2007), 2 arguing that the *Legislation Act 2001* (ACT), s121(1) requires everyone (including all public authorities) to act compatibly with the rights in the *Human Rights Act 2004* (ACT) but cf ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-month Review: Report* (2006), 29-30.

¹⁷³ *Ghaidan v Godin-Mendoza* [2004] 2 AC 537, [31]-[33], [67]-[68], [115]-[124]

¹⁷⁴ *Human Rights Act 1998* (UK), s7(1)(b).

which comply with the constraints required by the Victorian government¹⁷⁵ but also permit the maximum protection of human rights within those constraints.

The responsibility for rights

The Charter's passage will (or should) significantly change the behaviour of the legislative and executive branches of government, in light of, respectively, the scrutiny and obligations regimes. However, the impact of the Charter on the behaviour of Victoria's courts, properly (if not always) identified as another part of the Victorian government, will be far more modest. The Supreme Court of Victoria will have a new function – making declarations of inconsistent interpretation – and all courts will have a new rule to follow when interpreting legislation. The Charter's interpretation regime may, in turn, affect the content of some of the non-Charter laws that bind the courts. Finally, the Charter's obligations regime will mean that the courts will be issuing remedies and relief on the ground of unlawfulness more often. But, that's it.

In common with Parliament¹⁷⁶, but unlike all other parts of the Victorian government, Victoria's courts are largely exempted from the Charter's obligations regime. This is because the Charter's definition of 'a public authority' expressly excludes 'a court or tribunal except when it is acting in an administrative capacity.'¹⁷⁷ The only official explanation for this exemption is a couple of paragraphs in the Consultative Committee's report, which concludes as follows:

[W]hile the Victorian courts may be bound by the Charter as institutions, there is a limited capacity for them to be required to apply the rights in the development of the common law. This is because no one State can change the 'unified common law' of Australia. If Victoria attempted to do so, there is a real risk that the High Court would strike down part of the Charter as being inconsistent with the Australian Constitution.¹⁷⁸

As a justification for the exemption of courts' non-administrative actions, this explanation is flawed in several ways.

First, briefly, its constitutional analysis is doubtful.¹⁷⁹ It is true that the High Court held in the late 1990s that its decisions are the sole source of Australian common law¹⁸⁰ – and that three judges have questioned "whether there are, *or can be*, rules established by judicial decision that are to remain peculiar to a particular State"¹⁸¹ – but these remarks were made in contexts where state statutes didn't apply. The key judgments are replete with statements affirming all Australian legislatures' capacity to abrogate the common

¹⁷⁵ Compare *Human Rights Act 1998* (UK), s8(1), which appears to exceed those limits (but it clearly severable from s7(1)(b)).

¹⁷⁶ s4(1)(i), exempting 'Parliament or a person exercising functions in connection with proceedings in Parliament'.

¹⁷⁷ s4(1)(j).

¹⁷⁸ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 59.

¹⁷⁹ Cf J Perry, 'International Human Rights and Domestic Law and Advocacy', paper delivered at Human Rights Law Resource Centre Seminar, Melbourne, 7th August 2006, available at <http://www.hrlrc.org.au/html/s02_article/default.asp?nav_cat_id=139&nav_top_id=60&dsb=308> (accessed 18th May 2007), 13-14.

¹⁸⁰ *Kable v DPP (NSW)* (1996) 189 CLR 51, 112; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562-563; *Lipohar v the Queen*; *Winfield v the Queen* [1999] HCA 65, [24], [43]-[59], [179] but see Callinan J's contrary view at [230]-[261] cf L Priestly, 'A Federal Common Law in Australia?' (1995) 6 Public LR 221; *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67, [23], [91].

¹⁸¹ *Lipohar v the Queen*; *Winfield v the Queen* [1999] HCA 65, [49] cf *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67, [23] holding that '[t]he fragmentation of the common law... is unacceptable.'

law, including references to how the common law, including the law of evidence, can be influenced, developed by or even originate in statutes.¹⁸² A holding that Australia's common law limits the powers of its legislatures would turn the hierarchy of legal authority in Australia on its head. Given that Australia's Constitution doesn't even mention the common law, this seems a leap too far, at least for the Consultative Committee, if not the High Court.¹⁸³

Second, even accepting that Victoria's parliament cannot 'change' or 'develop' the common law (or alter how the courts do so), it can still simply abrogate the common law within its jurisdiction.¹⁸⁴ Indeed, Australian parliaments do so every time they pass statutes that address subject-matter governed by the common law. Federal, state and territory courts (and the High Court if it takes an interest) must routinely determine what is left (if anything) of the common law in each of Australia's jurisdictions (including whether later developments of the common law by the High Court apply in that state) in light of the thousands of applicable statutes and regulations. To date, the High Court has never doubted the constitutionality of this arrangement.¹⁸⁵ Any objection to Victoria's courts performing the same role if Part Two of the Charter was expressed to override the common law would have to be based on an argument – not mentioned by the Consultative Committee – that the human rights it contains are so broad and general that the courts' determination of what is left of the common law will be akin to legislating.¹⁸⁶ While there is arguably a difference in degree between a comprehensive human rights statute and other legislation that occupies subject-matter dealt with by the common law (e.g. acts interpretation statutes or anti-discrimination statutes or Torrens title statutes or sexual privacy statutes¹⁸⁷), it is not at all apparent that there is a qualitative difference that merits constitutional intervention.

Third, the Consultative Committee's recommended solution to these possible constitutional problems – exempting *all* exercises of judicial and quasi-judicial¹⁸⁸ power from the Charter's obligations regime¹⁸⁹ – goes substantially beyond what is necessary.¹⁹⁰

¹⁸² *Lipobar v the Queen; Winfield v the Queen* [1999] HCA 65, [49], [57], [167]; *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67, [19]-[20], [28], [91], [144].

¹⁸³ Cf *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67, [18] noting that the argument about the development of the common law 'was not at the forefront of the appellant's oral submissions in this Court and reliance is placed upon the written submissions. *The interrelation and interaction between common law and statute may trigger varied and complex questions requiring full arguments in cases where they arise.*' (emphasis added)

¹⁸⁴ Cf J Perry, 'International Human Rights and Domestic Law and Advocacy', paper delivered at Human Rights Law Resource Centre Seminar, Melbourne, 7th August 2006, available at <http://www.hrlrc.org.au/html/s02_article/default.asp?nav_cat_id=139&nav_top_id=60&dsb=308> (accessed 18th May 2007), 17.

¹⁸⁵ Compare Australian Human Rights Centre, *Submission to the Victorian Human Rights Consultation Committee* (August 2005), 29 stating that 'the current position in Australia is that there is one unified common law of Australia, which is not susceptible to *direct* influence by legislation in any one state.' (emphasis added). One explanation for the presence of the word 'direct' in this passage is that it is a typo and that the reference should have been to 'indirect influence', which is what was at issue in *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67. Unfortunately, if this is a typo, then it is a highly consequential one, as the passage was quoted (apparently with approval) by the Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 59.

¹⁸⁶ This argument was mooted by Terese Henning in an unpublished paper she presented at the *Evidence, Criminal Justice and Adjudication Colloquium*, Faculty of Law, UNSW, 21st April 2007

¹⁸⁷ E.g. the *Human Rights (Sexual Conduct) Act 1994* (Cth).

