

FACTS AND EVIDENCE IN LITIGATION UNDER THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 (VIC) AND THE HUMAN RIGHTS ACT 2004 (ACT)

CHRISTOPHER TRAN*

[In cases brought under the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Human Rights Act 2004 (ACT), whether legislation limits a human right and whether that limitation is demonstrably justified will often depend on facts and evidence about the purpose and effects of the legislation in issue. The use of facts and evidence in this context, as in other contexts within Australian public law, has not been the subject of sustained attention to date. This article analyses how the Victorian and Australian Capital Territory courts have approached such facts and evidence, with an eye to comparative practice and the overseas literature on this topic. It demonstrates that facts about the operation of legislation have been relevant in a number of Victorian and ACT cases, but that the courts have yet to develop a consistent approach to determining those facts. It concludes with reflections on how this topic touches upon broader themes within Australian constitutional law, and thus why this area is in particularly urgent need of clarification.]

CONTENTS

I	Introduction	288
II	Basic Concepts	290
	A Facts in Public Law Litigation	290
	B Taxonomies and Issues Associated with the Use of Facts	291
III	Comparative and Analogous Practice	294
	A Australia	296
	B United States	298
	C Canada	299
	D United Kingdom	302
	E South Africa	304
	F New Zealand	306

* BA, LLB (Hons) (Melb). My thanks to Glyn Ayres, Olaf Ciolek, Graeme Hill, Phil Lynch, Emrys Nekvapil, Meg O'Brien, Jason Pobjoy, Vee Vien Tan and the anonymous referees.

G Summary.....	307
IV Facts under the <i>Charter</i> and the <i>HRA</i>	308
A Victoria.....	309
B ACT	316
V Insights from Victoria and the ACT	323
VI Conclusion	332

I INTRODUCTION

The High Court's decision in *Momcilovic v The Queen* ('*Momcilovic*')¹ addressed a number of significant issues in Australian public law. One issue that escaped much attention was the role of facts and evidence in litigation concerning the consistency of legislation with statutory human rights Acts. Gummow J (with Hayne J agreeing) explicitly left for another day 'the nature and standard of the evidence or other means by which "reasonable limits" are to be held to be "demonstrably justified"'² under s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'). Heydon J was more forthcoming, adopting the view that s 7(2) 'contemplates evidence or material of a kind going far beyond the evidence or material ordinarily considered by courts' in determining the meaning and validity of legislation.³ The other judgments of the Court did not advert to this issue.

The uncertain status of facts in *Charter* litigation mirrors the High Court's underdeveloped approach to ascertaining facts that are relevant to the constitutionality of legislation. In 1990, Susan Kenny (now Justice Kenny of the Federal Court) observed that the High Court 'has failed not only to develop appropriate measures of review, especially in challenges to legislative validity, but also to agree on evidentiary rules, particularly relating to the burden of proof, to facilitate fact presentation and ascertainment.'⁴ This state of affairs has been attributed to the lack of fact-dependent standards in Australian constitutional law, but Kenny's assessment remains apt a little over 20 years later notwithstanding the increased emergence of such standards in

¹ (2011) 280 ALR 221.

² *Ibid* 279 [165], Hayne J agreeing: at 306 [280].

³ *Ibid* 347 [431].

⁴ Susan Kenny, 'Constitutional Fact Ascertainment (with Reference to the Practice of the Supreme Court of the United States and the High Court of Australia)' (1990) 1 *Public Law Review* 134, 164.

recent times.⁵ Promisingly, there are signs that the Court and litigants are showing greater sensitivity to the issues in this area.⁶

This article examines how the courts have dealt with facts and evidence in cases involving the *Charter* and the *Human Rights Act 2004* (ACT) ('HRA'). It focuses on facts and evidence relevant to whether legislation limits a right and whether such a limitation is demonstrably justifiable.⁷ As explained further in this article, the literature and comparative case law commonly applies the label 'legislative facts' to these sorts of facts. An examination of how courts ascertain legislative facts is important because an accurate understanding of the facts of a case, and therefore a coherent theory of fact finding, is fundamental to the development and application of sound legal principles.⁸

Part II introduces the distinction between legislative and adjudicative facts and highlights the core analytical concepts that are relevant to fact finding in public law litigation. Part III reviews how courts in other jurisdictions have approached facts that are relevant to justifying restrictions of constitutionally or statutorily protected rights. This comparative practice and commentary paints a complex and often conflicting picture, but it provides a useful standard against which to assess the Victorian and ACT experiences. Part IV then examines the cases decided under the *Charter* and the *HRA* to date. Very few cases have considered the proper role of facts expressly, and those that

⁵ See Jo Lennan, 'How to Find Facts in Constitutional Cases' (2011) 30 *Civil Justice Quarterly* 304, 326; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 658.

⁶ See especially *Thomas v Mowbray* (2007) 233 CLR 307, 511–25 [612]–[649] (Heydon J); Transcript of Proceedings, *Betfair Pty Ltd v Racing New South Wales* [2011] HCATrans 230 (30 August 2011); Transcript of Proceedings, *Betfair Pty Ltd v Racing New South Wales* [2011] HCATrans 232 (1 September 2011). See also Justice K M Hayne, 'Deference: An Australian Perspective' [2011] *Public Law* 75; Justice J D Heydon, 'Developing the Common Law' in Justin T Gleeson and Ruth C A Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) 93.

⁷ Facts and evidence will also be relevant in other human rights contexts, for example litigation challenging the *Charter* or *HRA* compatibility of a public authority's conduct (see *Charter* s 38 and *HRA* s 40B) or the determination of whether to grant, renew or revoke an exemption from the prohibition of discrimination (see *Equal Opportunity Act 2010* (Vic) s 90). Although this article focuses on litigation concerning the consistency of legislation with statutory human rights Acts, the issues raised in this article have wider application to and ramifications for these other contexts. At a minimum, it is plain that a coherent approach to fact finding is essential in all of these areas.

⁸ Although motivated more by reasons of practicality and expedience, a single justice will not ordinarily reserve a point of law for the consideration of the full bench of the High Court until the factual issues are first determined: *Kruger v Commonwealth* (1995) 69 ALJR 885. This procedural stance reflects the more fundamental proposition that an accurate appreciation of the facts is important to the development of sound legal principles.

have done so are yet to establish a consistent and theorised approach. Finally, Part V teases out the implications of this survey for several larger issues in constitutional theory concerning judicial method, comparativism, and deference.

