

2 December 2025

Ms Sophie Ellis
Manager, Crime Practice, Youthlaw
By email: Sophie@youthlaw.asn.au

Dear Ms Ellis,

The Justice Legislation Amendment (Community Safety) Bill 2025

1. On 27 November 2025, you briefed us to provide an advice on the Allan Government's recently announced "[Adult Time for Violent Crime](#)" proposed amendments to the *Youth Justice Act 2024* (Vic) (*YJA*) and the *Children, Youth and Families Act 2005* (Vic) (*CYFA*). Thank you for your helpful memorandum.
2. On 12 November 2025, the Victorian Government announced that certain crimes allegedly committed by children aged between 14 and 17 will be subject to trial and potential sentencing in the County Court of Victoria, and that these crimes will also be subject to increased penalties. The Government stated that the intention of the legislation would be so "courts will treat these children like adults, so jail is more likely, and sentences are longer". The Government also stated that it would remove "the rule that jail for children is the 'last resort' – because for some crimes, it shouldn't be".
3. The Justice Legislation Amendment (Community Safety) Bill 2025 (Vic) (**the Bill**) is to be tabled in Parliament on 2 December 2025. We understand the Bill will be introduced today at midday with debate guillotined at 5:00pm, when there will be a forced vote.¹

¹ Because of the very limited time to consider the Bill, this advice may be revised. For example, we have not been able to consider the Statement of Compatibility.

Structure

4. After providing a summary of our advice, this memorandum of advice will consider:
 - (A) The content of the Bill;
 - (B) Statements of principle from the Victorian Court of Appeal in relation to children in the criminal justice system; and
 - (C) The relevance of human rights of children under the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**) and the human rights of children under international law, including the Convention on the Rights of the Child (**CROC**).²

Summary of Advice

5. The Bill represents a significant departure from long-standing principles underpinning the Victorian criminal justice system in relation to children.
6. In summary:
 - (1) The Bill fails to give sufficient weight to the well-recognised principles that:
 - (i) Children are immature and prone to ill-considered or rash decisions, and may lack the degree of insight, judgment and self-control that is possessed by an adult and do not fully appreciate the nature, seriousness and consequences of their criminal conduct;
 - (ii) Children are able to be rehabilitated, and such rehabilitation is one of the great objectives of the criminal law;
 - (iii) Incarceration will more likely impair, rather than improve, a child's prospects of rehabilitation;

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

- (2) It is strongly arguable that the proposed amendments in the Bill are contrary to the Charter and Australia's obligations under international law because:
- (i) They fail to protect the best interests of the child as a primary consideration;
 - (ii) They subject children to the potential for disproportionate punishment, which may constitute cruel, inhuman or degrading treatment;
 - (iii) They fail to adhere to the foundational principle that the detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time; and
 - (iv) They reflect a failure to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment (many of whom will themselves commit offences), and fail to provide an environment that fosters the health, self-respect and dignity of the child;
- (3) While the Bill does not permit children to be sentenced under the *YJA* and the *CYFA* having regard to the principle of 'general deterrence', it would still treat children as a 'means to an end' through taking a disproportionately punitive approach. It would expose more children to being sentenced as adults in the Higher Courts, where general deterrence can be a relevant sentencing consideration, and this will result in significantly increased sentences. This ignores the best evidence, such as that given to the Yoorrook Justice Commission (**Yoorrook**), as to how imprisonment affects children and ultimately makes the community less safe because of the criminogenic effects of detention and imprisonment;
- (4) The proposed amendments will have a disproportionate impact on First Nations children and other children of colour. It should be noted that many

representatives of the Government gave evidence before Yoorrook and acknowledged these kinds of effects.³ As made clear at Yoorrook:

- (i) The impact of imprisonment on First Peoples is profound, far-reaching and intergenerational. It contributes to disempowerment and marginalisation, which in turn harms physical, emotional, social, economic and cultural wellbeing. It also engages human and cultural rights of First Peoples;⁴
 - (ii) as a result of systemic racism, racist attitudes and discriminatory actions of police have gone undetected, unchecked, unpunished or without appropriate sanctions and have caused significant harm across generations of Aboriginal families;⁵
- (5) The above matters may result in the Supreme Court issuing a declaration of inconsistent interpretation pursuant to s 36(2) of the Charter because the amendments are incompatible with the human rights of children;⁶ and
- (6) Further, the proposed amendments may breach s 10 of the *Racial Discrimination Act 1975* (Cth) because of their disproportionate impact on minorities, including First Nations peoples. This may result in the proposed amendments being inoperative to the extent of the inconsistency between State and Federal laws.⁷

³ Yoorrook for Justice Report into Victoria's Child Protection and Criminal Justice Systems 2023, p 20 and 238 and 239. See, for example, the evidence of the Hon Enver Erdogan MP, Minister for Corrections, Youth Justice and Victim Support, who said that "[a]s we know, the younger the cohort, the more likely they will grow out of the behavioural issues they are displaying and you've got the best chance at turning their trajectories around". See further the evidence of the Hon Jaclyn Symes, the then Attorney-General.

⁴ Ibid, 239.

⁵ Yoorrook Justice Commission, Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 496 [40]–[46].

⁶ Subject to an override by Parliament pursuant to s 31 of the Charter. Albeit that, in *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 (*Momcilovic*), Crennan and Kiefel JJ observed at 229 [605]: "[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate".

⁷ Because of the time constraints, it is beyond the scope of this advice to consider this issue in detail, but is it a matter that, in our view, should be referred to Committee for serious consideration.

Part A: The Bill

7. The Bill contains six parts, of which parts 2, 3, and 4 contain the substantive changes.
8. **Part 1** contains an outline of the Bill, a statement of its purpose, and commencement dates:
 - a. Part 2 will come into effect the day after the Amending Bill receives Royal Assent;
 - b. Parts 3 and 4 will come into effect either on 27 February 2026, or
9. **Part 2** is headed 'Offences and Penalties' and contains amendments to the *Crimes Act 1958* (Vic) (***Crimes Act***) and the *Criminal Procedure Act 2009* (Vic) (***CPA***). It has four broad effects:
 - a. It increases maximum penalties for five offences (for all offenders, not only children), including raising the maximum penalty for aggravated home invasion and aggravated carjacking to Level 1 imprisonment (life);⁸
 - b. It classifies the offence of recruiting a child to engage in criminal activity as an indictable offence triable summarily under the *CPA*;⁹
 - c. It creates a new offence of using a knife to commit other specified offences (including causing serious injury recklessly, affray, or violent disorder);¹⁰ and
 - d. It amends the offence of aggravated carjacking, so that the offence of carjacking is aggravated by the presence of a child in the stolen vehicle, whether or not the offender knows about the child's presence.¹¹

⁸ Bill, Cls 5 and 6 (unless otherwise stated, all footnotes refer to the Bill).

⁹ Cl 8.

¹⁰ Cl 9.

¹¹ Cl 10.

10. **Part 3** is headed ‘Sentencing’ and amends the *CYFA* and the *YJA*. It alters the factors that courts sentencing children under those Acts must take into account in the following ways:
- a. It creates a new requirement for Courts sentencing under the *CYFA* to take into account any impact on victims and any restorative steps taken by the child;¹²
 - b. It broadens the consideration of protecting the community from further offending as a sentencing factor under the *CYFA* from only applying to sentences for specific offences, to sentences for all offences;¹³
 - c. It repeals from the *YJA* the principle that “efforts to support rehabilitation and positive development are the most effective ways to reduce reoffending”;¹⁴ and
 - d. It repeals from the *YJA* the principle that “a custodial sentence [should be] imposed as a last resort and for the minimum period appropriate and necessary”.¹⁵
11. **Part 4** is headed ‘Charges not to be heard and determined summarily by the Children's Court’, and amends the *CYFA*, the *YJA*, the *CPA*, and the *Magistrates’ Court Act 1989 (MCA)*. It restricts the jurisdiction of the Children’s Court to hear and determine certain 'designated offences'. In particular:
- a. It creates a new category of ‘designated offences’, which are: causing serious injury intentionally in circumstances of gross violence; recklessly causing serious injury in circumstances of gross violence; home invasion; aggravated home invasion; and aggravated carjacking;¹⁶

¹² Cl 11(a).