¹⁸⁸ See the Charter's *Explanatory Memorandum* on clause 4(1)(j).

¹⁸⁹ See also the baffling exemption for a regulation 'which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal' from the regime requiring the issuing of a 'human rights certificate' for all proposed statutory rules: *Subordinate Legislation Act 1994* (Vic), s12A(3), inserted as a

Developing and applying the common law is only one of many judicial functions that courts and tribunals exercise. Putting aside the function of applying the s32(1)'s rule on the interpretation of legislation,¹⁹¹ (regulated by s32(1)), courts and tribunals must apply other rules of interpretation¹⁹² and make collateral legal and factual findings relevant to determining whether a statute is in force and applicable. More importantly, courts routinely exercise discretions and powers granted by statutes and common law, many of which, on any view, are extremely broad. Moreover, much judicial work is expended in interlocutory or procedural matters, where courts are simply exercising their inherent power to manage their own business.

Why shouldn't a Victorian court doing these things – none of which impinge on Australia's unified common law – be obliged to act compatibly with and take account of human rights? The exemption of courts from the Charter's obligations regime seems to be a case of an esoteric bit of human rights theory gone awry. The Consultative Committee's discussion of the common law emerged from its consideration of a policy debate about whether rights regimes that apply to government action ought to be permitted have a 'horizontal effect', via the courts, on how citizens deal with each other (arguably broadening power imbalances between them.)¹⁹³ However, the legal relationship between private citizens (i.e. private law) is not a topic that is commensurate with either the common law¹⁹⁴ or the non-administrative function of the courts. Rather, much of the common law, and what the courts do generally, concerns private people's legal relationship with the state (i.e. public law), including the criminal law and the courts' public role in resolving factual disputes. There is no political controversy whatsoever about subjecting this aspect of the courts' activity to human rights law, especially the civil and political rights that the Charter promotes.

Indeed, many of the rights in Part Two – notably fair hearings, rights in criminal proceedings, children in criminal process, deprivation of liberty and constraints on punishment¹⁹⁵ – are essentially rights to have the courts act or make decisions in a particular way. To oblige other public authorities to conform to these rights¹⁹⁶ but to

consequential amendment of the Charter (Schedule, clause 7.1) Also, see G Brennan, 'Introduction to Human Rights Law: Seminar – Part II' (2007) 81 ALJ 248, 250, suggesting that s4(1)(j) means that courts and tribunals (acting judicially) has, like Parliament, a right 'to limit or destroy a person's human rights' despite s7(3).

¹⁹⁰ Query also whether the common law is applied, to some extent, in committal hearings: see *Grassby v The Queen* [1989] HCA 45, per Deane J.

¹⁹¹ Applicable to the courts via s6(2)(b), regardless of the definition of public authority.

¹⁹² See, e.g. *R v YL* [2004] ACTSC 115, [24]-[28], applying the *Acts Interpretation Act 1901* (Cth), s10A (on references to repealed legislation) in a case where the judge raised concerns that its application to *Evidence Act 1995* (Cth), s19 (exempting some proceedings from s18, providing courts with a discretion to permit a relative of the defendant not to testify), could lead to physical harm to a witness, contrary to *Human Rights Act 2004* (ACT), s11 on the right of children to protection.

¹⁹³ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 59, quoting Australian Human Rights Centre, *Submission to the Victorian Human Rights Consultation Committee* (August 2005), 29, citing numerous comparative law articles at n90.

¹⁹⁴ See S Evans & C Evans, 'Legal redress under the Victorian *Charter of Human Rights and Responsibilities*' (2006) 17 Public LR 264, 269-270, noting that s32(1) will have a horizontal effect, including potentially giving (via statute) human rights to corporations, despite the intentions of 'some of the participants in the political debate.'

¹⁹⁵ ss 23-27.

¹⁹⁶ Cf '[T]he presumption of innocence implies a right to be treated in accordance with this principle. It is therefore a duty of *all public authorities* to refrain from prejudging the outcome of a trial' (emphasis added): Human Rights Committee, *General Comment 13, Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), [7].

exempt courts in their judicial function from them is simply perverse. In Victoria's first major Charter decision, gangster Carl Williams sought an adjournment of his murder trial to allow him to seek a lawyer of his choice, pursuant to s25(2)(d)'s guarantee that he could 'defend himself... through legal assistance chosen by him'. The Supreme Court held that, even if the Charter had applied to Williams' trial, the obligations regime did not apply to a court's decision to fix or adjourn a trial date, as such a decision 'is discretionary and... in determining those matters a court must act judicially and balance a number of factors'.¹⁹⁷ Whatever else might be said about Williams' claim, this is surely a totally absurd reason to reject any person's appeal to vindication of a human right.

Once the Charter is fully operation in 2008, the role of human rights inside Victoria's courtrooms (including those human rights that are about things that only courts typically do, like granting bail, trials of criminal charges and sentencing) will depend on the collateral effect of two of the Charter's regimes:

- the interpretation regime, *as it applies to statutes that apply to the courts*
- the obligations regime, *as it applies to public authorities that engage in conduct in connection with court proceedings*

To see how these regimes may affect what courts do (or not) in the field of evidence law, consider the complex rules that govern when defendants can be cross-examined on their character, potentially allowing an otherwise inadmissible criminal record to be revealed to the jury.¹⁹⁸

In Victoria, as elsewhere, there are long-standing statutory provisions that authorise a court to permit such cross-examination if the defence attacks a prosecution witness's character or raises the defendant's good character.¹⁹⁹ These rules can be criticised for penalising someone simply for defending themselves.²⁰⁰ A notorious example is *Phillips v the Queen*, where a rape defendant sought to explain why his fingerprint was on the complainant's window by saying that he had peered through the window one day to respond to an inquiry she had made about buying some marijuana. The result of this 'attack' on the complainant's character was that the court allowed the prosecution to adduce evidence of the defendant's priors for break-and-enter (which might have been treated by the jury as significant given that the alleged rape was during a break-and-enter.)²⁰¹ It could be argued that this sequence of events, had they occurred in Victoria, is incompatible with a defendant's rights to a decision after a 'fair' hearing by an 'impartial' court²⁰² and to 'without discrimination... defend himself' and 'have examined, witnesses against him'²⁰³. However, because the discretion to permit the cross-examination of the defendant is 'a judicial one'²⁰⁴, a Victorian court would not be obliged to make its decision compatibly with the rights in the Charter. Could the Charter's rights be brought into this situation another way?

One possibility is the interpretations regime, because the requirement for judicial leave before a defendant can be cross-examined on character happens to be contained in a

¹⁹⁷ *R v Williams* [2007] VSC 2, [50] cf the note to s4(1)(j), asserting that 'listing' is an administrative capacity.

¹⁹⁸ See J Gans & A Palmer, *Australian Principles of Evidence* (2004, Cavendish), 395-405.

¹⁹⁹ *Crimes Act 1958* (Vic), s399(5) & (6) cf *Criminal Evidence Act 1898* (UK).

²⁰⁰ *Phillips v The Queen* (1985) 159 CLR 45, 66-67.

²⁰¹ *Phillips v The Queen* [1985] HCA 79; (1985) 159 CLR 45.

²⁰² s24(1)

²⁰³ s25(2)(d) ; s25(2)(j).

²⁰⁴ *Phillips v The Queen* (1985) 159 CLR 45, 62.