In adopting this structure, this article seeks to do three things. Parts II and III clarify certain conceptual matters to ensure that any future work on legislative facts in Australia is built on solid foundations. This is particularly useful because legislative facts have received little sustained attention in Australia. Part IV then examines how Victorian and ACT courts have dealt with legislative facts to highlight the topic as one worthy of greater consideration in the future. Finally, Part V links legislative facts to broader themes in constitutional law to show that more is at stake than simply having a coherent stance for litigants preparing their cases (itself a worthy aspiration).

II BASIC CONCEPTS

A *Facts in Public Law Litigation*

Facts are relevant to judicial review of administrative action in a number of ways. At the most basic level, an administrative decision-maker must apply the law to the facts of the case before them, and facts about how they did so will be relevant to a court upon judicial review. A more complex illustration is the merits–legality dichotomy, which means that courts will scrutinise the legality but not the factual merits of an administrative decision. This distinction is maintained except in the case of ‘jurisdictional facts’, the determination of which remains the ultimate responsibility of the courts,⁹ and fact finding that is so illogical as to amount to reviewable jurisdictional error.¹⁰ At the same time as the High Court has renewed its interest in facts relevant to the constitutional validity of legislation, the Court has also begun to take a more robust view of these doctrines.¹¹

In judicial review of legislation, facts have at least three roles to play. Some approaches to constitutional interpretation depend on an understanding of particular facts. For example, originalist approaches call upon historical facts

⁹ See *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

¹⁰ See *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59.

¹¹ See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144. See also Mark Aronson, ‘The Resurgence of Jurisdictional Facts’ (2001) 12 *Public Law Review* 17.

about what the framers understood at federation.¹² Additionally, some constitutional provisions are drafted in such a way that they are only triggered when a particular entity, purpose or event exists or occurs. Accordingly, facts are needed to establish the existence of that trigger in much the same way as jurisdictional facts in administrative law. For example, the immigration power is only triggered if a person is in fact an ‘immigrant’.¹³ Finally, some doctrines require a balancing of competing interests, and the factual operation of the legislation in issue is invariably important to this enquiry. An example of this is the implied freedom of political communication.¹⁴

Domestic human rights litigation may involve judicial review of administrative or legislative action depending on how the human rights instrument is formulated, and it typically proceeds in two stages.¹⁵ The first stage is to determine whether a right has been limited, which will require interpretation of the right itself. If a right has been limited, the second stage in most jurisdictions is to determine whether that limitation is justifiable. Facts are potentially relevant to both stages. Most obviously, whether an administrative or legislative act limits a human right will ordinarily involve facts about how that act affects the right in question. Facts may also be relevant to the interpretation of the right (for example, evidence about embryos may shed light on the meaning of the right to life)¹⁶ and the justification for limiting those rights.

B Taxonomies and Issues Associated with the Use of Facts

It is apparent that different sorts of facts are needed to answer different sorts of enquiries in public law litigation. Some facts are particular to a specific

¹² See Bradley Selway, ‘The Use of History and Other Facts in the Reasoning of the High Court of Australia’ (2001) 20 *University of Tasmania Law Review* 129, 142–4. On constitutional interpretation and evidence, see also *S v Makwanyane* [1995] 3 SA 391, 405–7 [16]–[19] (Chaskalson P).

¹³ *Constitution* s 51(xxvii). See, eg, *Potter v Minahan* (1908) 7 CLR 277, 290 (Griffiths CJ), 298–9 (Barton J), 302 (O’Connor J), 307–9, 311 (Isaacs J), 318–19 (Higgins J); *Donohoe v Wong Sau* (1925) 36 CLR 404.

¹⁴ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹⁵ See, eg, Brian Foley, *Deference and the Presumption of Constitutionality* (Institute of Public Administration, 2008) 16–18. For a similar framework, see *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [65] (Bell P).

¹⁶ For a discussion of the United States case law on the question of when life begins, see generally David L Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (Oxford University Press, 2008) 9–13.

thing or event whereas other facts are more general in nature and relate to, for example, the state of society. For example, evidence of a corporation's activities, which is used to establish whether it is a 'trading or financial' corporation under s 51(xx) of the *Constitution*,¹⁷ is of a different kind to evidence of the importance of mica to the defence effort so as to engage the defence power.¹⁸ A number of commentators and judges have therefore proposed taxonomies of facts to reflect these differences,¹⁹ the most influential of which is Kenneth Culp Davis' distinction between 'legislative facts' and 'adjudicative facts'.²⁰ Adjudicative facts 'usually answer the questions of who did what, where, when, how, why, with what motive or intent' and are thus peculiar to specific parties.²¹ Legislative facts, on the other hand, 'do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.'²² One may rightly be sceptical about the utility of all-embracing taxonomies. Categorising facts is by no means a precise science and the categories are unlikely to be rigid or mutually exclusive no matter the typology used. The point is simply that different kinds of facts are needed for different kinds of enquiry. In the context of *Charter* and *HRA* litigation, whether a right has been limited will often turn on adjudicative facts specific to a particular person. Legislative facts will usually only be relevant to the limitation question to help interpret the right itself (for example, the meaning of the right to life) or where a party challenges the rights compatibility of the legislation on its face. Instead, legislative facts are particularly important at the justification stage because general facts about the purpose and effects of legislation go to the heart of the issue.

¹⁷ See, eg, *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190.

¹⁸ See *Jenkins v Commonwealth* (1947) 74 CLR 400.

¹⁹ See, eg, Faigman, above n 16, 43–62; A Christopher Bryant, 'The Empirical Judiciary' (2009) 25 *Constitutional Commentary* 467, 480–3; Selway, above n 12, 130–2; Shawn Kolitch, 'Constitutional Fact Finding and the Appropriate Use of Empirical Data in Constitutional Law' (2006) 10 *Lewis & Clark Law Review* 673, 675–7; Justice J D Heydon, LexisNexis, *Cross on Evidence*, vol 1 (at Service 140) [3005]; *Thomas v Mowbray* (2007) 233 CLR 307, 512 [614] (Heydon J).

²⁰ See Kenneth Culp Davis, 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55 *Harvard Law Review* 364.

²¹ Kenneth Culp Davis, *Administrative Law Text* (West Publishing, 3rd ed, 1972) 160 [7.03].