¹³ Cl 11(b).

¹⁴ Cl 12.

¹⁵ Cl 13.

¹⁶ Cl 16(3) (This definition is carried over to the *YJA*, see Cl 18).

- b. It removes from the Children's Court the ability to hear and determine charges against children for designated offences where the child was 15 years or over;¹⁷
- c. It removes from the Children's Court the ability to hear and determine charges against children
 - (i) for designated offences where the child was 14 years old, or
 - (ii) for charges of carjacking where the child was 14 years or older,

unless a request is made by the child or prosecution, and the Court is satisfied it has adequate sentencing powers, and (inter alia) there is a substantial and compelling reason for the Children's Court to hear and determine the charge summarily;¹⁸
- d. It explicitly removes designated offences from being considered as indictable offences triable summarily for the purposes of the *CYFA*;¹⁹
- e. It restricts the exception that allowed certain offences to be tried summarily where (amongst other things) substantial and compelling reasons exist so that it only applies to terrorism and foreign incursion offences;²⁰
- f. It restricts the circumstances where the Children's Court *must* consider whether it is inappropriate to hear and determine charges against a child summarily to only charges of rape and rape by compelling sexual penetration;²¹
- g. It prevents the Children's Court from hearing and determining indictable charges summarily where the child is already committed to stand trial for

¹⁷ Cl 16(1).

¹⁸ Cl 14(6).

¹⁹ Cl 14(2)(a).

²⁰ Cl 14(3).

²¹ Cl 14(7).

related offending, unless there are substantial and compelling reasons to do so;²²

- h. It inserts as an example of factors that might establish exceptional circumstances which would cause the Children's Court to uplift an indictable offence triable summarily to the County Court: "If the child has previously committed a number of serious armed robberies or aggravated burglaries, the seriousness, nature and number of those offences";²³
 - i. It inserts parallel sections into the *CPA* regarding transfers back to the Children's Court;²⁴ and
 - j. It extends the jurisdiction of the Magistrates' Court to conduct committal proceedings for designated offences committed where the child was 15 years or older.²⁵
12. In short, the Bill contains what, if enacted, would be sweeping changes to the criminal justice system that would see many more children sentenced in the Higher Courts (potentially as adults) and exposed to lengthier sentences of imprisonment.²⁶

Part B: The Court of Appeal

13. The Court of Appeal of the Supreme Court of Victoria has, on many occasions, emphasised the vulnerability of children and young people in the criminal justice system.
14. It is now well-accepted that, in a vast majority of cases, children should not be sentenced in order to make an example to others (known as the principle of general deterrence). This is based on the principle that it is wrong to treat children, who are

²² Cl 14(9).

²³ Cl 15.

²⁴ Cl 24.

²⁵ Cl 25.

²⁶ Children must be dealt with in the Higher Courts for some offences, such as homicides; *CYFA*, s 516.

particularly vulnerable, as a means to other ends, and reflects a recognition enshrined in the *YJA* and *CYFA* that children require sentences that prioritise their rehabilitation.

15. In *CNK v The Queen*,²⁷ the Court of Appeal (Maxwell P, Harper JA and Lasry AJA) found that, on a proper construction of s 362(1) of the *CYFA*, general deterrence was excluded from consideration in the sentencing of children. The Court held:

General deterrence as a sentencing consideration is entirely foreign to a scheme of this character. For, unlike all other sentencing considerations, general deterrence is unconnected with the particular offender. Rather, *the principle of general deterrence treats the offender as a means to an end, as an instrument for effecting a broader community interest*. The court must ask itself what sentence should be imposed on the offender in order to deter other persons who might be minded to engage in similar offending.²⁸

16. The Court explained, “to treat a child as a vehicle for general deterrence would amount to ‘making an example’ of the child, for the purpose of deterring others. This would, in our view, be in direct conflict with the court’s obligation under s 362(1)(d) to ‘minimise the stigma to the child’ resulting from the court’s determination”.²⁹

17. In *Azzopardi v The Queen*,³⁰ Redlich JA (with whom Coghlan and Macaulay AJJA agreed) summarised three key principles concerning the sentencing of youthful offenders (which includes young adults):

There are a number of considerations which underlie the general primacy of an offender’s youth as a sentencing consideration. First, young offenders being immature are therefore “more prone to ill-considered or rash decisions”. They “may lack the degree of insight, judgment and self-control that is possessed by an adult”. They may not fully appreciate the nature, seriousness and consequences of their criminal conduct. As Vincent JA explained in *Director of Public Prosecutions v SJK and GAS*:

In the case of young people, to some extent, the law incorporates an acknowledgment of aspects of immaturity. By reason of the stage of development that an offender may have reached, he or she may not fully appreciate the seriousness and real consequences of the offending actions. However, it does not follow that this is always the situation or that, as teenagers, offenders cannot be held appropriately accountable for their conduct in engaging in serious criminal activity.

²⁷ [2011] VSCA 228; (2011) 32 VR 641 (*CNK*).

²⁸ Ibid, 645 [12] (citation omitted) (our emphasis added).

²⁹ Ibid, 645 [14].

³⁰ [2011] VSCA 372; (2011) 35 VR 43 (*Azzopardi*).

Secondly, courts “recognise the potential for young offenders to be redeemed and rehabilitated”. This potential exists because young offenders are typically still in a stage of mental and emotional development and may be more open to influences designed to positively change their behaviour than adults who have established patterns of anti-social behaviour. No doubt because of this potential, it has been stated that the rehabilitation of young offenders, “is one of the great objectives of the criminal law”. The added emphasis for the purposes of sentencing on realisation of a young offender’s potential to be rehabilitated is further justified because of the community’s interest in such rehabilitation, not only at a theoretical level, but because the effective rehabilitation of a young offender protects the community from further offending. As stated in *R v Lam*:

A primary objective of the criminal justice system is to achieve crime prevention to protect the public. The rehabilitation of an offender should not be seen as a consideration inimical to that objective. Crime prevention to protect the public and the rehabilitation of the offender are interlinked objectives. In sentencing there is thus a broad public interest in taking into account the youth of the offender.

Thirdly, courts sentencing young offenders are cognisant that the effect of incarceration in an adult prison on a young offender will more likely impair, rather than improve, the offender’s prospects of successful rehabilitation. While in prison a youthful offender is likely to be exposed to corrupting influences which may entrench in that young person criminal behaviour, thereby defeating the very purpose for which punishment is imposed. Imprisonment for any substantial period carries with it the recognised risk that anti-social tendencies may be exacerbated. The likely detrimental effect of adult prison on a youthful offender has adverse flow-on consequences for the community. As Fox J stated in *R v Dixon*:

The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every activity is so strictly regulated and supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals ...

When, therefore, a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long one, is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in. His own personality may well be permanently impaired in a serious degree. If he could be kept in gaol for the rest of his life, it might be possible to ignore the consequences to society, but he will re-enter society and often while still quite young. His new-found propensities then have to be reckoned with. A substantial minority of persons who serve medium or long gaol sentences soon offend again.³¹

18. In *Azzopardi*, Redlich JA also cited with approval³² the following principles from the leading judgment of *R v Mills* in relation to youthful (adult) offenders.³³

³¹ Ibid, 53 [34] – 55 [36] (citations omitted).

³² At 55 [37].

³³ [1998] 4 VR 235.