Victorian statutory provision.²⁰⁵ However, there are two problems with interpreting this provision, say, as requiring a court to refuse leave if the attack was a necessary part of the defence case. One is that the High Court has already held that the discretion to give leave to a cross-examination must not be interpreted as a ‘general exclusionary rule’, as to do so would undermine the intended statutory scheme, which balances many factors, including the capacity for judicial directions to manage any prejudice that might result from admission.²⁰⁶ This view would appear to preclude a contrary interpretation under s32(1) ‘so far as possible consistently with [the cross-examination statute’s] purpose.’ A further problem is that the High Court has held that this statutory provision – which contains no criteria for the discretion it creates – in fact ‘expresses a rule of practice’ (applicable whether the statute exists or not) and also ‘gives statutory recognition’ to a common law discretion to exclude unfairly prejudicial evidence.²⁰⁷ So, arguably, the only aspect of the discretion amenable to statutory interpretation is its existence; everything else is governed by non-statutory law, which the Charter’s interpretation regime is not supposed to affect.

An alternative way to bring such cross-examinations within the Charter’s operative provisions would be to argue that the prosecutor, almost always a ‘public authority’,²⁰⁸ is forbidden by the Charter’s obligations regime from cross-examining the defendant ‘in a way that is incompatible with a human right.’ However, while this argument does seem to follow from s38(1), it seems unsatisfactory as it means that the prosecution and court are effectively subject to different rules of evidence. Procedurally, whereas disputes about the court’s version of evidence law are resolved through hearings on admissibility, the prosecutor’s version – based on conduct, rather than admissibility – would require interlocutory proceedings on the issuing of a declaration or injunction²⁰⁹; in practice, a court would first have to decide whether to give a prosecutor leave to cross-examine under the cross-examinations statute and then decide whether to enjoin the prosecutor from doing so under the Charter. Moreover, the court would need to rule, not on the evidence itself, but rather the prosecutor’s decisions about it, a subject traditionally off limits from judicial scrutiny as it turns on tactical and ethical concerns and may require the divulgence of confidential information.

The problem of applying two different sets of rules of evidence is even more extreme with respect to the differential application of the obligations regime to different ‘functions’ of Victoria’s courts and tribunals.²¹⁰ A note to the Charter’s definition of ‘public authority’ asserts that committal proceedings are ‘administrative functions’ of the

²⁰⁵ Crimes Act 1958 (Vic), s399(6)

²⁰⁶ *Phillips v The Queen* (1985) 159 CLR 45, 57.

²⁰⁷ *Phillips v The Queen* (1985) 159 CLR 45, 51 cf *Matusевич v The Queen* (1977) 136 CLR 633, 652 discussing the Victorian provision.

²⁰⁸ s4(1), including a ‘public official’, defined by the *Public Administration 2004* (Vic), s4(1), which in turn includes the ‘holder of a statutory office’, in turn defined as ‘an office established by or under an Act to which the right to appoint is vested in the Governor in Council or a Minister’ cf *Public Prosecution Act 1994* (Vic), s31. But cf *R v YL* [2004] ACTSC 115, [21] noting the possibility of private prosecutions.

²⁰⁹ s39(2)(b) cf *Pretty v. Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61, [121], decriing suggestions that prosecutors themselves should resolve disputes about what the law is, but compare s41(c), giving the Victorian Equal Opportunity and Human Rights Commission a function ‘when requested by a public authority, to review the authority’s programs and practices to determine their compatibility with human rights’. See also s33, providing for referral to a higher court if a party requests and ‘the question is appropriate for determination by the Supreme Court’ and barring lower court determinations or inconsistent action while the referred question is pending.

²¹⁰ s4(1)(j)

courts and, hence, are subject to s38(1).²¹¹ If this is correct²¹², then it means that Victorian magistrates, in determining whether there is sufficient evidence for charges to proceed to a trial, will need to exercise any discretion they have compatibly with Charter rights, including s24(1)'s right to a fair hearing. It is possible, therefore, that magistrates presiding over committals will be required to disregard some evidence, e.g. of disputed confessions, even though the trial judges in any eventual trial will be under no similar obligation.²¹³ The anomalies have led the House of Lords to discourage such so-called 'satellite litigation'²¹⁴, i.e. collateral reliance on human rights in relation to decision-making by prosecutors and at committals, holding that such actions seek to 'bypass the ordinary operation of our system of criminal justice' and 'undermines the proper and fair management of our criminal justice system'.²¹⁵ The Lords, in barring such actions, could rest assured that the UK's trial and appellate courts would themselves prevent any incompatibility between human rights and what goes on in their courtrooms, unless a statute provided otherwise. Because Victorian courts are exempted from the Charter's obligations regime, such an assumption cannot be made here.

Whatever might be said for either of these methods, their application will turn on a host of excruciating legal distinctions, including distinguishing:

- a statutory provision from the common law rules or rules of practice it recognises or gives effect to²¹⁶
- statutory discretions that can be interpreted as general exclusionary rules from those that cannot²¹⁷
- the purposes of statutory discretions that are consistent with bars on decisions that are incompatible with human rights from those that are not²¹⁸
- courts' and tribunals' 'administrative' capacities from their other capacities²¹⁹
- public authorities from non-public authorities²²⁰

²¹¹ A note to s4(1)(j) asserts that courts act in an administrative capacity when holding committal proceedings, issuing warrants, listing cases and adopting practices and procedures.

²¹² Compare the remarks of the High Court in *R v Murphy* (1985) 158 CLR 596, 616 that 'Even though they are properly to be regarded as non-judicial in character, committal proceedings themselves traditionally constitute the first step in the curial process, possibly culminating in the presentation of the indictment and trial by jury. They have the closest, if not an essential, connexion with an actual exercise of judicial power' cf *Fingleton v The Queen* [2005] HCA 34, [44] cf the Explanatory Memorandum, which states that the exception to s4(1)(j) covers 'courts when acting in a judicial or quasi-judicial capacity.' (emphasis added)

²¹³ Cf *Grassby v The Queen* [1989] HCA 45, per Deane J, holding that the decision to commit must take account of rulings a judge might make at the trial. Query whether a magistrate acts compatibly with a defendant's rights under the Charter if the magistrate relies on confessional evidence that, while arguably obtained in breach of the s25(2)(k), would nevertheless be admissible under Victoria's law of evidence.

²¹⁴ *Director of Public Prosecutions, Ex Parte Kebeline and Others, R v.* [1999] UKHL 43, per Lord Steyne cf *R v. DPP ex parte Kebilene* [1999] EWHC Admin 278, [55]; *O'Connor & Anor, Re An Application For Judicial Review* [2005] NIQB 40, [22]-[24].

²¹⁵ *Pretty v. Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61, [123].

²¹⁶ E.g., *Crimes Act 1958* (Vic), s399(6) cf *Phillips v The Queen* (1985) 159 CLR 45, 51; *Matusевич v The Queen* (1977) 136 CLR 633, 652.

²¹⁷ E.g., *Crimes Act 1958* (Vic), s399(6) cf *Phillips v The Queen* (1985) 159 CLR 45, 57.

²¹⁸ E.g., *R v YL* [2004] ACTSC 115, [31] regarding *Legislation Act 2001* (ACT), s39 as providing no barrier to interpreting *Supreme Court Act 1933* (ACT), s30, conferring jurisdiction 'necessary to administer justice' as giving courts the power to refuse to coerce a witness to testify.