²² *Ibid.*

Whether and what type of facts are relevant to the determination of a legal issue depends on how the issue is framed,²³ but framing is only the first issue when dealing with facts. Appropriate evidence of those facts must then come before the courts, which raises questions of judicial method and procedure.²⁴ The court must then weigh the evidence to determine whether the relevant facts are established. The court will be assisted in this task by articulating a standard and burden of proof and an appropriate presumption of legality or illegality.²⁵ The burden of proof and related presumptions can be explained briefly. In broad terms, parties must adduce sufficient evidence to establish the facts essential to their claim to a cause of action or to a defence.²⁶ A presumption of validity or invalidity (depending on which party carries the burden) will apply in the event that the burden of proof is not discharged.²⁷ The standard of proof of facts requires further explanation because it is less well understood in the context of public law. The important point is that the standard of proof of facts is a distinct concept from the standard of review of a legal issue. The standard of proof explains how much evidence is needed to establish relevant legislative facts, and the standard of review explains how the court then assesses the facts as proved.²⁸ For example, it might be expected that strict scrutiny of a legal claim would also entail a stricter scrutiny of the evidence establishing facts relevant to that claim, but in fact there is no necessary correlation between the two. This is most apparent when approach-

²³ On the framing of doctrine and legislative facts in the United States, see generally Angelo N Ancheta, 'Science and Constitutional Fact Finding in Equal Protection Analysis' (2008) 69 *Ohio State Law Journal* 1115. In Australia, see, eg, Patrick Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970) 4 *Federal Law Review* 65, 80; Enid Campbell, 'Fact Finding in Constitutional Cases' in Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988) vol 2, 1099, 1100. In the United Kingdom, see David Feldman, 'Institutional Roles and Meanings of "Compatibility" under the *Human Rights Act 1998*' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 87, 107–11.

²⁴ For a taxonomy of sources of legislative facts in the context of developing the common law, see Heydon, 'Developing the Common Law', above n 6, 99–122.

²⁵ On the connection between the burden of proof and presumptions of legality or illegality, see Henry Burmester, 'The Presumption of Constitutionality' (1983) 13 *Federal Law Review* 277, 291.

²⁶ See generally Heydon, *Cross on Evidence*, above n 19, ch 4; Michelle T Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press, 2010) 70–86.

²⁷ The term 'presumption' is used here to mean 'nothing more than a conclusion which must be drawn until the contrary is proved': see Heydon, *Cross on Evidence*, above n 19, [7240]; Grando, above n 26, 94–5.

²⁸ See Grando, above n 26, 86.

ing the ‘reasonably appropriate and adapted’ standard,²⁹ which says little if anything about the amount of evidence needed to establish a relevant fact that will be fed into the ‘reasonably appropriate and adapted’ calculus.

Answers to these issues will often depend on how the legal doctrine is framed and will thus vary between substantive areas of law. However, they may also depend on the particular category of fact that is in issue. In terms of procedure, the usual process for tendering evidence appears appropriate for adjudicative facts, which are specific to individual parties, whereas such a procedure appears to be ill-adapted to the proof of legislative facts about, for example, the current state of the economy. In terms of amenability to review on appeal, adjudicative facts are usually not appealable because they constitute findings of fact, whereas legislative facts can usually be appealed because they are crucial to determining the content of the law.³⁰ Other examples may also exist. The answers to certain issues may not vary between categories, but distinguishing between facts promotes analytical clarity and accuracy and avoids category errors in the event that principles appropriate for one category are not appropriate for another.

To summarise thus far, there are three core issues when dealing with facts in public law litigation. The first issue is framing: are facts relevant to the determination of the legal issue and if so what sorts of facts are relevant? The second issue is methodology and procedure: how can those facts be established through evidence or otherwise? The third issue is the assessment of that evidence: what standard of proof, burden of proof and related presumptions apply?

III COMPARATIVE AND ANALOGOUS PRACTICE

Courts around the world have been alive to these issues, and they have developed approaches to facts and evidence with varying degrees of success and sophistication. The determination of adjudicative facts has not been controversial because the ordinary rules of evidence and procedure adequately apply. In contrast, the principles associated with legislative facts are considerably more enigmatic. The chief reason for this is that the ordinary rules of evidence and procedure have been considered to be inadequate in

²⁹ See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

³⁰ In New Zealand, see, eg, *Ministry of Health v Atkinson* [2011] NZHC 202 (11 March 2011). In the United States, see *Federal Rules of Civil Procedure* r 52(a); *Federal Rules of Evidence* r 201 and the notes to r 201.

their application to legislative facts, both because legislative facts are less particularised than adjudicative facts and because it is thought that legislative facts, going as they do to the meaning of the law, should not be left to the whim of the parties.

This section canvasses the approaches to legislative facts in other jurisdictions to understand better the concepts introduced in Part II. Comparative practice is particularly useful for this purpose because the Victorian and ACT jurisprudence is still in its infancy (as will be seen in Part IV) and is therefore not ideally placed to illustrate these concepts. Moreover, overseas experiences highlight how much work still needs to be done in Victoria and the ACT in this area and provides possible options for how the courts can proceed in future. To be clear, this is not to say that Victorian and ACT courts must follow foreign practice due to some perceived similarity between the human rights instruments in issue,³¹ although they may of course be constrained to follow the practice of the High Court of Australia. The practice of other courts simply provides a useful array of options, and thus a starting point, for how to approach legislative facts.

The courts and jurisdictions selected for discussion in this section are the High Court of Australia (as the apex of the Australian judicial system), the United States (as the birthplace of the modern concept of legislative facts), Canada, the United Kingdom and New Zealand (as jurisdictions, like Victoria and the ACT, with human rights legislation within the new Commonwealth model of constitutionalism),³² and South Africa (a jurisdiction that provided a model for the Victorian and ACT legislation).³³ The discussion of each jurisdiction loosely focuses upon three issues: when are facts relevant (framing), how are those facts proved (methodology and procedure), and how is the evidence assessed (standard and burden of proof).

³¹ Cf *Momcilovic* (2011) 280 ALR 221, 233–4 [18]–[20] (French CJ), 273 [146(i)], 276–9 [148]–[161] (Gummow J), 344 [424] (Heydon J) rejecting the slavish adoption of comparative law in the context of the interpretative obligation in s 32 of the *Charter*. Hayne J agreed with Gummow J; at 306 [280].

³² Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707; Stephen Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 167.

³³ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9; Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 3.