- (1) Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises;
 - (2) In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender.);
 - (3) A youthful offender is not to be sent to an adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark for what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and, where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified. (This proposition is a particular application of the general principle expressed in s 5(4) of the *Sentencing Act*.)
19. The above principles echo what French CJ observed in the judgment of *Hogan v Hinch*,³⁴ “[r]ehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest”.³⁵
20. Similarly, in *DPP v Tokava*,³⁶ the Court of Appeal observed:

A sentencing judge should be astute to investigate whether a non-custodial disposition is to be preferred, even in a case of a serious offence, if in the long term the community’s interest will be best served by that course. This Court should seek to promote public understanding of the fact that – apart from the interest of the individual whom it is sought to rehabilitate, an important interest in itself – there is a vital community interest in maximising the prospects of rehabilitation of an individual who has been convicted of a serious crime”.³⁷

³⁴ (2011) 243 CLR 506.

³⁵ Ibid, 537 [32].

³⁶ [2006] VSCA 156.

³⁷ Ibid, [21] (Buchanan JA, with whom Maxwell P and Vincent JA agreed).

21. It is important to recognise that the above principles relevant to the sentencing of youthful offenders are not without qualification. For example, in *Azzopardi*, the Court observed:

In the same year as *Mills* was decided, this court recognised that there would be cases in which factors such as youth and rehabilitation would take a “back seat” to other sentencing considerations. A year after *Mills*, Batt JA in *R v Bell* cautioned sentencing judges that the propositions in that case, while applied frequently were not of universal or automatic application and would depend upon the circumstances of the offence as well as the offender. His Honour further stated that where the offence in question is conduct that is prevalent among young men, then “besides rehabilitation, general deterrence and specific deterrence must bulk large in informing a sound discretionary determination”. This concept was repeated in *R v Ung*, where Eames JA said that there may be circumstances in which considerations of youth must give way to factors of general and specific deterrence. He referred to the reasons of Callaway JA, with whom Buchanan and Vincent JJA agreed in *R v Tran* that while “rehabilitation of youthful offenders is one of the great objectives of the criminal law which will usually be given greater weight than general deterrence ... [it] is not the only relevant consideration and in an appropriate case might have to yield to considerations of general deterrence”. Vincent JA in *SJK & GAS* recognised that youth may forfeit its primacy where the seriousness of the offence combined with the lack of evidence of any real remorse and no reasonable prospects for rehabilitation. In *Director of Public Prosecutions v McCloy*, Ashley JA discussed a variety of circumstances in which the considerations discussed in *Mills* would no longer be at the forefront when a young offender is to be sentenced. In *R v Huynh*, Nettle JA observed that so long as there remains a realistic prospect of a lenient sentencing disposition facilitating the processes of rehabilitation, the youth of the offender is likely to remain of first importance.

The most oft-cited passage dealing with the issue of the tension between the mitigating influence of an offender’s youth and the increased need for general (and specific) deterrence in the case of very serious violent offending is that of Batt JA in *Director of Public Prosecutions v Lawrence*:

... with an offence as serious as intentionally causing serious injury and particularly with an instance of it as grave as this one, the offender’s youthfulness and rehabilitation, achieved and prospective, whilst not irrelevant in the instinctive synthesis which the sentencing judge must make, were of much less significance than they would have been with a less serious offence. As has been said, youth and rehabilitation must be subjugated to other considerations. They must, as the President said in *Wright*, take a “back seat” to specific and general deterrence where crimes of wanton and unprovoked viciousness (of which the present is an example) are involved, particularly where (again as here) the perpetrator has been given previous chances to control his aggressive habits. This is because the offending is of such a nature and so prevalent that general deterrence, specific deterrence and denunciation of the conduct must be emphasised. There is a particular reason why, with this offence, youthfulness of an offender cannot be of much significance. This is that, as this very case exemplifies, the persons who commit the offence and wreak appalling injuries, very often by kicking and stomping upon their prone or supine

victims, are predominantly youths and young men acting under the influence of alcohol or drugs or both.

In *R v Wyley*, Maxwell P, explained that cases such as “Director of Public Prosecutions v Lawrence are not to be viewed as ‘excluding the principles in Mills’ but simply as instances of how those principles are to be applied”.³⁸

22. However, it is important to emphasise that the above passages focus on the role that general (and specific) deterrence may have for an adult youthful offender. As *CNK* makes clear, in relation to children being sentenced under the *CYFA*, general deterrence is an irrelevant sentencing consideration.
23. However, for children sentenced in the Higher Courts outside of the *CYFA* regime, general deterrence may be a relevant sentencing consideration, although it is often significantly moderated given their youth.³⁹
24. It should be noted that research from the Sentencing Advisory Council demonstrates that there is a real question as to whether, in reality, general deterrence is effective at all, let alone for children at an earlier stage of cognitive development who are less likely than adults to give consideration to the consequences of their actions.⁴⁰
25. In addition to increasing the number of children exposed to general deterrence as a relevant sentencing consideration, the increased penalties and other proposed amendments in the Bill also appear to be intended to achieve a deterrent effect in so far as they would seek, in part, to elevate community protection as a sentencing consideration for children, and remove the principle that imprisonment is a measure of last resort.
26. In reality, by seeking to permit sentences of detention for children – other than as a measure of last resort – it must be intended that this will send a message to the

³⁸ At 55 [38] – 56 [40] (citations omitted).

³⁹ See *DPP (Vic) v Anderson* [2013] VSCA 45; (2013) 228 A Crim R 128, 140 [47] (Maxwell P, Neave JA and Kaye AJA); *Fuller (a pseudonym) v The Queen* [2013] VSCA 186, [38], [41] (Ashley JA); *Castillo v The King* [2023] VSCA 150, [52]-[55], (Beach and Taylor JJA).

⁴⁰ See, eg, Sentencing Advisory Council, “Does Imprisonment Deter? A Review of the Evidence” (April 2011): [https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Does Imprisonment Deter A Review of the Evidence.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf)

community, including the children allegedly engaged in these crimes. Accordingly, the Bill does seek to treat children as a means of achieving other ends.

27. It is interesting that *CNK* and *Azzopardi* did not expressly consider the operation and effect of the Charter, to which we now turn.

Part C: The Charter and International Law⁴¹

*Children are ends in themselves and not the means of others. They form part of the family, the fundamental group unit of society. Children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should be given proper consideration in relation to matters affecting them. Children are especially entitled to protection from harm, and to human development.*⁴²

– Justice Kevin Bell

28. Because Australia has what is known as a ‘dualist’ system, international treaties, even when ratified by Australia, do not become part of domestic law unless they are enacted as legislation.⁴³ Whilst Australia has ratified the CROC,⁴⁴ it has not been implemented as domestic law. This means that while the CROC plays a critical role in shaping Australia’s human rights obligations at an international level, its provisions are not directly enforceable by Australian Courts.⁴⁵

⁴¹ This part of our advice is based on a paper prepared in 2021 by Michael Stanton and Katharine Brown for the UNSW Diplomacy Training Program named “The Convention on the Rights of the Child and Domestic Human Rights Legislation: Opportunities and Future Directions”. Available here: <https://dtp.org.au/wp-content/uploads/2022/08/The-CROC-and-Domestic-Human-Rights-Legislation-Paper-Rev-1.pdf>

⁴² *Secretary to the Department of Human Services v Sandling* [2011] VSC 42; (2011) 36 VR 221, 227 [11].

⁴³ See *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] UKPC 6; [1937] AC 326, 348; *Koowarta v Bjelke-Peterson* [1982] HCA 27; (1982) 153 CLR 168, 193 (Gibbs CJ).

⁴⁴ Australia ratified the CROC on 17 December 1990.