²¹⁹ E.g. *R v Williams* [2007] VSC 2, [50]; committal proceedings in light of *R v Murphy* (1985) 158 CLR 596, 616.

- situations where it is reasonable for a public authority to refrain from doing something that the ordinary rules of evidence permit from those where it isn't
- 'satellite litigation' from non-'satellite litigation' (and the consequences of that distinction for any discretionary remedies)

Contrary to the express claims of the Charter's supporters²²¹, these various difficulties can only lead to recurrent drawn-out technical arguments, i.e. a lawyers' picnic.²²² Worse still, the resulting legal effect of the Charter on the conduct of court proceedings would be, at best, a pastiche of weak restraints, waxing and waning as courts drift between their administrative and non-administrative capacities, proceedings pass in and out of the purview of suitably malleable statutory provisions and public authorities enter and leave the courtroom.

What is all this trouble in aid of? A 'unified' common law? Preserving the High Court's position at the apex of Australia's courts? Keeping human rights out of private relationships? What it certainly *isn't* in aid of is Victorians' rights to the fundamental court-based rights listed in Part Two of the Charter. Surely, leaving those rights to be promoted only by proxy is contrary to the Charter's foundational principles that human rights are 'essential in a democratic and inclusive society', 'belong to all people without discrimination' and 'come with responsibilities.'²²³ Victoria's courts, in common with all other public authorities, should have the responsibility, rather than the mere discretion, to promote human rights during judicial proceedings whenever non-Charter law (or maybe just non-Charter *statutes*) permit.²²⁴

The remedy for responsibility

The above discussion of the legal effect of the Charter could be seen as missing the point.²²⁵ The Charter's primary purpose is not to change the law directly, but rather to have an indirect impact, through the creation of a human rights culture.²²⁶ From that perspective, the interpretation, obligations and remedies regimes are less important than the Charter's wholly procedural provisions, including the Supreme Court's power to issue a 'declaration of inconsistent interpretation.'²²⁷ On some views, the Charter's main contribution is to facilitate a dialogue between the courts and parliament on human

²²⁰ Cf S Evans & C Evans, 'Legal redress under the Victorian *Charter of Human Rights and Responsibilities*' (2006) 17 Public LR 264, 273-274. Query whether lawyers employed by the Legal Aid Commission are public authorities cf s4(5). As a matter of policy, it seems dubious that legal aid lawyers (and hence their clients' defence) will be constrained by s38(1), whereas privately funded lawyers are not.

²²¹ G Williams, 'The Charter You Wanted', *Herald Sun*, Melbourne, 26th July 2006, 18.

²²² Cf ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-month Review: Report* (2006), 29 noting that reliance on the 'indirect operation of the interpretative provision is unnecessarily complex and this may have an adverse effect on the growth of a broad rights dialogue.'

²²³ Preamble.

²²⁴ Cf *Human Rights Act 1998* (UK), s6(3)(a), which expressly includes a 'court or tribunal' in the definition of 'public authority' and s6(4) excising 'the House of Lords in its judicial capacity' from the exemption for Parliament in s6(3). See also s9(1) restricting the proceedings that can be brought 'in respect of a judicial act'.

²²⁵ G Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2007) 30 Melbourne ULR 880, 903: 'To focus narrowly on the *Victorian Charter of Rights* as it applies to courts is to misunderstand its operation and to take far too limited a perspective of its significance.'

²²⁶ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), Chapter 5.

²²⁷ s36

rights.²²⁸ What are the prospects for such a dialogue developing with respect to evidence law? This section, necessarily more speculative than the earlier discussion, will first address the role of the courts and then the role of parliament, before considering the significance of the impending adoption of model evidence legislation in Victoria.²²⁹

The Supreme Court of Victoria's new power to issue a 'declaration of inconsistent interpretation' is conditioned on the Court forming an 'opinion that a statutory provision cannot be interpreted consistently with a human right.'²³⁰ In the case of one human right, s24(1)'s right to have civil and criminal matters determined after a 'fair hearing', Victoria's courts have always had a function of opining on whether or not this right has been respected. All Victorian courts are empowered to take action to ensure that proceedings before them are fair, including making a determination about risks of an unfair trial and considering the appropriate remedial procedure, such as jury directions or a stay.²³¹ Also, courts exercising appellate jurisdiction are routinely called upon to determine whether trials that have been held are fair; a negative finding will trigger the appeal ground of (other) 'miscarriage of justice', necessitating a further inquiry into whether a trial absent that error would have fairly led to the same result.²³²

However, there is a significant difference between these determinations – about whether a *trial proceeding* is fair – and the formation of an opinion that a *statutory provision* is fair, the prerequisite to making a declaration of inconsistent interpretation. In the 1990s, the High Court of Australia balked at a suggestion that findings about the fairness of a statutory provision can be an appropriate trigger for remedial action by a court. The Court was asked to grant special leave to consider a series of cases where trial judges had been asked to stay criminal trials of rape defendants on the ground that NSW's rape shield law, the world's strictest, had excluded evidence that was relevant to the defence case.²³³ A majority of the Court refused special leave in the following terms:

To grant special leave would be to elevate to the level of arguability the proposition that a court may decline to exercise its jurisdiction to try a criminal case because it forms the view that a law enacted by the Parliament is unfair. That is not a view to

²²⁸ G Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2007) 30 Melbourne ULR 880, 901-903 citing P Hogg & A Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)' (1997) 35 Osgoode Hall LJ 75.

²²⁹ The discussion will not address the considerable literature debating and critiquing the propriety and effect of human rights dialogues in general. Rather, it is concerned with arguments, additional to those, that arise in relation to the law of evidence.

²³⁰ s36(2). Compare the different wording of s32(1), referring to whether a provision can be interpreted 'in a way that is compatible with human rights' and the limitation (not present in s36(2)) to when 'it is possible to do so consistently with [the statutory provisions]' purpose' cf G Brennan, 'Introduction to Human Rights Law: Seminar – Part II' (2007) 81 ALJ 248, 252. Note also the procedural requirements of a proceeding where 'a question arise that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter' (s36(1)) (and query whether the latter arises when no-one suggests that a statutory provision can be interpreted in any alternative way) and notice to the Attorney-General and the Victorian Equal Opportunity & Human Rights Commission (s36(3)).

²³¹ *Dietrich v R* (1992) 177 CLR 292, 363-364 cf

²³² *Crimes Act 1958* (Vic), s568(1) cf *Stevens v McCallum* [2006] ACTCA 13, [137]-[140] holding that the *Human Rights Act 2004* (ACT), s21(1) gives ACT courts a jurisdiction to quash new trials that goes beyond the limits of appeal statutes. (Note that the ACT Act has no equivalent to s39.)