A Australia

The focus of Australian case law and commentary has been ‘constitutional facts’,³⁴ which are those legislative or adjudicative facts that are relevant to the constitutional validity of legislation.³⁵ Because judicial review of legislation is treated as ‘axiomatic’³⁶ in Australia, the courts must determine those facts upon which the constitutionality of legislation depends. As Williams J observed in *Australian Communist Party v Commonwealth*, ‘it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation.’³⁷ Yet what the High Court has taken by reserving to itself the duty of determining constitutional facts, it has given away by framing doctrines in such a way as to make them turn upon abstract legal propositions more than facts. The best example of this framing practice is the process of characterisation. Although the Court customarily affirms the relevance of the practical operation of the law to the question whether it is ‘with respect to’ a head of legislative power,³⁸ the Court has tended to focus more upon the law’s legal operation, and in particular ‘the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes.’³⁹ Accordingly, constitutional facts have traditionally been limited to a few discrete areas.⁴⁰ Their role is, however, expanding as the Court increasingly frames doctrines in a way that examines and turns upon the purpose and effects of the legislation at issue.⁴¹

³⁴ On legislative facts, see *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 478–81 [64]–[70] (McHugh J), 510–15 [162]–[169] (Callinan J); Heydon, ‘Developing the Common Law’, above n 6. On historical facts, see Selway, above n 12.

³⁵ See Brazil, above n 23; Kenny, above n 4; Lennan, above n 5; P H Lane, ‘Facts in Constitutional Law’ (1963) 37 *Australian Law Journal* 108; Heydon, *Cross on Evidence*, above n 19, [3156].

³⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J).

³⁷ *Ibid* 222. See also *Sue v Hill* (1999) 199 CLR 462, 484 [38] (Gleeson CJ, Gummow and Hayne JJ).

³⁸ See, eg, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 369 (McHugh J); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 198–9 [138] (Hayne, Kiefel and Bell JJ). See also Zines, above n 5, 38.

³⁹ *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 7 (Kitto J). See Brazil, above n 23, 67–8; Burmester, above n 25, 284–5.

⁴⁰ In particular ss 51(vi) and 92. See generally P H Lane, *The Australian Federal System* (Law Book, 2nd ed, 1979) 1090–6.

⁴¹ Zines, above n 5, 658.

Where a doctrine implicates constitutional facts, the High Court can take cognisance of them through a number of avenues.⁴² The parties may submit evidence in the usual way or proceed on a case stated with an agreed statement of facts,⁴³ a Justice usually overseeing this latter process in directions hearings.⁴⁴ Another option is to proceed by way of demurrer, which enables a case to be heard on the basis of the material facts stated in the pleadings.⁴⁵ The court may also undertake its own research or take judicial notice of, at a minimum, ‘open and notorious’ facts and those facts that are in the ‘common knowledge of educated men’ as collected in ‘accepted writings’, ‘standard works’ and ‘serious studies and inquiries’.⁴⁶ The limits of judicial notice and the Court’s ability to accept evidence not presented to the lower courts remain unclear, and their suppleness has been conceded on occasion. In *Gerhardy v Brown*, Brennan J candidly stated that ‘[t]he court must ascertain the statutory facts “as best it can” and it is difficult and undesirable to impose an a priori restraint on the performance of that duty.’⁴⁷ Consistent with this desire for flexibility, the Court is yet to articulate a standard of proof for constitutional facts, although it does seem clear that a party challenging the constitutionality of legislation carries the burden of proof to adduce sufficient supporting evidence. For example, the High Court held that the inadequate factual record in *Sportsodds Systems Pty Ltd v New South Wales*⁴⁸ made it an

⁴² See Frank W D Jones, ‘High Court Procedure under the *Judiciary Act*’ (1994) 68 *Australian Law Journal* 442; *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ).

⁴³ As to the latter, see *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 88 [229] (Gummow, Crennan and Bell JJ), citing *Thomas v Mowbray* (2007) 233 CLR 307, 517 [629] (Heydon J).

⁴⁴ See, eg, Transcript of Proceedings, *Roach v Electoral Commissioner* [2007] HCATrans 187 (2 May 2007); Transcript of Proceedings, *Rowe v Electoral Commissioner* [2010] HCATrans 182 (29 July 2010); Transcript of Proceedings, *Rowe v Electoral Commissioner* [2010] HCA-Trans 204 (4 August 2010).

⁴⁵ See *High Court Rules 2004* (Cth) r 27.07. See also *Wurridjal v Commonwealth* (2009) 237 CLR 309, 368–9 [119]–[121] (Gummow and Hayne JJ).

⁴⁶ *Thomas v Mowbray* (2007) 233 CLR 307, 513 [619] (Heydon J), quoting *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 196 (Dixon J). See generally Heydon, *Cross on Evidence*, above n 19, [3005]–[3160].

⁴⁷ (1985) 159 CLR 70, 142, quoting *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon CJ). See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 256 (Fullagar J).

⁴⁸ (2003) 133 FCR 63.

inappropriate vehicle for special leave, which meant that the challenged legislation remained valid.⁴⁹

B *United States*

The United States has a highly developed jurisprudence and literature on legislative facts, although much of the Supreme Court's practice remains the subject of domestic criticism.⁵⁰ Such facts have proved to be particularly significant, and controversial, when determining whether a constitutional right has been limited and whether that limitation is justified. At times, however, Justices of the Supreme Court have answered this factual (or mixed factual and evaluative) question with a response cloaked in legal propositions.⁵¹

A distinctive feature of the United States practice on legislative facts is the use of so-called 'Brandeis briefs' as the primary vehicle for bringing facts and evidence to the Supreme Court's attention. 'Brandeis briefs' are legal submissions to the Court that contain facts and evidence, which are received by the Court apparently on the basis of an expansive notion of judicial notice.⁵² The practice takes its name from Louis Brandeis' brief to the Court in *Muller v Oregon*⁵³ that contained two pages of legal submissions and more than 100 pages of factual material. Such briefs can in theory be filed in the lower courts but parties (and non-parties) generally file them only in the Supreme Court.⁵⁴ As a result, the material that they contain is usually brought to judicial scrutiny for the first time in that Court, and as such it cannot readily be tested

⁴⁹ Transcript of Proceedings, *Sportsodds Systems Pty Ltd v New South Wales* [2004] HCATrans 464 (19 November 2004). See also *Thomas v Mowbray* (2007) 233 CLR 307, 399–400 [260]–[261] (Kirby J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 146–7 [427] (Heydon J). *Contra South Australia v Tanner* (1989) 166 CLR 161, 179 (Brennan J): 'validity is a question of law and questions of law do not depend upon a party's discharge of an onus of proof of facts.'