⁴⁵ The ratification of the CROC had been held by the High Court to result in a ‘legitimate expectation’ that the executive would act in conformity with it and treat the best interest of the appellant’s children as a primary consideration: *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273. Cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1. See *Royal Women’s Hospital v Medical Practitioners Board* [2006] VSCA 85; (2006) 15 VR 22, 39 [75]-[79] (Maxwell P); *Tomasevic v Travaglini* [2007] VSC 337; (2007) 17 VR 100, 114-5 [73] (Bell J). However, the High Court has subsequently held that “the phrase ‘legitimate expectation’ when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded”: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; (2012) 246 CLR 636, 658 [65] (Gummow, Hayne,

29. However, in Victoria, we now have the Charter which contains several provisions relevant to children and the criminal justice system.
30. Section 17(2) of the Charter provides that “[e]very child has the right, without discrimination, to such protection as is in the child's best interests and is needed by the child by reason of being a child”.
31. Section 23 of the Charter is headed “Children in the Criminal Process”, and provides:
- (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
 - (2) An accused child must be brought to trial as quickly as possible.
 - (3) A child who has been convicted of an offence must be treated in a way that is appropriate for that child's age.
32. Section 25(3) of the Charter provides that “[a] child charged with a criminal offence has the right to a procedure that takes account of that child's age and the desirability of promoting the child's rehabilitation”.
33. Those rights are drawn from CROC:
- (1) Article 3(1): “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”;
 - (2) Article 37(a): “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age”;
 - (3) Article 37(b): “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in

Crennan and Bell JJ); *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326, 335 [29]-[30] (Kiefel, Bell and Keane JJ), 343 [61] (Gageler and Gordon JJ).

conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”;

- (4) Article 39: “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child”.

34. The rights of children engaged with the criminal justice system are also protected by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (**Beijing Rules**). Relevantly, they set out:

- (1) The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence;⁴⁶
- (2) Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time;⁴⁷
- (3) Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home;⁴⁸ and
- (4) The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.⁴⁹

35. Seen in the context of these principles, it is very concerning that the Government has decided to expressly repeal the principle of detention being a measure of last resort for children.

⁴⁶ Rule 5.1.

⁴⁷ Rule 13.1.

⁴⁸ Rule 13.2.

⁴⁹ Rule 19.

What is the Potential Relevance of the Charter?

36. The Charter is underpinned by a ‘dialogue model’.⁵⁰ It provides for a dialogue between the legislature and the judiciary, whilst preserving parliamentary sovereignty. Parliament remains the supreme law maker.
37. This means that while courts and tribunals must interpret laws, consistently with their purpose, compatibly with the human rights protected by the Charter, if a statutory provision cannot be interpreted consistently with the Charter then this does not invalidate the law in question. In such circumstances, the Supreme Court of Victoria is empowered to make a declaration of inconsistent interpretation.⁵¹ If such a declaration is made, then Parliament is required to prepare a written response,⁵² but no remedial legislative action is required.⁵³
38. The Charter also requires the legislature to make ‘statements of compatibility’ when new bills are introduced into Parliament.⁵⁴ These statements outline whether the new law is compatible with human rights and, if not, the nature and extent of the incompatibility. This is intended to promote accountability and transparency in Government.⁵⁵

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

⁵¹ Charter, s 36(2).

⁵² Charter, s 37.

⁵³ This contrasts with guarantees protected by the Australian *Constitution*, where the High Court is empowered to invalidate unconstitutional legislation.

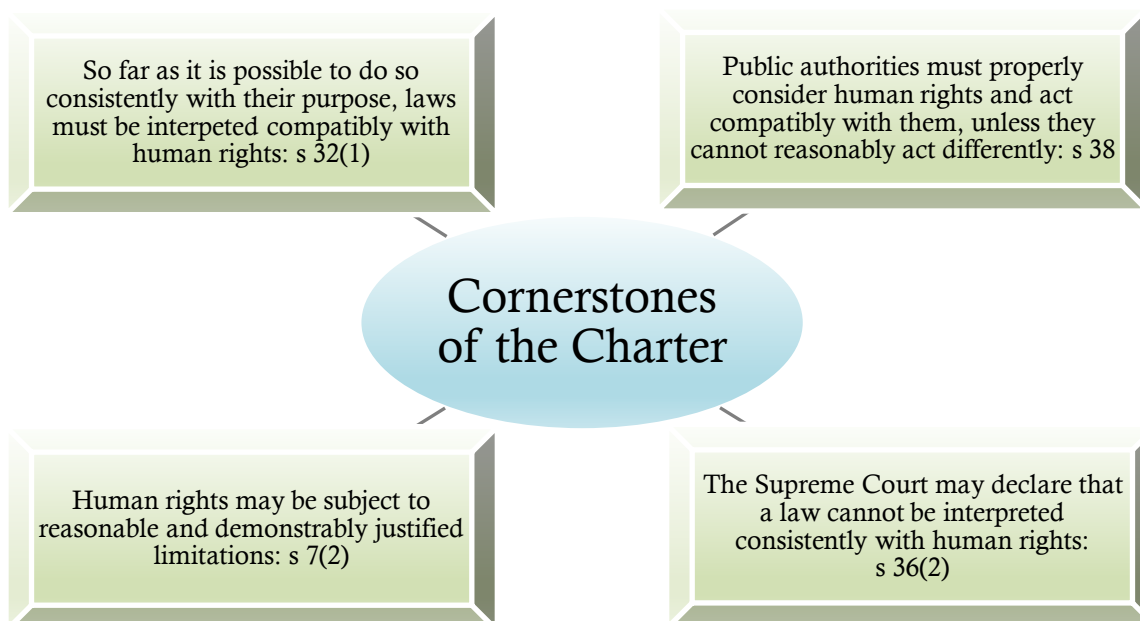
⁵⁴ Charter, s 28.

⁵⁵ Paradoxically, the protection of children has been cited by Parliament as providing a justification for legislative reform that it accepts is incompatible with human rights. In the Statement of (In)compatibility to the Control of Weapons Amendment Bill 2010 (Vic) (enabling searches of persons including children in gazetted areas without reasonable suspicion) the Minister for Police and Community Services stated:

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

The Cornerstones

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



The Interpretive Provision

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

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

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

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

42. In the first wave of Charter jurisprudence there was significant debate about the appropriate method to be employed when interpreting legislation pursuant to s 32(1).

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

That debate concerned determining the permissible boundaries of interpretation, and how the interpretive provision operates with other sections in the Charter.⁵⁶

43. After the judgment of the High Court in *Momcilovic*,⁵⁷ it appears clear that the Charter's interpretive provision is not as far-reaching as its counterpart in the *Human Rights Act 1998* (UK).⁵⁸
44. In *Momcilovic*, both the Court of Appeal and the High Court were unanimous that the Charter did not permit a reverse-onus provision regarding illicit drug offences to be interpreted as only imposing an evidentiary, rather than persuasive onus (on the balance of probabilities), on an accused person.⁵⁹

⁵⁶ In particular whether the s 7(2) 'proportionality' considerations affect the interpretive exercise: see *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) 29 VAR 1, overturned in *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436. For critics of human rights instruments, the interpretive provision has the potential to be undemocratic due to allowing for the 'reinterpretation' of laws by judicial officers contrary to Parliamentary intent. See Michael Stanton, '[Fighting Phantoms: A Democratic Defence of Human Rights Legislation](#)' (2007) 32(3) AltLJ 138. See, eg, Heydon J, in dissent in *Momcilovic*, 179-185 [447]-[457], in particular 184 [455]: "[j]udicial fires which have sunk low may burn more brightly in response to a call to adventure." At the time the Charter was enacted there had been particular criticism of the British judgment of *Ghaidan v Godin-Mendoza* (2004) UKHL 30 ('*Ghaidan*'), [2004] 2 AC 557 (concerning inheritance of tenancy with regard to persons in same sex relationships). In *Ghaidan*, Lord Nicholls held at [29]:

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

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

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

⁵⁷ [2011] HCA 34; (2011) 245 CLR 1.