²³³ *Crimes Act 1900* (NSW), s409B (now *Criminal Procedure Act 1986* (NSW), s293)

which a court is entitled to give effect in determining whether to exercise its jurisdiction when it is properly invoked.²³⁴

This pronouncement may be read in a number of ways, possibly with different implications for the Supreme Court of Victoria's role under the Charter. On one reading, it won't be applicable in Victoria from 2008, because the Charter's interpretation regime gives Victoria's courts a jurisdiction (albeit a limited one) to act on any opinion it forms that a statutory provision is unfair. On another reading, the High Court's position remains apposite, in light of s36(5) of the Charter, holding that the making of a declaration of inconsistent interpretation neither affects 'the validity, operation or enforcement' of any statutory provision nor gives legal rights to anyone. On a third reading, the remarks signal a possible constitutional problem with the Charter's provisions on declarations of inconsistent interpretation, on the basis that they give the Supreme Court a legislative role that is incompatible with its role in exercising federal jurisdiction.²³⁵

This paper's concern is based on a quite different, but arguably more far-reaching reading of the High Court's position: that it reflects a view that, in an Australian context, the notion of a 'fair' trial is commensurate with one that is 'according to law'. This reading is based on the arguments put by one of the barristers in the High Court:

It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law. The expression 'fair trial according to law' is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognizes that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness.²³⁶

This argument was not well received by at least two members of the High Court:

Brennan CJ: However you describe it, the proposition is: because it is according to law, it will not be a fair trial?

Mr Bodor: Yes.

Brennan CJ: How can that be?

Mr Bodor: Because the evidence is available which demonstrates that any attack, if I can call it that, upon the complainant must be incomplete, it cannot be assessed in its true context, in its true light.

McHugh J: But that overlooks the view that Parliament took a considered decision. They were not lacking people when this legislation was introduced to warn those who had the carriage of this matter as to what the result of this sort of legislation could bring about, but Parliament went ahead and legislated. That being so, how could a trial be regarded as fair [*sic* unfair] when the Parliament has said this evidence has to be excluded?²³⁷

²³⁴ Transcript of proceedings, *PJE v The Queen* S154/1995 (9th September 1996). See also *Berrigan v The Queen* S159/1994 (23 November 1995), holding that '[t]he correct application of the provision cannot of itself found an argument that the trial was unfair'.

²³⁵ *Kable v DPP* (NSW) [1996] HCA 24.

²³⁶ Transcript of proceedings, *PJE v The Queen* S154/1995 (9th September 1996).

²³⁷ *Ibid.* Counsel also raised the hypothetical of counsel being (literally) gagged at a special leave application. Justice McHugh noted that the accused can (and has been) metaphorically gagged and raised the hypothetical of Parliament legislating that 'Upon arrest there's a presumption of guilty', asking 'But what would a court do?' See also *Berrigan v The Queen* S159/1994 (23 November 1995), where McHugh J said: 'That is really a staggering proposition. How can a trial be unfair if it is conducted in accordance with the

If these views were applied to interpret s24(1) of the Charter, then the right to a ‘fair hearing’ would be equated with a right to the application of the current rules of evidence. While this is by no means an empty right, it is one that is subject to the same defects that Part A of this paper identified in relation to Charter rights that are expressly limited to unlawful interferences or that contain exceptions where the law otherwise provides. Such rights are *always* compatible with existing laws, leaving the scrutiny and interpretation regimes inapplicable and removing the law reform benefits that flow from subjecting laws to the test in s7(2).²³⁸

It might be argued that courts considering issuing a declaration of inconsistent interpretation will be applying the notion of a ‘fair hearing’ in s24(1), which is expressly drawn from the ICCPR and thus ought to be read as precisely that ‘overriding qualification and universal criterion’ that counsel proposed to the High Court in the rape shield case.²³⁹ However, there are (at least) two Australian precedents for reading internationally-focussed references to the fairness of trials in Australian legislation as, at least in part, a reference to a trial’s accordance with Australia’s law of evidence.²⁴⁰

law?’ and that ‘[I]f the legislature say that a trial is to be conducted without this evidence, it is obviously the legislative judgment that such a trial is not unfair. How can a court say it is unfair?’

²³⁸ Cf the hypothetical emerged at the conclusion of the High Court proceedings:

Mr Kintomanis: If Parliament was to reintroduce the *Test Act* and deprive Roman Catholics of certain privileges like giving evidence in court, so if you were stuck with a Roman Catholic witness you would be in difficulties, one could not say that there would be a fair trial.

McHugh J: Why not?

Kirby J: It seems very unfair to me.

Brennan CJ: I think your time is up, Mr Kintominas. You are saved by the bell perhaps.

Ibid. See also *Berrigan v The Queen* S159/1994 (23 November 1995), where McHugh J posed the following hypothetical: ‘[S]upposing the legislature said hearsay evidence is admissible in all criminal trials and it does not matter how removed the hearsay is. Could a court then say there is a miscarriage of justice because an innocent man may have been convicted; he has been convicted entirely on hearsay evidence; nobody has had a chance to cross-examine the person who is the source of this hearsay material?’ cf *Military Commissions Act of 2006* (USA), inserting 10 USC 47A, §§ 949a(b)(2)(E) [hearsay evidence] & 949d(f) [introduction of classified information].

Perhaps more telling is the High Court’s approach to the same NSW statutory provision during an appeal four years later, where the argument based on a fair trial was again raised: *HG v The Queen* [1999] HCA 2, [46]-[47].²³⁸ The High Court held that the provision’s ban on ‘evidence of sexual experience... and sexual activity’ extended to evidence of non-consensual sex, making no reference to the Court’s earlier unanimous view, in a case involving such evidence, that the operation of the provision required legislative attention (Transcript of proceedings, *PJE v The Queen* S154/1995 (9th September 1996), extracted below.): [28]-[31], [67]-[70], [92], [124], [146]-[147], holding that the prohibitions on ‘evidence of sexual experience... and sexual activity’ covered non-consensual sex. The result – a quite disturbing one in this author’s view – is that the defendant’s conviction for child sexual abuse was sustained even though he had been unable to present his primary defence theory: an expert witness who, after interviewing the complainant, had concluded that he account of abuse by the defendant was likely to be a transference from a much earlier episode of abuse at the hands of another.

²³⁹ Cf J Spigelman, ‘The truth can cost too much: The principle of a fair trial’ (2004) 78 ALJ 29, 30 referring to fairness as ‘an overriding and, perhaps, unifying principle’, citing *Dietrich v The Queen* (1992) 177 CLR 292, 326 (per Deane J).

²⁴⁰ Note also that s32(2) provides that ‘judgments of *domestic*, foreign and international courts and tribunals... may be considered’ (emphasis added) contrast *Human Rights Act 2004* (ACT), s31(1), which refers only to ‘foreign and international courts and tribunals’ cf G Brennan, ‘Introduction to Human Rights Law: Seminar – Part II’ (2007) 81 ALJ 248 noting that the ‘sparse terms in which rights and responsibilities are defined in the Charter will have to be fleshed out... having regard to *the common law, the laws and*

One concerns s34(2) of the *Extradition Act 1988* (Cth), which obliges Australian magistrates considering an application for extradition to New Zealand to order defendants to be released if surrendering them to New Zealand ‘would be *unjust*’.²⁴¹ The Federal Court, observing that overseas courts have assessed the validity of extraditions according to international human rights documents, including the right to a fair trial, has held that one basis for finding that surrender would be unjust is if the defendant would, in New Zealand, be unlikely to be receive a fair trial.²⁴² However, despite the international law references²⁴³ and the court’s own holding that fairness should be assessed according to the ‘standards... which prevail in the Australian community’²⁴⁴, the court’s discussion of fairness in this context has instead focussed on the requirements of Australia’s law of evidence (discerned either from High Court rulings or the uniform evidence legislation.)²⁴⁵

A second example concerns the Charter itself. In the first major judgment on the Charter, King J, despite holding that the Charter was inapplicable to the proceedings before her, considered the interaction of s6(2)(b), applying the Charter to courts ‘to the extent that they have functions under Part 2’ and the fair trial rights under Part 2, stating a preliminary view that:

When a Court is determining what would constitute a fair hearing in respect of a criminal trial it would be difficult to imagine that the rights referred to as minimum guarantees in criminal proceedings would not form, *in addition to any common law and other statutory requirements*, the basis of what constitutes a fair hearing.²⁴⁶

While King J’s view that courts are bound to apply the Charter in determining what is fair is controversial, the importance of her remarks for this paper is her assumption that the meaning of a ‘fair hearing’ under s24(1) is to be based, not on the meaning of that provision, but rather other legal tests, including the common law, statutes and the narrower criteria in s25(2) of the Charter.