⁵⁰ See, eg, John O McGinnis and Charles W Mulaney, 'Judging Facts Like Law' (2008) 25 *Constitutional Commentary* 69; Faigman, above n 16.

⁵¹ See Mark Tushnet, 'Harry Kalven and Kenneth Karst in the *Supreme Court Review*: Reflections after Fifty Years' [2010] *Supreme Court Review* 35, 43–4.

⁵² *Muller v Oregon*, 208 US 412, 421 (1907). See Ellie Margolis, 'Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs' (2000) 34 *University of San Francisco Law Review* 197, 203–6.

⁵³ 208 US 412 (1907).

⁵⁴ See Faigman, above n 16, 98; McGinnis and Mulaney, above n 50, 81, 126. See also Aaron-Andrew P Bruhl, 'Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court' (2012) 97 *Cornell Law Review* 433, 436, 463–5, 470–2.

except through other parties putting forward conflicting material.⁵⁵ Other mechanisms for ascertaining facts besides the Brandeis brief include the use of judicial notice generally, independent judicial research and the statements of legislative fact typically contained in parliamentary debates and legislation itself.⁵⁶

In assessing the constitutionality of legislation, the Supreme Court has established different standards of review, ranging from ‘strict scrutiny’ to ‘rational basis’ review. These standards of review are loosely linked to the standard of proof of legislative facts but there is no consistent connection between them.⁵⁷ It seems clear that in rational basis review, ‘a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.’⁵⁸ However, when applying the strict scrutiny standard, the Court has at times been willing to defer to the legislature’s findings of constitutional fact in assessing the legality of the law.⁵⁹

C Canada

Legislative facts have historically played a role in determining the constitutionality of legislation in Canada,⁶⁰ but this role has grown considerably with the advent of the *Canadian Charter of Rights and Freedoms*.⁶¹ The Supreme Court has generally insisted that ‘*Charter* decisions should not and must not be made in a factual vacuum. ... The presentation of facts is not ... a mere technicality; rather, it is essential to a proper consideration of *Charter*

⁵⁵ See John Frazier Jackson, ‘The Brandeis Brief — Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts’ (1993) 17 *American Journal of Trial Advocacy* 1.

⁵⁶ On legislative facts previously determined by Congress, see generally McGinnis and Mulaney, above n 50.

⁵⁷ See Caitlin E Borgmann, ‘Rethinking Judicial Deference to Legislative Fact-Finding’ (2009) 84 *Indiana Law Journal* 1, 10; Faigman, above n 16, 129–32.

⁵⁸ *FCC v Beach Commissioners Inc*, 508 US 307, 315 (Thomas J) (1993). See also *Heller v Doe*, 509 US 312, 333 (Kennedy J) (1993); *Miller v Albright*, 523 US 420, 452 (O’Connor J) (1998).

⁵⁹ See Borgmann, above n 57, 10. See also Faigman, above n 16, 130–2.

⁶⁰ See, eg, *Re Anti-Inflation Act* [1976] 2 SCR 373. See generally P W Hogg, ‘Proof of Facts in Constitutional Cases’ (1976) 26 *University of Toronto Law Journal* 386.

⁶¹ *Canada Act 1982* (UK) c 11, sch B pt I. See Justice Frank Iacobucci, ‘The *Charter*: Twenty Years Later’ (2002) 21 *Windsor Yearbook of Access to Justice* 3, 6–7.

issues.⁶² The party claiming that a right has been limited must therefore lead facts and evidence to establish their claim, after which the governmental party has the burden of adducing evidence establishing justification.⁶³ The evidence establishing justification should be ‘cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit’ unless the elements of the justification analysis are ‘obvious or self-evident’.⁶⁴ Justification requires ‘proof by a preponderance of probability’, but within this civil standard ‘there exist different degrees of probability’.⁶⁵ Where there is conflicting or inconclusive evidence, the governmental party must only show that the evidence establishes a ‘reasonable basis’ for the limitation,⁶⁶ which reflects the requirement that ultimately the government must prove justifiability ‘on a balance of probabilities’.⁶⁷

The Court’s preferred procedures for ascertaining these facts have swung between a liberal and a restrictive approach,⁶⁸ and the pendulum currently rests somewhere in between these two extremes. In its most recent detailed discussion of the issue,⁶⁹ the Court placed the ascertainment of all facts (whether of an ‘adjudicative’, ‘social’ or ‘legislative’ nature) upon a principled footing. Although some uncertainty remains, the following propositions summarise the approach.

First, the Court prefers evidence of facts to be adduced by expert testimony that can be cross-examined in court, and ‘[l]itigants who disregard the

⁶² *MacKay v Manitoba* [1989] 2 SCR 357, 361–2 (Cory J). See also *RJR-MacDonald Inc v A-G (Canada)* [1995] 3 SCR 199, 330–1 [133] (McLachlin J). On occasion, the Court has been willing to assess legislation on the basis of ‘reasonable hypothetical’ situations: see, eg, *R v Goltz* [1991] 3 SCR 485, 515–16 (Gonthier J).

⁶³ See John T Pepall, ‘What’s the Evidence? The Use the Supreme Court of Canada Makes of Evidence in *Charter* Cases’ in Anthony A Peacock (ed), *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Oxford University Press, 1996) 161, 162.

⁶⁴ *R v Oakes* [1986] 1 SCR 103, 138 (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ).

⁶⁵ *Ibid* 137.

⁶⁶ Sujit Choudhry, ‘So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*’s Section 1’ (2006) 34 *Supreme Court Law Review* (2d) 501, 525, citing *Irwin Toy Ltd v Quebec (A-G)* [1989] 1 SCR 927, 994 (Dickson CJ, Lamer and Wilson JJ).

⁶⁷ *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 282 [43] (Charron J for McLachlin CJ, Bastarache, Binnie, Fish and Charron JJ).

⁶⁸ See generally Mahmud Jamal, ‘Legislative Facts in *Charter* Litigation: Where Are We Now?’ (2005) 17 *National Journal of Constitutional Law* 1.