⁵⁸ Section 3(1) of the *Human Rights Act 1998* (UK) provides:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Note the addition in s 32(1) of the Victorian Charter that "[s]o far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a way that is compatible with human rights" (our emphasis added).

⁵⁹ Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (*DPCSA*) provides that when drugs are located at a premises occupied, used, enjoyed or otherwise controlled by a person, that person is deemed to be in possession of the drugs unless he or she "satisfies the court of the

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

Section 32(1) does not create a “special” rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question.⁶⁰

46. This arguably results in an interpretive provision with broad application and limited impact, which has been regarded as comparable to other interpretive principles such as the principle of legality.⁶¹

47. In *Gebrehiwot v State of Victoria (Gebrehiwot)*,⁶² the Court of Appeal (Tate, Kaye and Emerton JJA) observed:⁶³

As this Court emphasised in *R v DA*,⁶⁴ where there is a constructional choice, the interpretive obligation under the Charter requires that the construction be adopted that renders the statutory provision compatible with human rights, providing this is consistent with the purpose of the provision. This Court said:

Where more than one interpretation of a provision is available on a plain reading

contrary”. That reverse onus provision has been consistently interpreted by Victorian Courts as requiring that an accused person must prove, on the balance of probabilities, that the drugs were not in his or her effective possession (a persuasive onus); *R v Clarke* [1986] VR 643. It should be noted that *Momcilovic* was decided on a technical point about the relationship between ss 5 and 71AC of the *DPSCA*, with the majority holding that the reverse onus provision did not apply to the expression ‘possession for sale’ with regard to trafficking offences, and so arguably the analysis about the Charter is *obiter dictum*, albeit considered analysis from the High Court.

⁶⁰ *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 446 [35] (Maxwell P, Ashley and Neave JJA). See, eg, *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91; (2012) 38 VR 569, 576-7 [28]-[31] (Warren CJ and Cavanough JA); 609 [142] (Nettle JA); *Slaveski v Smith and Victoria Legal Aid* [2012] VSCA 25; (2012) 34 VR 206, 215 [23] (Warren CJ, Nettle and Redlich JJA). Cf Tate JA in *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; (2013) 49 VR 1, 62 [189].

⁶¹ See French CJ in *Momcilovic* at 50 [51]: “Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application”. The principle of legality is a principle of statutory interpretation that provides that legislation should not be understood to abrogate fundamental rights in the absence of clear and unambiguous language. Justice Tate has criticised a narrow conception of the interpretive provision, see *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; (2013) 49 VR 1, 62 [189]-[190]; see further her Honour’s extra-judicial writing: [‘Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court’s Reasoning in Momcilovic?’](#), Judicial College of Victoria Online Journal 2 (2014), 68.

⁶² [2020] VSCA 315; (2020) 287 A Crim R 226 (*Gebrehiwot*).

⁶³ *Ibid*, 262 [135].

⁶⁴ *R v DA* [2016] VSCA 325; (2016) 263 A Crim R 429.

of the statute, then that which is compatible with rights protected under the Charter is to be preferred.⁶⁵

48. This approach was described in *Gebrehiwot* as the ‘better accommodates’ test.⁶⁶

49. More recently the High Court, in *DPP (Vic) v Smith*,⁶⁷ observed:

By operation of s 32(1) of the Charter, s 389E(1) of the *Criminal Procedure Act*, in common with all provisions of Victorian legislation, is to be interpreted in a way that is compatible with the human rights set out in Pt 2 of the Charter, so far as it is possible to do so consistently with its purpose. This has been said to mean that “[w]here more than one interpretation of a provision is available on a plain reading of the statute, then that which is compatible with rights protected under the Charter is to be preferred”.

The general operation of the interpretative principle in s 32(1) of the Charter need not be resolved in this appeal. What is beyond question is that s 32(1) requires “close attention to the particular rights said to be engaged by the statutory provision that falls for interpretation”.⁶⁸

50. It is clear that, at least under the current approach, remedial interpretation which would involve a *departure* from the ordinary rules of statutory interpretation, in order to find a rights-compatible meaning, is not permitted. There must be a constructional choice.⁶⁹ Thus, the interpretive does not go as far as some of its international counterparts, such as s 3 of the *Human Rights Act 1998* (UK).⁷⁰

⁶⁵ Ibid, 443 [44] (Ashley, Redlich and McLeish JJA).

⁶⁶ [2020] VSCA 315; (2020) 287 A Crim R 226, 263 [138], after citing *Nguyen v Director of Public Prosecutions (Vic)* [2019] VSCA 20; (2019) 59 VR 27, 63 [104]-[105] (Tate JA, Maxwell P agreeing at 30 [1], Niall JA agreeing at 74 [151]).

⁶⁷ [2024] HCA 32; (2024) 98 ALJR 1163.

⁶⁸ Ibid, 1176 [57]-[58] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) (citations omitted). See also at 1190 [129] – 1194 [143] (Edelman J).

⁶⁹ See, eg, *FT v The King* [2024] VSCA 90, [62] (Beach, McLeish and Niall JJA). Cf the approach taken, in dissent, by Walker JA in *Charisiou v The King* [2025] VSCA 277, [135].

⁷⁰ For further consideration of the proper construction of the interpretive provision, see the articles by Bruce Chen: ‘[Section 32\(1\) of the Charter: Confining Statutory Discretions Compatibly with Charter Rights?](#)’ [2016] MonashULawRw 21; and ‘[Revisiting s 32\(1\) of the Victorian Charter: Strained Constructions and Legislative Intentions](#)’ [2020] MonashULawRw 6.

Limitations on Human Rights

51. The human rights protected by the Charter are not absolute,⁷¹ and can be subject to limitations. Some rights also have internal limitations.⁷² Section 7(2) of the Charter provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

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

52. Once a human right is identified as being limited by the action of a public authority, the onus of ‘demonstrably justifying’ the limitation in accordance with s 7(2) of the Charter resides with the party seeking to uphold the limitation. In light of what must be justified, the standard of proof is high.⁷³

⁷¹ Even though, under international law, some human rights are absolute and/or non-derogable, such as the freedom from torture, freedom from slavery, and the prohibition against the retrospective operation of criminal laws.

⁷² For example, the right to privacy protected by s 13(a) of the Charter provides that a person has the right “not to have his or her privacy, family, home or correspondence *unlawfully or arbitrarily* interfered with” (our emphasis added). With regard to the right to liberty protected by s 21 of the Charter, s 21(3) provides that “[a] person must not be deprived of his or her liberty *except on grounds, and in accordance with procedures, established by law*” (our emphasis added). Under international law, when considering whether there is ‘arbitrary’ interference with the right, arbitrariness can extend to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought. Interference can be arbitrary although it is lawful: *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 395 [85] (Bell J); cf *WBM v Chief Commissioner of Police* [2012] VSCA 159; (2012) 43 VR 446, 469-73 [102]-[120] (Warren CJ).

⁷³ *Re an application under the Major Crime (Investigative Powers) Act 2004* (Vic); *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381; (2009) 24 VR 415 (*‘DAS’*), 448 [147] (Warren CJ). Approved by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 475 [144]. Warren CJ cited with approval the observations of Dickson CJ in the celebrated Canadian judgment of *R v Oakes* [1986] 1 SCR 10, 43 [70]:

There are... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair

Declarations of Inconsistent Interpretation

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

Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

54. No declaration of inconsistent interpretation has yet been made in Victoria.

55. In *Momcilovic*, the Court of Appeal proposed to make a declaration of inconsistent interpretation in relation to the reverse onus provision, s 5 of the *DPCSA*.⁷⁴ However, the High Court, by majority, held that the declaration of inconsistent interpretation should not be made.⁷⁵

The Human Rights of Children

56. Justice Bell has stated:⁷⁶

The human rights in the *Charter* that generally and specifically apply to children reflect the provisions of international treaties to which Australia is a party, including the *International Covenant on Civil and Political Rights* (the ICCPR) and the *Convention on the*

or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance” (citations omitted).