It is, of course, far too early to predict how Victoria’s courts will define the word ‘fair’ in s24(1) of the Charter.²⁴⁷ The above decisions are neither binding Charter precedents nor

conventions in force in Victoria, the text and structure of the Charter and the values and standards of the contemporary Victorian community.’ (emphasis added)

²⁴¹ Emphasis added.

²⁴² *Bannister v New Zealand* [1999] FCA 362, approved in *New Zealand v Moloney* [2006] FCAFC 143 (special leave to the High Court refused: *Moloney & Anor v New Zealand* [2006] HCATrans 569.)

²⁴³ *New Zealand v Moloney* [2006] FCAFC 143, [45]-[51]

²⁴⁴ *Bannister v New Zealand* [1999] FCA 362, [26].

²⁴⁵ *Bannister v New Zealand* [1999] FCA 362, [11]-[17], [27]; *New Zealand v Moloney* [2006] FCAFC 143, [185]-[187], [206]-[220] but cf [186] (holding that neither a High Court judgment nor a provision of the UEL was an ‘Australian standard’ in relation to ordering separate trials), [203] (decrying comparisons ‘between Australian and New Zealand rules of evidence and criminal procedure’) and [224] (deciding that the High Court’s jurisprudence on directions on forensic disadvantage ‘does not seem to us to be as integral to a fair trial’ as the High Court’s jurisprudence on representative counts).

²⁴⁶ *R v Williams* [2007] VSC 2, [54].

²⁴⁷ In the United Kingdom, of ten ‘declarations of incompatibility’ issued (and upheld) by UK courts under the *Human Rights Act 1998* (UK) listed in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, appendix to Lord Steyne’s judgment, just two made in relation to Article 6(1), the ECHR equivalent to s24(1). In one case, the statute’s unfairness only because it required that a defendant’s property be seized until the defendant satisfied a reverse burden.: *International Transport Roth GmbH & Ors v Secretary of State For the Home Department* [2002] EWCA Civ 158, [47] cf [183]-[189]. In the other, the ruling relied on the requirement that decision be made by an ‘independent and impartial’ court of tribunal: *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46. (A further three declarations on the basis of Article 6(1) were overturned on appeal.) Of a further ten applications of the interpretation regime listed by Lord Steyne, seven related to Article 6, but only one (*R v A (No 2)* [2002] 1 AC 45, discussed earlier in this article) related to the law of

do they rigidly prescribe an approach that equates ‘fairness’ with ‘according to law’. However, the possibility of such an approach, or even a tendency towards it, is notable, because it would greatly limit the application of the Charter to the law of evidence. Some have voiced concerns that courts under human rights regimes may become too deferential to the views of the executive or the legislature, especially in regards to whether a law is a reasonable and demonstrably justified limit on a human right.²⁴⁸ Evidence law may be susceptible to an equally insidious form of deference, where the core human right that that body of law is supposed to promote comes to be defined by the contents of the law, whether sourced from the judiciary or the legislature.²⁴⁹

It takes two to participate in a dialogue on human rights. Assuming that a court is willing to declare that part of the law of evidence is incompatible with a human right, will the legislative and executive branches respond? Australian evidence law has at least one celebrated example of governments responding to rights-focused judicial criticism with both changed conduct and new statutes. In the 1970s and 1980s, the High Court repeatedly dealt with appeals where the defendants claimed that evidence of confessions they had allegedly made was the product of police ‘verballing’.²⁵⁰ Eventually in 1991, a majority of the High Court, noting that some jurisdictions had begun recording all interviews with suspects, held that the content of ‘the entitlement of an accused person to a fair trial according to law... may vary with... developments in technology’ and stated that all jurors must be told of the Court’s view that convictions on the basis of uncorroborated confessions are dangerous.²⁵¹ Within the next five years, all Australian jurisdictions introduced recording equipment in police stations and enacted statutes excluding confessions from suspects that are not evidenced by tape recordings of the whole interview.²⁵²

However, this example of a dialogue between the judicial, legislative and executive branches of government differs from one that would occur under the Charter in a crucial way: the High Court’s 1991 pronouncement was backed by a remedial measure – a mandatory jury direction – that would not be available for legislation that is incompatible with a Charter right.²⁵³ In Western Australia, the difference was more stark, because the executive initially refused to proclaim the legislation that the parliament had enacted. This impasse was only broken when the Western Australian Court of Criminal Appeal, after decrying the executive’s failure, announced its intention to exclude future confessions uncorroborated by tape recordings.²⁵⁴

evidence. The remainder related to commencements of civil actions or claims, reverse burdens and legal advice to prisoners. A recent decision on the exclusion of evidence obtained by torture relied on Article 5(1) (on humane treatment on detention) rather than Article 6(1): *A v Secretary of State for the Home Department* [2005] UKHL 71, [25].

²⁴⁸ E.g. *Liversidge v Anderson* [1941] 3 All ER 338, 361 (Atkin LJ dissenting).

²⁴⁹ Note, however, that this argument relates only to the ‘fair hearing’ right in s24(1). It is not suggested that the courts will be similarly deferential in relation to breaches of the remainder of the procedural rights: ss21-27.

²⁵⁰ See e.g. *Driscoll v The Queen* (1977) 137 CLR 517; *Wright v The Queen* (1977) 15 ALR 305; *Carr v The Queen* (1988) 165 CLR 314; *Duke v The Queen* (1989) 83 ALR 650.

²⁵¹ *McKinney v The Queen; Judge v The Queen* (1990) 171 CLR 468, 474-478 but see 485-486, where Brennan J held that a new rule ‘designed to compel or to induce the executive government to enhance the administration of justice for which the executive government is responsible... is more appropriate to the exercise of legislative power than it is to the exercise of judicial power.’

²⁵² See J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 498-505.

²⁵³ s36(5) cf s39(1).