⁶⁹ See *R v Spence* [2005] 3 SCR 458. See also *R v Clayton* [2007] 2 SCR 725, 779–80 [109] (Binnie J for Binnie, LeBel and Fish JJ).

suggestion proceed at some risk.⁷⁰ The Court has acknowledged that expert evidence may be too difficult or expensive for some litigants to obtain, but it appears that the Court will attempt to take this into account in some other way rather than resort to judicial notice in circumstances that would ‘dilute the principled exercise of judicial notice.’⁷¹

Secondly, material placed before the lower courts can (and indeed must) be brought before the Supreme Court in the parties’ stated case.⁷² Fresh evidence can only be brought before the Supreme Court upon a ‘fresh evidence’ motion under s 62(3) of the *Supreme Court Act*,⁷³ and only then if it meets the requirements of ‘due diligence’ (with due diligence could it have been adduced in the lower courts), ‘relevance’ (does it bear on ‘a decisive or potentially decisive issue’), ‘credibility’ (is it ‘reasonably capable of belief’) and ‘decisiveness’ (if it were believed, could it ‘be expected to have affected the result’).⁷⁴ In making a fresh evidence motion, the parties must include draft submissions that identify the ‘exact propositions’ sought to be drawn from the fresh evidence.⁷⁵

Thirdly, where the parties seek to rely upon judicial notice, the starting point and ‘gold standard’⁷⁶ are the so-called ‘Morgan criteria’:⁷⁷ judicial notice can be taken of facts ‘so notorious or generally accepted as not to be the subject of debate among reasonable persons’ or ‘capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable

⁷⁰ *R v Spence* [2005] 3 SCR 458, 493–4 [68] (Binnie J for Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ).

⁷¹ *Ibid* 494 [69].

⁷² *Supreme Court Act*, RSC 1985, c S-26, s 62(2) (*‘Supreme Court Act’*). See also *Public School Boards’ Association of Alberta v Alberta (A-G)* [1999] 3 SCR 845, 848 [5] (Binnie J).

⁷³ Section 62(3) provides:

The Court or a judge may, in the discretion of the Court or the judge, on special grounds and by special leave, receive further evidence on any question of fact, such evidence to be taken in the manner authorized by this Act, either by oral examination, by affidavit or by deposition, as the Court or the judge may direct.

See also *Public School Boards’ Association of Alberta v Alberta (A-G)* [1999] 3 SCR 845, 848–50 [6]–[8] (Binnie J).

⁷⁴ *Public School Boards’ Association of Alberta v Alberta (A-G)* [2000] 1 SCR 44, 48 [6], 49 [10] (Binnie J), quoting *Palmer v The Queen* [1980] 1 SCR 759, 775 (McIntyre J for Laskin CJ, Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ). See also *UL Canada Inc v Quebec (A-G)* [2004] 3 SCR 760.

⁷⁵ *School Boards’ Association of Alberta v Alberta* [2000] 1 SCR 44, 48 [6], 50 [11] (Binnie J)

⁷⁶ *R v Spence* [2005] 3 SCR 458, 490 [61] (Binnie J for Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ).

⁷⁷ The reference is to Edmund M Morgan, ‘Judicial Notice’ (1944) 57 *Harvard Law Review* 269.

accuracy'.⁷⁸ The Morgan criteria are not, however, determinative for social and legislative facts because 'the limits of judicial notice are inevitably somewhat elastic' in this context.⁷⁹ Here, 'the permissible scope of judicial notice should vary according to the nature of the issue under consideration.'⁸⁰ In particular, the weight of the Morgan criteria will depend on how significant the fact is to the disposition of the case. '[T]he closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria.'⁸¹ Accordingly, judicial notice of social and legislative facts sits on a spectrum. At the 'high end'⁸² where the fact is dispositive of the matter, the Morgan criteria are necessary and sufficient conditions. At the 'low end' where the fact goes to a background matter, 'the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond controversy'.⁸³ In between, the test is

whether such 'fact' would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy.⁸⁴

D *United Kingdom*

The United Kingdom courts have somewhat reluctantly embraced the factual nature of proportionality analysis in *Human Rights Act 1998* (UK) ('HRA (UK)') litigation, probably because the United Kingdom lacks a tradition of judicial review of primary legislation.⁸⁵ In *Wilson v First County Trust Ltd*

⁷⁸ *R v Spence* [2005] 3 SCR 458, 486–7 [53] (Binnie J for Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ), quoting *Find v The Queen* [2001] 1 SCR 863, 886 [48] (McLachlin CJ for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

⁷⁹ *R v Spence* [2005] 3 SCR 458, 490–1 [63] (Binnie J for Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ).

⁸⁰ *Ibid* 490 [60] (emphasis altered).

⁸¹ *Ibid* 490 [61].

⁸² *Ibid* 491 [65].

⁸³ *Ibid*.

⁸⁴ *Ibid* 491–2 [65] (emphasis in original).

⁸⁵ See Sir Michael Supperstone, James Goudie and Sir Paul Walker, *Judicial Review* (LexisNexis, 4th ed, 2010) 285 [9.22.1]. See also Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 242.

[No 2], Lord Nicholls noted that ‘the court will look *primarily* at the legislation, but *not exclusively so*. Convention rights are concerned with practicalities. When identifying the practical effect of an impugned statutory provision the court *may* need to look outside the statute in order to see the complete picture’.⁸⁶ This statement carefully avoids a broad confirmation that facts will be relevant in proportionality analysis, but it is tolerably clear from the case law that legislative facts, in substance if not in name, are a key integer in the analysis. This has been expressly recognised by some judges⁸⁷ and practitioners,⁸⁸ and certainly by academics.⁸⁹

This ambivalence towards facts has resulted in a dearth of case law⁹⁰ and an unstable and ill-defined approach to legislative facts.⁹¹ Nonetheless, it is possible to identify a few guideposts. In conducting proportionality analysis, the Supreme Court has recently affirmed earlier views that ‘the facts will often speak for themselves’⁹² and that it is legitimate to refer to published government materials and parliamentary debates, so long as due caution is paid when doing so.⁹³ The House of Lords has also frequently referred to compara-

⁸⁶ [2004] 1 AC 816, 842 [61] (emphasis added). See also *A v Secretary of State for the Home Department* [2005] 2 AC 68, 112 [44] (Lord Bingham).

⁸⁷ See, eg, *R v Ministry of Defence; Ex parte Smith* [1996] QB 517, 564 (Henry LJ); *R v Shayler* [2003] 1 AC 247, 281 [61] (Lord Hope); *R (Countryside Alliance) v A-G (UK)* [2008] 1 AC 719, 765 [78] (Lord Hope); *Evans v Amicus Healthcare Ltd* [2004] 3 WLR 681, 699 [56] (Thorpe and Sedley LJ); *Sheldrake v DPP* [2005] 1 AC 264, 297 [21] (Lord Bingham). See also *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 546 [23] (Lord Bingham).