⁷⁴ *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 478 [157]. The Court of Appeal observing at 477 [152]-[153]:

In our view, there is no reasonable justification, let alone any “demonstrable” justification, for reversing the onus of proof in connection with the possession offence. As we have said, the combined effect of ss 5 and 72(1) is to presume a person guilty of the offence of possession unless he/she proves to the contrary. That is not so much an infringement of the presumption of innocence as a wholesale subversion of it. It was not suggested on the appeal that either the nature of the offence or the exigencies of prosecution could justify such a step.

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

⁷⁵ Crennan and Kiefel JJ also observed “[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate”: *Momcilovic*, 229 [605].

⁷⁶ *DPP v SL* [2016] VSC 714; (2016) 263 A Crim R 193.

Rights of the Child (CROC). These provisions in turn reflect the fundamental principle of the best interests of the child, which is itself-expressed in s 17(2) of the Charter.⁷⁷

57. Section 3(1) of the Charter defines a ‘child’ as a person under 18 years of age.

58. As noted above, s 17(2) of the Charter is headed ‘Protection of families and children’, and provides:

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

59. Section 23 of the Charter is headed ‘Children in the Criminal Process’ and provides:

- (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
- (2) An accused child must be brought to trial as quickly as possible.
- (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

60. Section 25(3) of the Charter is headed ‘Rights in criminal proceedings’, and provides:

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

61. Section 8(3) of the Charter is headed ‘Recognition and equality before the law’, and provides:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.⁷⁸

62. As noted above, some of the key cases advancing children’s rights in Victoria have not referred to the Charter, or the CROC, at all.⁷⁹ However, in other cases the Charter and the CROC have been considered.

⁷⁷ Ibid, 195-6 [7] (citations omitted).

⁷⁸ Section 3 of the Charter defines ‘discrimination’, in relation to a person, as discrimination within the meaning of the *Equal Opportunity Act 2010* (Vic) on the basis of an attribute set out in s 6 of that Act. ‘Age’ is a protected attribute.

⁷⁹ See, eg, *CNK v The Queen* [2011] VSCA 228; (2011) 32 VR 641, where the Court of Appeal held that the principle of general deterrence (punishing an offender to set an example to others) was excluded from consideration when sentencing children under the *CYFA*.

63. For example, in *A & B v Children's Court of Victoria*,⁸⁰ in the context of a protection proceeding under the *Children, Youth and Families Act 2005* (Vic) (*CYFA*), Garde J found that the Children's Court had erred in finding that the plaintiffs lacked the maturity to provide instructions to legal representatives and in denying them leave to be represented by the same legal practitioner. The Children's Court had "misconceived its function as confined to a conclusion as to the maturity of the girls based on chronological age alone",⁸¹ and there was no evidence to support such a finding.⁸² His Honour also found that there had been breaches of procedural fairness and natural justice.⁸³

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

If I were of the view that the words of ss 524(2) and (4) [provisions in the *CYFA* relating to the legal representation of children] were capable of more than one meaning, it would have been appropriate to consider which of those meanings best accords with the human rights in question. It might also have been necessary to consider, as the Commission submitted, whether Articles 3 and 12 of the CROC should be taken into account and given weight in determining the ultimate construction to be adopted.⁸⁴

Consideration of the human rights sought to be relied on by the plaintiffs and the presumption of statutory interpretation that provisions should be interpreted consistently with international law only serve to provide further reasons why the construction of ss 524(2) and (10) that I have preferred should be adopted. Such a construction is consistent with the best interests principles generally and the principle that the best interests of the child must always be paramount.⁸⁵

65. The Charter and the CROC have also been referred to in the context of an, ultimately unsuccessful, application for bail by a child accused held at Barwon Children's Remand Centre, which was within the confines of Barwon Prison.⁸⁶

⁸⁰ [2012] VSC 589

⁸¹ Ibid, [120].

⁸² Ibid, [122].

⁸³ Ibid, [125], [134].

⁸⁴ In addition to the relevance of Article 12 of CROC in interpreting "best interests" in both the Act and the Charter, it is, as an established principle of international law, relevant of itself by reason of the presumption of statutory interpretation that provisions should be interpreted consistently with international law, given the presumption that Parliament intends to comply with Australia's international treaty obligations (footnote in original).

⁸⁵ Ibid, [109]-[110].

⁸⁶ *Application for bail by HL* (No 2) [2017] VSC 1, [121]-[123] (Elliott J).

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

- (1) *Secretary to the Department of Human Services v Sandling*:⁸⁷ the Court considered the proper interpretation of the *CYFA* in the context of child protection, and in particular considered international law, including the CROC, when giving meaning to the ‘best interest principles’ under the *CYFA*;⁸⁸
- (2) *ZZ v Secretary to the Department of Justice*:⁸⁹ the Court considered the proper construction of the *Working with Children Act 2005* (Vic) and the *Transport (Compliance and Miscellaneous) Act 1983* (Vic).⁹⁰ Justice Bell observed that an interpretation which is consistent with Australia’s obligations and the Charter is one which positively ensures protection of children from harm, not one which would deny a person access to their chosen field of employment when there was no real risk of harm;⁹¹
- (3) *Director of Public Prosecutions v SL (SL)*:⁹² the Court had regard to international law, including the International Covenant on Civil and Political Rights (**ICCPR**),⁹³ the CROC and statements by the Committee on the Rights of the Child, when making protective directions regarding the manner of trial for a child accused.⁹⁴ Bell J stated:

⁸⁷ [2011] VSC 42; (2011) 36 VR 221.

⁸⁸ Ibid, 227-30 [11]-[23]. Ultimately the Court dismissed the appeal by the Secretary against the decision of the Children’s Court ordering the aboriginal children be returned to the care of their maternal grandmother.

⁸⁹ [2013] VSC 267.

⁹⁰ Ibid, [54]-[71].

⁹¹ Ibid, [68]. It was held that it was not legally open to refuse ZZ’s application on public interest grounds without first determining whether granting accreditation would or would not pose an unjustifiable risk to the safety of children: at [236].

⁹² [2016] VSC 714; (2016) 263 A Crim R 193.

⁹³ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁹⁴ SL was charged with attempted murder, and therefore not within the jurisdiction of the Children’s Court of Victoria. The directions were:

- (1) the detention on remand of SL is to be subject to regular judicial oversight;
- (2) at court, SL is neither to be handcuffed nor detained with adult prisoners;
- (3) directions and sentencing hearings are to be conducted in Court 7;
- (4) SL is to be given the opportunity to become familiar with the court precinct, Court 7 and the hearing procedures;

It is generally recognised under these treaties, as it is implicitly recognised under the Charter, that children are especially vulnerable to physical and emotional harm and negative formative influence in criminal detention and to discriminatory exclusion in the operation of the processes of the criminal law, and that governments and courts must take and adopt all necessary actions and procedures to protect them from that harm and influence and ensure their effective participation in those processes;⁹⁵

(4) *Director of Public Prosecutions v SE (SE)*:⁹⁶ where the Court applied *SL* and made protective directions for an aboriginal child accused.⁹⁷

67. In both *SL* and *SE*, Justice Bell observed that the directions were required by direct application of s 6(2)(b) of the Charter when the Court was exercising its functional responsibilities, including those under ss 17(2), 23 and 25(3) of the Charter.⁹⁸

- (5) during hearings, counsel and I will not robe (neither counsel nor judges wig in this court) and will remain seated when speaking;
- (6) counsel for *SL* is to ensure that *SL* understands the procedure to be adopted at hearings and I as the judge will also so ensure;
- (7) *SL* may sit with counsel at hearings or with family or friends as *SL* wishes;
- (8) counsel for the prosecution and *SL* are to speak in a language that so far as possible can be understood by *SL* and I will also do so; and
- (9) the procedure at hearings is otherwise to be conducted in accordance with the principles explained in this ruling and, generally, all possible steps are to be taken to enable *SL* to understand and effectively participate in the proceeding.