²⁵⁴ *Mallard v R* (unreported, Court of Criminal Appeal of Western Australia, 11th September 1996). Alas, the Court refused to apply this rule retrospectively to the facts before it, cf *Mallard v The Queen* P52/1996 (24

Section 36(5)(b) of the Charter holds that ‘a declaration of inconsistent interpretation does not... create in any person any legal right’. Rather, a declaration’s sole legal effect is that the Minister responsible for the statutory provision must respond in writing within six months. Will Victoria’s government do anything more if a declaration of inconsistent interpretation is issued in relation to a provision of Victoria’s evidence law? In the NSW rape shield case discussed above, the High Court, after rejecting the argument that courts can give effect to a view they form that an enacted statutory provision is unfair, added the following remark:

It is the unanimous view of the Court... that the provisions... clearly warrant further consideration by the legislature in the light of the experience of its operation.²⁵⁵

This pronouncement, while avoiding any reference to human rights, is nevertheless in many respects analogous to (and was presumably intended to have a similar effect to) a declaration of inconsistent interpretation under the Charter. Significantly, the NSW government’s response was to refer the rape shield provision to the NSW Law Reform Commission. The Commission, noting the fundamental nature of the presumption of innocence and the right to a fair trial, recommended significant changes to the law.²⁵⁶

This sequence resembles exactly the sort of dialogue that the Charter is supposed to promote. However, nearly a decade later, none of the Law Reform Commission’s proposals have been implemented, with the government’s only reaction to date being a call for further research.²⁵⁷ More significantly, NSW’s rape shield provision remains on the statute books unaltered except for its location.²⁵⁸ It might be argued that this is entirely consistent with the kind of dialogue the Charter envisages, which leaves the final decision to the legislature.²⁵⁹ However, an alternative explanation lies in the political limits to law reform. Two other factors might have stayed the government’s hand: First, the Commission’s proposals sparked furious responses from different lobby groups on criminal justice, which produced little if any common ground.²⁶⁰ Second, the NSW government has long been locked in a series of ‘law and order’ auctions, with rape defendants featuring as a recurrent source of moral panic.²⁶¹ Arguably, the type of dialogue that the Charter envisages cannot occur in these circumstances.

So, the Charter has much to overcome if it is to promote evidence law reform that corresponds to the human rights in Part Two. Courts may regard much of the law of evidence as inherently compatible with the core right to a ‘fair hearing’ under s24(1). Any declaration of inconsistent interpretation may lead to a discussion, but not a dialogue, because evidence law’s competing goals can produce intractable opposing views. Moreover, evidence law’s low priority on the agenda of Australian governments, especially where criminal defendants’ rights are concerned, may mean that no reforms

October 1997). Ten years later, Andrew Mallard joined the ranks of victims of Australian miscarriages of justice: *Mallard v The Queen* [2005] HCA 68.

²⁵⁵ Transcript of proceedings, *PJE v The Queen* S154/1995 (9th September 1996).

²⁵⁶ NSW Law Reform Commission, *Report 87: Review of the Crimes Act 1900* (NSW), s409B (1998).

²⁵⁷ Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005, Attorney General’s Department of NSW), 61.

²⁵⁸ *Criminal Procedure Act 1986* (NSW), s293.

²⁵⁹ Cf S Evans & C Evans, ‘Legal redress under the *Victorian Charter of Human Rights and Responsibilities*’ (2006) 17 Public LR 264, 271.

²⁶⁰ See Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005, Attorney General’s Department of NSW), 59-60, noting a ‘clear division’ on the NSWLRC’s central recommendation and the ‘unlikely of resolving this issue’.

²⁶¹ See R Hogg & D Brown, *Rethinking Law and Order* (1998, Pluto Press, Sydney).

follow. Notably, the major evidence law reforms in recent years, the model evidence legislation and sexual assault law reform, emerged not from a court-prompted human rights agenda, but rather as a traditional law reform response to outmoded common law jurisprudence.

Paradoxically, the success of the model evidence law reforms may act as a further brake to the rights-focussed reform of Victoria's law of evidence. As noted in the introduction to this paper, the Victorian government has announced its intention to adopt Australia's model evidence legislation. That legislation, the product of an inquiry by the Australian Law Reform Commission in the 1980s²⁶² has been adopted by the Commonwealth government (in a law applicable in the ACT) and in New South Wales, Norfolk Island and Tasmania.²⁶³ Not only Victoria, but also the Northern Territory and Western Australia are moving, to some degree, towards adopting the legislation.²⁶⁴ While the initial impetus for the model legislation was to improve upon the common law, the contemporary momentum is the drive to 'harmonise' Australia's laws.²⁶⁵ As the Northern Territory Law Reform Commission observed in its brief report recommending adoption of the legislation in that jurisdiction, failure to do so may leave non-adopters 'stand[ing] out like an outhouse [*sic*] in the desert.'²⁶⁶

To understand the potential clash between the Charter and the uniform evidence legislation, consider the following mechanisms that exist to promote consistency across jurisdictions that have adopted the legislation:

- in-statute notes detailing where provisions (which have common numbering across all the statutes) differ from other jurisdictions²⁶⁷
- joint participation of all jurisdictions (including jurisdiction yet to enact the legislation) in law reform commission inquiries into evidence law²⁶⁸
- a recommendation that no jurisdiction amend its legislation without that amendment being approved by the Standing Committee of Attorneys-General²⁶⁹
- court judgments favouring comity across jurisdictions that have adopted the legislation and sympathetic development of the common law in jurisdictions that haven't²⁷⁰

²⁶² Australian Law Reform Commission, *Report No 26 (Interim) Evidence* (1985); Australian Law Reform Commission, *Report No 38 Evidence* (1987).

²⁶³ *Evidence Act 1995* (Cth) (applicable in the ACT: s4), *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas) & *Evidence Act 2004* (NT).

²⁶⁴ Northern Territory Law Reform Committee, *Report No. 30: Report on the Uniform Evidence Act* (2006); Law Reform Commission of Western Australia, *Final Report, Project 92: Review of the Criminal and Civil Justice System in Western Australia* (1999) cf Queensland Law Reform Commission, *A Review of the Uniform Evidence Acts* (2005), 8, noting 'those provisions that would require further review if Queensland were to consider adopting the uniform Evidence Acts.'; Australia Law Reform Commission, *Submission No 32 to the Standing Committee on Legal and Constitutional Affairs's inquiry into Harmonisation of legal systems within Australia and between Australia and New Zealand* (2006, 4, stating that it has been advised that South Australia's Attorney-General has 'placed the introduction of the uniform evidence legislation on [its] legislative agenda'.

²⁶⁵ Standing Committee on Legal and Constitutional Affairs (Cth House of Representatives), *Harmonisation of legal systems within Australia and between Australia and New Zealand* (2006), 155-160.

²⁶⁶ Northern Territory Law Reform Committee, *Report No. 30: Report on the Uniform Evidence Act* (2006), 12.

²⁶⁷ Cf *Evidence Act 2001* (Tas), s2A.

²⁶⁸ Australian Law Reform Commission, *ALRC Report 102, NSWLRC Report 112, VLRC Final Report: Uniform Evidence Law* (2005), 40-41.

²⁶⁹ Standing Committee on Legal and Constitutional Affairs (Cth House of Representatives), *Harmonisation of legal systems within Australia and between Australia and New Zealand* (2006), 160.

If Victoria adopts the uniform evidence legislation, then all its version of the statute will become subject to the Charter's interpretation regime, as well as the potential impact of any declaration of inconsistent interpretation. In effect, from the moment it is enacted, Victoria's statute will differ – or at least potentially differ – from all the other model evidence statutes in Australia, even if precisely the same wording is used. Moreover, every time a Victorian court is compelled by s32(1) to interpret a provision differently from the interpretation followed elsewhere, the Victorian statute will effectively be amended (without any in-statute note to that effect, joint law reform effort, approval by SCAG or broadly applicable court ruling.)