⁸⁸ See Rabinder Singh, ‘The Human Rights Act and the Courts: A Practitioner’s Perspective’ [2010] *European Human Rights Law Review* 589, 591–2.

⁸⁹ Kavanagh, above n 85, 242, 254–5; Jason Coppel and Michael Supperstone, ‘Judicial Review after the Human Rights Act’ [1999] *European Human Rights Law Review* 301, 326–7; Andrew Henderson, ‘Brandeis Briefs and the Proof of Legislative Facts in Proceedings under the Human Rights Act 1998’ [1998] *Public Law* 563; Supperstone, Goudie and Walker, above n 85, 285 [9.22.1]; Ian Leigh and Laurence Lustgarten, ‘Making Rights Real: The Courts, Remedies, and the Human Rights Act’ (1999) 58 *Cambridge Law Journal* 509, 522–6.

⁹⁰ See *A v Essex County Council* [2011] 1 AC 280, 316 [112] (Baroness Hale JSC), noting the ‘very little case law’ on limitations more generally.

⁹¹ See Paul Roberts, ‘Criminal Procedure, the Presumption of Innocence and Judicial Reasoning under the Human Rights Act’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 377, 419–22.

⁹² *R (F) v Secretary of State for the Home Department* [2011] 1 AC 331, 341–2 [18] (Lord Phillips PSC), citing *Wilson v First County Trust Ltd [No 2]* [2004] 1 AC 816, 842–3 [62]–[64] (Lord Nicholls).

⁹³ *R (F) v Secretary of State for the Home Department* [2011] 1 AC 331, 341–2 [18] (Lord Phillips PSC), citing *Wilson v First County Trust Ltd [No 2]* [2004] 1 AC 816, 842–3 [62]–[64]

tive practice apparently as empirical evidence supporting the proportionality or otherwise of legislation.⁹⁴ It appears that the parties can put these and other materials to the court in submissions or as evidence,⁹⁵ or relevant facts can be ascertained via judicial notice. In a case pre-dating the *HRA* (UK), it was said:

if the court is satisfied on the basis of judicial notice that the requirements of proportionality have been met, there is no need for the prosecution to adduce oral or documentary evidence. Judicial notice is not confined to questions which everyone would be able to answer of his own knowledge. It includes matters of a public nature such as history, social customs and public opinion which may have to be culled from works of reference.⁹⁶

Perhaps reflecting the dominant view in the United Kingdom that proportionality is a ‘value judgment’, the courts’ decisions often tend to combine the relevant court’s view of any facts with the court’s ultimate conclusion on the legal argument itself. There is thus no clear statement of principle about the standard of proof of relevant facts, although, clearly enough, the governmental party bears the onus of establishing justifiability.

E *South Africa*

Despite an early anomalous suggestion that justification analysis is primarily a question of law,⁹⁷ whether a right has been justifiably limited clearly depends on facts about the purpose and effects of the legislation.⁹⁸ Each party must place before the courts sufficient evidence to establish their claim,⁹⁹ and the

(Lord Nicholls). See also *Wilson v First County Trust Ltd [No 2]* [2004] 1 AC 816, 842–3 [62]–[64] (Lord Nicholls), 856–7 [116]–[118] (Lord Hope), 865–6 [142] (Lord Hobhouse); *Lancashire County Council v Taylor* [2005] 1 WLR 2668, 2681–3 [53]–[59] (Lord Woolf CJ for Lord Woolf CJ, Sedley and Gage LJ); *R (Wilson) v Wychavon District Council* [2007] QB 801, 816–18 [33]–[36] (Richards LJ), 837 [107] (Moses LJ); *R (Morris) v Westminster City Council* [2006] 1 WLR 505, 521 [39] (Sedley LJ).

⁹⁴ See, eg, *R v Lambert* [2002] 2 AC 545, 573–4 [40] (Lord Steyn).

⁹⁵ See *Evans v Amicus Healthcare Ltd* [2004] 3 WLR 681, 695–9 [43]–[56] (Thorpe and Sedley LJ), 712–13 [114]–[115] (Arden LJ). See also *R (British American Tobacco) v Secretary of State for Health* [2004] EWHC 2493 (Admin) (5 November 2004) [65] (McCombe J); Supperstone, Goudie and Walker, above n 85, 285 [9.22.1].

⁹⁶ *Stoke-on-Trent City Council and Norwich City Council v B & Q plc* [1991] Ch 48, 65 (Hoffman J).

⁹⁷ See *S v Lawrence* [1997] 4 SA 1176, 1198–9 [52] (Chaskalson P).

⁹⁸ Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta, 5th ed, 2005) 167.

⁹⁹ *Prince v President, Cape Law Society* [2001] 2 SA 388, 399 [22] (Ngcobo J).

Constitutional Court has particularly insisted that the governmental party has the burden and duty to lead evidence to justify the legislation.¹⁰⁰ However, this appears to be a special sort of burden. The Court has accepted that legislation can be aimed at ‘subjective’ goals that are not capable of objective proof, in which case the government should simply ‘place sufficient information’ before the Court.¹⁰¹ Moreover, and somewhat curiously, in theory a failure to adduce any evidence does not necessarily result in invalidity,¹⁰² although it has in most cases.¹⁰³ This can probably be explained by the Court’s ability to bridge the evidentiary gap by relying on ‘common sense and judicial knowledge’¹⁰⁴ in addition to documents lodged, in accordance with r 31 of the *Constitutional Court Rules 2003* (South Africa), canvassing facts that are ‘common cause or otherwise incontrovertible’ or ‘are of an official, scientific, technical or statistical nature capable of easy verification.’¹⁰⁵

Each party must ordinarily produce their evidence to the court of first instance,¹⁰⁶ after which it will be admissible as of right in the Constitutional Court. The Constitutional Court also has the power under the *Constitutional Court Rules 2003* (South Africa) to receive fresh evidence,¹⁰⁷ but it has said it will only do so if ‘compelling reasons exist’.¹⁰⁸ The Court will take into account whether the impugned legislation ‘serve[s] an important public

¹⁰⁰ *Khosa v Minister of Social Development* [2004] 6 SA 505, 520 [18]–[19] (Mokgoro J). See also *ibid.*

¹⁰¹ *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2005] 3 SA 280, 294 [35]–[36] (Chaskalson CJ).