⁹⁵ [2016] VSC 714; (2016) 263 A Crim R 193, 195-6 [7].

⁹⁶ [2017] VSC 13.

⁹⁷ *Ibid*, [17]. The directions were:

- (a) at court, *SE* is neither to be handcuffed nor detained with adult prisoners;
- (b) *SE* is to be given the opportunity to become familiar with the court precinct, the court in which the hearing is to be conducted and the hearing procedures;
- (c) during hearings, counsel and I will not robe (neither counsel nor judges wig in this court) and will remain seated when speaking;
- (d) during hearings, counsel for *SE* is to ensure that *SE* understands the procedure to be adopted at hearings and I as the judge will also so ensure;
- (e) during hearings, *SE* may sit with counsel or with carers and support service officers as *SE* wishes;
- (f) during hearings, counsel for the prosecution and *SE* are to speak in a language that so far as possible can be understood by *SE* and I will also do so;
- (g) during hearings, *SE* is to be referred to by *SE*'s preferred first name; and
- (h) the procedure at hearings is otherwise to be conducted in accordance with the principles explained in this ruling and the ruling in *SL* and, generally, all possible steps are to be taken to enable *SE* to understand and effectively participate in the proceeding.

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

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

⁹⁸ *DPP v SL* [2016] VSC 714; (2016) 263 A Crim R 3, 195 [6]; *DPP v SE* [2017] VSC 13, [12]; see also *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 82 [252] (Tate JA). The operation and effect of

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

- (1) When refusing a permanent stay of a prosecution because of a delay in charging a child offender which prevented the Children’s Court of Victoria from having jurisdiction to sentence;⁹⁹
- (2) When considering the entitlement of a person with a criminal history of sexual offences against a minor to access assisted reproduction treatment (IVF);¹⁰⁰ and
- (3) When making rules concerning the proper cross-examination of child witnesses, where the Court recommended the introduction of neutral ‘intermediaries’ in the questioning of children, as recommended by the Victorian Law Reform Commission.¹⁰¹

69. The CROC has also informed human rights judgments in comparable Australian jurisdictions, such as in the ACT, for example in relation to the need to make proper arrangements for children being a relevant factor in the sentencing of a parent.¹⁰²

s 6(2)(b) of the Charter has not been the focus of this advice, for more information see the Judicial College of Victoria, Human Rights Bench Book:
<https://www.judicialcollege.vic.edu.au/eManuals/CHRRBB/index.htm#57270.htm>.

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

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

See also *LM v Childrens Court of the Australian Capital Territory* [2014] ACTSC 26, where the Supreme Court of the Australian Capital Territory dismissed judicial review proceedings after the Children’s Court had refused an application for a permanent stay of proceedings based on delay and, amongst other things, the right protected by

s 20(3) of the *Human Rights Act 2004* (ACT) that “[a] child must be brought to trial as quickly as possible”.

¹⁰⁰ *Patient Review Panel v ABY and Anor* [2012] VSCA 264; (2012) 37 VR 634, 651 [88] (Warren CJ, Tate JA and Beach AJA).

¹⁰¹ *Ward v The Queen* [2017] VSCA 37; (2017) 54 VR 68, 93-4 [98] fn 28 (Maxwell P and Redlich JA). Intermediaries have now been introduced for witnesses who are children and/or have cognitive impairments: *Criminal Procedure Act 2009* (Vic), Pt 8.2A.

¹⁰² *Aldridge v The Queen* [2011] ACTCA 20, [34] (Refsauge J); *Hugg v Driessen* [2012] ACTSC 46; (2012) 261 FLR 324, [62] (Refsauge J), referring to the Constitutional Court of South Africa judgment of *S*

70. The above analysis demonstrates that human rights instruments, and the CROC, can have a broad field of relevance, and a significant impact, in litigation. This was perhaps most powerfully demonstrated by the ‘Certain Children’ litigation.

The Certain Children Litigation

71. In late 2016, riots and consequent damage at the Parkville Youth Justice Precinct significantly reduced the capacity of Victoria’s Youth Justice System. The result was described by the government and the courts as an ‘accommodation crisis’.
72. In response, the Government established a Youth Justice and Remand Centre within a maximum-security adult male prison known as the Grevillea Unit. It transferred several children to the unit, which had previously been known as part of HM Barwon Prison. Although the children were kept separate from adult prisoners, the built environment was that of a maximum-security adult prison, and the conditions were described as ‘harsh and austere.’ The evidence was that the children did not receive adequate education, had minimal time outside and were frequently locked down in isolation in their cells for extended periods of time.
73. The establishment of the Grevillea Unit led to two sets of proceedings which resulted in Supreme Court judgments considering children’s rights under the Charter. Both proceedings were judicial review proceedings; they involved the plaintiffs challenging the lawfulness of government decisions in relation to the establishment and running of the Grevillea Unit. Each proceeding was brought on both traditional administrative law grounds and Charter unlawfulness grounds. This part of our advice is only concerned with the Charter grounds.

v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18, which in turn had regard to the CROC. This principle has not yet been applied in Victoria: see *Markovic v The Queen*; *Pantelic v The Queen* [2010] VSCA 105; (2010) 30 VR 589; 594-5 [16]-[19] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA).

*First Proceeding: Certain Children (1)*¹⁰³

74. In this proceeding, the plaintiffs challenged the decisions to: (a) establish the Grevillea Unit as a Youth Justice and Remand Centre; and (b) transfer children there. The plaintiffs sought writs of habeas corpus and an order directing the plaintiffs' release from the Unit. They also sought orders declaring invalid or quashing both the Orders in Council which established the Unit and the transfer decisions.
75. The Charter grounds relied on were that the Government had failed to give proper consideration to the plaintiffs' rights under s 38(1) of the Charter. The primary Charter rights relied on were:
- a. Section 17(2) — Best interests of the child;
 - b. Section 10(b) — Prohibition on treatment that is cruel, inhumane or degrading; and
 - c. Section 22(1) — Right to humane treatment when deprived of liberty.
76. The Court ultimately found that the Government had failed to give proper consideration to each of these rights in both making the decision to establish the Grevillea Unit and in deciding to transfer the children there. As a result, the decisions were unlawful under the Charter. The Court observed that there was some legal complexity around whether this could render the decisions invalid, but it was ultimately unnecessary to decide as the decisions were ruled invalid on other administrative law grounds. The Government was ordered by the Court to transfer the children to a lawfully established Youth Justice and Remand Centre.

¹⁰³ *Certain Children v Minister for Families and Children* [2016] VSC 796; (2016) 51 VR 473 (*Certain Children (No 1)*). Note that this decision was subject to a partially successful appeal, but the appeal did not concern the Charter grounds: *Minister for Families and Children v Certain Children* [2016] VSCA 343; (2016) 51 VR 597.

77. Of particular interest is the Court’s consideration of the protection of the best interests of the child under s 17(2). The Court specifically stated that the CROC and materials from the United Nations inform the scope of the right.¹⁰⁴

78. The Court observed, for example, that the CROC:

[P]rovides for the protection of children’s dignity in the criminal process in art 40(1). It states that children should be:

‘treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedom of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society’.¹⁰⁵

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

- a. treatment that is consistent with the child’s sense of dignity and worth;
- b. treatment that reinforces the child’s respect for the human rights and freedoms of others;
- c. treatment that takes into account the child’s age and promotes the child’s reintegration and the child’s assuming a constructive role in society; and
- d. respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented.