Not only will this result in lack of harmonisation between Victoria and other Australian jurisdictions, but there will also be disharmony *within* Victoria in two respects. One is that the *Evidence Act 1995* (Cth), applicable in all federal court proceedings within Victoria,²⁷¹ will not be subject to the Charter, whereas Victoria's statute, applicable in all state courts, including those hearing federal matters, will be. A second is that even the Victorian statute will potentially not be subject to the Charter with respect to some proceedings in state courts. This is the result of the Charter's poorly drafted and conceived transitional provisions, which, while applying the Charter to all legislation, past or future,²⁷² nevertheless provide that the 'Charter does not affect any proceedings commenced or concluded' before 1st January 1997.²⁷³ One reading of this proviso is that the interpretation regime will not apply to such proceedings, even if they only come to trial several years after the Charter has commenced;²⁷⁴ so, once the uniform evidence legislation has commenced in Victoria, some proceedings will be governed by that statute as modified by s32(1), whereas others (especially in the legislation's early days) will be governed by the unmodified version.

This unsatisfactory situation will, most likely, be ameliorated by one or more of the following developments

- Courts applying s32(1) may regard the 'purpose' of uniformity in the model evidence legislation as barring any divergent rights-compatible readings
- The Supreme Court may exercise its discretion *not* to issue a declaration of inconsistent interpretation in relation to the new Victorian evidence legislation, on

²⁷⁰ See J Gans & A Palmer, *Australian Principles of Evidence* (Cavendish, 2004), 18-20.

²⁷¹ *Evidence Act 1995* (Cth), s4(1).

²⁷² s49(1)

²⁷³ s49(2). Compare the position under the *Human Rights Act 1998* (UK), where the House of Lords sensibly distinguishes between circumstances where a retrospective re-interpretation of legislation would have an 'unfair result for one party or the other' from those where it won't: *Wilson & Ors v. Secretary of State for Trade and Industry* [2003] UKHL 40, [20].

²⁷⁴ Cf the Explanatory Memorandum, which provides that this sub-clause 'means that the Charter may not be *relied upon* in any legal proceedings commenced before that date.' (emphasis added). In *R v Williams* [2007] VSC 2, [40]-[48] the Supreme Court held that a criminal proceeding commences when the defendant is first charged. The effect of this interpretation is any defendant first charged before 1 January 2007 cannot rely on the Charter in any trial, even one delayed for years or even decades (for example because an earlier trial miscarried or a conviction was quashed on appeal or a reference to an appeal court.) (Note that the Explanatory Memorandum misstates the commencement date of Part 2 as 1 January 2008, whereas the correct date is 1 January 2007: see s2(1).) Compare the sensible position under the *Human Rights Act 1998* (UK), where the House of Lords has noted that the UK interpretation regime can be applied to 'a post-Act criminal trial in respect of pre-Act happenings' as 'The prosecution does not have an accrued or vested right in any relevant sense': *Wilson & Ors v. Secretary of State for Trade and Industry* [2003] UKHL 40, [21].

the basis that such a declaration would promote undesirable lack of uniformity across Australia²⁷⁵

- The Victorian government may refuse to enact legislation responding to such a declaration unless all other model evidence law jurisdictions also agree to do so.
- Indeed, the Victorian parliament may regard the existence of the harmonisation movement in evidence law as an ‘exceptional circumstance’ meriting the use of an override declaration to prevent the application of the scrutiny and interpretation regimes from causing Victoria to diverge from the national model.²⁷⁶

These mechanisms (in addition to the features of the Charter noted in this paper that dampen its effect on evidence law in any case) will almost certainly keep Victoria’s future evidence law largely in harmony with other jurisdictions. However, they will do so at the cost of failing to promote the Charter’s human rights in the settlement of factual disputes in Victoria.

CONCLUSION: RECOMMENDATIONS 34 & 35

In an article on the origins of the Charter, George Williams, the Chair of the Consultative Committee, conceded that journey from the Charter’s inception to its enactment was a brief one:

The time frame was tight, with only six months given to consult with Victorians... However, the decision to provide only six months was both pragmatic and sensible. It was pragmatic because with a Victorian election due in November 2006, a 12-month consultation would not have allowed time for the implementation of any recommendations prior to the election. It was also sensible because six months was sufficient time for an intense and busy process to determine if people were in favour of change and, if so, generate momentum towards that end. There was a real possibility that a longer consultation may have allowed any momentum generated by the process to dissipate.²⁷⁷

The political wisdom of this approach is evident in the fact that the Charter was enacted. However, the costs of this approach are equally evident in the enacted bill’s contents, drafted by the Committee apparently simultaneously with its extensive consultations across Victoria. Wherever one stands on the need for a bill of rights or the desirability of the parliamentary rights model, there are many significant provisions in the Charter that are inadequately justified and some that are indefensible.

The Consultative Committee, labelling the Charter ‘the beginning of a journey’, found that ‘regular reviews are necessary to assess whether the Charter is working effectively’.²⁷⁸ So, the final two of the Report’s thirty-five recommendations were for automatic reviews of the Charter. The matters that the Charter states should be included in the review all relate to the expansion of the Charter beyond the boundaries set by the Consultative Committee: adding additional rights protected by international treaties and augmenting the Charter’s discrimination protection, its auditing processes and its remedy provisions.²⁷⁹ This paper’s review suggests that a more urgent case for change exists with

²⁷⁵ Cf s35(2), providing that the Supreme Court ‘may’ make a declaration.

²⁷⁶ s31 cf s31(4).

²⁷⁷ G Williams, ‘The *Victorian Charter of Human Rights and Responsibilities*: Origins and Scope’ (2007) 30 Melbourne ULR 880, 886.

²⁷⁸ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 135-138.

²⁷⁹ s44(2).

respect to the way the Consultative Committee's past decisions were implemented in legislative form.

The major problems identified are:

- The gap between the ICCPR's procedural rights and those valued in Victoria's evidence law, notably the scope of the right to a fair hearing and the comprehensiveness of the privilege against self-incrimination
- The failure to appropriately excise the limiting provisions from the ICCPR's rights, especially the limits on the right to privacy and the exemption of Victoria's laws from the scope of some rights.
- The unnecessary narrowness of Part Three's operative provisions, notably the interpretation regime's purpose limitation and the remedies regime's focus on unlawfulness
- The unjustified and capricious exemption of Victoria's courts (when acting judicially) from the obligations regime.

These flaws, combined with the political barriers to a productive dialogue on human rights and evidence identified above, will, if they continue to apply, greatly limit the positive impact of the Charter on Victoria's law of evidence (if not the complexity of proceedings to establish that impact.)

The planned reforms of the Charter will occur in four yearly intervals, so the first review will most likely occur after Victoria has implemented the model evidence legislation. The Consultative Committee was probably correct in concluding 'that one year would be too soon to have a worthwhile review of the Charter.'²⁸⁰ However, there is also a danger that, in four years time, these flaws of the Charter will have become so entrenched in Victorian jurisprudence (and perhaps the statute books of jurisdictions that follow the Charter's approach) that reforms will be rejected on the basis of the need for continuity, both within Victoria and across Australia. In my view, that would be an unfortunate result. It would be equally unfortunate if Victoria's adoption of the model evidence legislation during that time period, with its accompanying imperative of uniformity with other jurisdictions, was to signal the end, rather than the beginning, of the rights-focussed reform of Victoria's evidence law.

²⁸⁰ Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, 2005), 136.