80. The Court also relied on the Beijing Rules, which provide that, while in custody, “juveniles shall receive care, protection and all necessary individual assistance — social, educational, vocational, psychological, medical and physical — that they may require in view of their age, sex and personality”.¹⁰⁶

¹⁰⁴ Ibid, 497 [146].

¹⁰⁵ Ibid, 497 [150].

¹⁰⁶ Ibid, see especially 498 [152]-[154].

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

*Second Proceeding: Certain Children (2)*¹⁰⁷

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

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

84. The main rights relied upon were again:

- a. Section 17(2) — Best interests of the child;
- b. Section 10(b) — Prohibition on treatment that is cruel, inhumane or degrading; and
- c. Section 22(1) — Right to humane treatment when deprived of liberty.

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

86. In relation to the weapons exemption, which allowed some staff to possess and use OC spray, the Court found that the right had not been substantively breached, as although it was engaged, the limitation of the right was reasonable under s 7(2),

¹⁰⁷ *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; 52 VR 441 (*Certain Children (No 2)*).

largely because the use of any weapons was subject to strict conditions. It did, however, find that the Government had nevertheless failed to properly consider the right when making the decision.

87. In arriving at these decisions, the Court was persuaded by evidence from a variety of sources, including expert evidence about the ‘built environment’ of the Grevillea Unit, its impact on the psychological wellbeing of the children, and its inability to cater for their developmental needs.
88. The ultimate result was that each decision was unlawful under the Charter. The Court declared the decisions unlawful and made an order restraining the Government from continuing to detain any children at Grevillea. There are two particularly notable aspects of the judgment.
89. First, the Court set out a useful framework or roadmap for applying s 38(1) of the Charter. The Court observed that when deciding whether a decision is lawful under s 38(1), it needs to ask itself the below questions.¹⁰⁸ Those same questions can be asked by potential plaintiffs when challenging government decisions, and provide a useful conceptual map:
- (1) Is any human right relevant to the decision or action that a public authority has made, taken, proposed to take or failed to take? (the relevance or engagement question);
 - (2) If so, has the public authority done or failed to do anything that limits that right? (the limitation question);
 - (3) If so, is that limit under law reasonable and is it demonstrably justified having regard to the matters set out in s 7(2) of the Charter? (the proportionality or justification question);

¹⁰⁸ Ibid, 497 [174].

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

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

90. Secondly, the Court made interesting observations about the rights of children and resource allocation. In considering whether the Charter rights had been substantively breached under s 38(1), the Court observed:

The evidence does not support the proposition that the defendants thought extensively or creatively about solutions to the emergency crisis that was before them. A traditional, but limited, response emerged that imposed some significant limitations on the rights of a few. Broadly speaking, the resources available to government are a relevant factor when determining what reasonable limits on human rights can be justified. In a free and democratic society based on human dignity, equality and freedom, the executive is expected to make a proper proportion of its resources available for the protection and advancement of its children ... By simply identifying four alternative places that are not suitable, the defendants fell well short in demonstrating that resources were inadequate for the provision of less restrictive measures.¹⁰⁹

91. The proceedings show that, in appropriate cases, courts are prepared to take guidance from international law as to the nature and scope of the rights under the Charter, including from the CROC.

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

¹⁰⁹ Ibid, 581 [474]-[475].

First proceeding

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

Second proceeding

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

93. The above analysis demonstrates that the Courts will consider the human rights of children very carefully when considering whether rights are engaged and whether the actions of public authorities are proportionate. A similar analysis will also be undertaken should it be contended that the proposed legislation, if enacted, is inconsistent with human rights under the Charter and international law.

The Effect on First Nations People and Other Minorities

94. If enacted, the Bill will likely mean that a greater, and therefore more disproportionate, number of First Nations children, and children from migrant backgrounds, will become entrenched in the criminal justice system.
95. Data obtained through freedom of information requests from Victoria Police¹¹⁰ demonstrates that Victoria Police are more likely to:
- (1) Use force, including tasers, against people of Aboriginal, African, Middle Eastern or Pacific Islander appearance than people of Caucasian appearance;
 - (2) Initiate a pursuit against Aboriginal, African or Middle Eastern appearance than people of Caucasian appearance;
 - (3) Target searches towards people of Aboriginal, African, Middle Eastern or Pacific Islander appearance than people of Caucasian appearance; and
 - (4) Search people of Aboriginal, African, Middle Eastern or Pacific Islander appearance and not find a reported item compared with searches of people of Caucasian appearance.
96. These proposed reforms cannot be properly divorced from the impact that is likely to occur through the discretionary exercise of police powers.
97. A consequence of the proposed legislation is that a disproportionate number of children with these backgrounds will enter the criminal justice system, face longer periods of time in custody, and face a higher likelihood of returning to prison in the future because of the criminogenic effects of detention and imprisonment.

¹¹⁰ The Racial Profiling Data Monitoring Project, *Key Findings* (accessed 2 December 2025) <<https://www.racialprofilingresearch.org/keyfindings-2024>>.

Lessons From Other Jurisdictions

98. When considering a proportionality analysis (and reasonable alternatives), it is important to consider the lessons from comparable jurisdictions.
99. For example, no children in Scotland are currently in prison. Following a series of tragic deaths in custody, in its youth detention centres, in August 2024 Scotland introduced legislation, the *Children (Care and Justice) (Scotland) Act 2024* outlawed the detention of under-18s in Young Offender Institutions (YOIs) and prisons in Scotland. Now all the remaining children under 18 (a total of 9) have been moved to secure care settings. The care centres house the children in groups of up to six and the centre is run by inspectorate and care staff. The legislation relied on evidence which showed that the imprisonment of children can lead to them being further traumatised and is likely to lead to future negative outcomes, such as reoffending, disengagement from education and employment opportunities, and the breakdown of positive relationships in their community.
100. In place of YOIs, all children under 18 who have their liberty deprived due to being in conflict with the law, will be housed in secure care accommodation. While still housing children in locked facilities, Scotland's secure care accommodation provides a trauma-informed, therapeutic environment. Staff in secure care settings are trained to take a trauma-informed approach, and children are provided with therapeutic support, recognising that many will have endured adverse childhood experiences, including often having been the victim of crime themselves.

Conclusion

101. If enacted, the amendments proposed by the Bill are highly likely to be challenged in the Courts. That, in combination with its sweeping effects, makes the Bill's rushed introduction, absence of consultation, and restricted debate very concerning.
102. The Bill reflects a significant departure from the principles that have underpinned the Victorian youth justice system for decades.

103. For the reasons above, it is strongly arguable that the proposed amendments in the Bill are contrary to the Charter and Australia's obligations under international law. Amongst other things, they fail to protect the best interests of the child, and they fail to adhere to the foundational principle that the detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.
104. This may result in the Supreme Court issuing a declaration of inconsistent interpretation pursuant to s 36(2) of the Charter because the amendments are incompatible with the human rights of children.¹¹¹
105. Further, the proposed amendments may breach s 10 of the *Racial Discrimination Act 1975* (Cth) because of their disproportionate impact on minorities, including First Nations peoples. This may result in the proposed amendments being inoperative to the extent of the inconsistency between State and Federal laws.¹¹²

Michael Stanton SC
Barrister
Brian Bourke Chambers

Cameron Moir
Barrister
Peta Murphy Chambers

2 December 2025

¹¹¹ Subject to an override by Parliament pursuant to s 31 of the Charter. See further Julie Debeljak, "Of Parole and Public Emergencies: Why the Victorian Charter Override Provision Should Be Repealed", (2022) 45(2) *UNSW Law Journal* 570.

¹¹² As noted above, because of the time constraints it is beyond the scope of this advice to consider this issue in detail, but is it a matter that, in our view, should be referred to Committee for serious consideration.