¹⁰² See *Moise v Greater Germiston Transitional Local Council* [2001] 4 SA 491, 498 [19] (Somayalo AJ); *Phillips v DPP* [2003] 3 SA 345, 355 [20] (Yacoob J). Moreover, a failure to make any justification *submission* has not prevented the Constitutional Court from considering justification on its own motion: *Du Toit v Minister of Welfare and Population Development* [2003] 2 SA 198, 211–12 [33]–[34] (Skweyiya AJ).

¹⁰³ See, eg, *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2005] 3 SA 280.

¹⁰⁴ *Ibid* 294 [36] (Chaskalson CJ) (citations omitted).

¹⁰⁵ See *S v Lawrence* [1997] 4 SA 1176, 1202 [68] (Chaskalson P). See also *S v Meaker* [1998] 8 BCLR 1038, 1047 (Cameron J). For an example of such statistical material, see *S v Makwanyane* [1995] 3 SA 391, 444–5 [126] (Chaskalson P).

¹⁰⁶ *Prince v President, Cape Law Society* [2001] 2 SA 388, 399 [22] (Ngcobo J).

¹⁰⁷ *Constitutional Court Rules 2003* (South Africa) r 30, Government Notice R1675, Government Gazette 25726 (31 October 2003), incorporating *Supreme Court Act 1959* (South Africa) s 22. See also *Constitutional Court Rules 2003* (South Africa) r 31.

¹⁰⁸ Currie and de Waal, above n 98, 138, citing *Bel Porto School Governing Body v Premier, Western Cape* [2002] 3 SA 265, 299 [119] (Chaskalson CJ); *Zondi v Minister of the Executive Council for Traditional and Local Government Affairs* [2005] 3 SA 589, 601–3 [22]–[28] (Ngcobo J).

interest', whether the right 'is of fundamental importance' and 'goes beyond the narrow interest' of the individual, whether the lower court judges have 'fully canvassed' the validity of the legislation, the course of the litigation below, the individual's resources, and any prejudice to the parties.¹⁰⁹

F *New Zealand*

The Supreme Court has endorsed both the legislative–adjudicative fact dichotomy and the relevance of facts at least to the justification of any limitation upon human rights,¹¹⁰ but the proper procedure for adducing evidence of these facts is unsettled. It appears that evidence may be tendered in the usual fashion and that the courts may take judicial notice of 'sufficiently self-evident' legislative facts that 'may be implicit in the relevant legislation, or readily identifiable and capable of evaluation'.¹¹¹ What remains unclear is whether evidence can be tendered for the first time in the Supreme Court, although the parties clearly risk the evidence being inadmissible if it is offered so late as not to enable it to be adequately tested by contrary submissions or evidence (cross-examination not being appropriate for legislative facts). Finally, it is established that the burden of proof initially rests upon the party seeking to establish a human rights limitation and then upon the party seeking to establish that the limitation is justified. Whether a party discharges its burden ostensibly depends upon the civil standard (balance of probabilities), although in their actual decisions it has been argued that New Zealand courts have adopted a non-intrusive standard of proof.¹¹²

The leading New Zealand authority is *R v Hansen*,¹¹³ where the Court refused to receive evidence submitted by the Crown to justify the enactment of a reverse onus provision that deemed a person in possession of a certain quantity of drugs to have possessed them for the purpose of sale or supply

¹⁰⁹ *Bel Porto School Governing Body v Premier, Western Cape* [2002] 3 SA 265, 298–9 [117] (Chaskalson CJ); *Prince v President, Cape Law Society* [2001] 2 SA 388, 399–400 [23] (Ngcobo J).

¹¹⁰ See *R v Hansen* [2007] 3 NZLR 1, 10 [9] (Elias CJ), 25 [50] (Blanchard J), 48 [132] (Tipping J), 75 [230] (McGrath J).

¹¹¹ *Ibid* 76 [232] (McGrath J).

¹¹² See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, 2005) 129 [6.7.2]. See also *ibid* 42 [112] (Tipping J).

¹¹³ [2007] 3 NZLR 1. For an excellent discussion of the main issue in this case — the interpretative obligation in s 5 of the *Bill of Rights Act 1990* (NZ) — see Claudia Geiringer, 'The Principle of Legality and the *Bill of Rights Act*: A Critical Examination of *R v Hansen*' (2008) 6 *New Zealand Journal of Public and International Law* 59.

‘until the contrary is proved’. Shortly before the hearing in the Supreme Court, counsel for the Crown sought leave to adduce material that had not been tendered in the lower courts. These materials included affidavits from police officers and others with knowledge of the drug industry, law enforcement policies and strategies, and some unpublished material.¹¹⁴ The Court refused to admit the evidence because it was too late in the proceedings.¹¹⁵ Tipping J declared that ‘[t]his Court is not the appropriate forum for initial fact finding and assessment’ of legislative facts,¹¹⁶ and in any event he doubted whether the evidence sought to be tendered could reliably shed any light on the effects of the provision.¹¹⁷ In contrast, McGrath J ‘recognise[d] that it will not always be practical to put the material before [the Court of Appeal]’¹¹⁸ and he declared that the Supreme Court ‘should be ready to receive material of this kind, without subjecting it to the requirements of the rules of evidence or of admitting new evidence’,¹¹⁹ as long as the evidence was ‘appropriately tested in Court.’¹²⁰ McGrath J held that the evidence was tendered too late to be adequately tested, but he instead took judicial notice of the nature of drug dealing in New Zealand, which he considered to be ‘sufficiently self-evident’.¹²¹

G Summary

It is not possible in this article to explore in detail the comparative case law or to reflect on why these jurisdictions have taken different trajectories on legislative facts. Each has its own particular constitutional setting and form of human rights protection that could bear on how their courts approach legislative facts. For present purposes, it is sufficient to note a few general points.

First, all of the jurisdictions recognise that facts are relevant to whether a right has been limited, and that legislative facts in particular are relevant to whether that limitation is justifiable. Several of the jurisdictions, with the

¹¹⁴ *R v Hansen* [2007] 3 NZLR 1, 24–5 [50] (Blanchard J), 48 [132] (Tipping J), 75 [229] (McGrath J).

¹¹⁵ *Ibid* 10 [9] (Elias CJ), 25 [50] (Blanchard J), 48 [133] (Tipping J), 76 [231] (McGrath J).

¹¹⁶ *Ibid* 48 [133].

¹¹⁷ *Ibid* 48 [132].

¹¹⁸ *Ibid* 76 [231].

¹¹⁹ *Ibid* 75 [230].

¹²⁰ *Ibid* 76 [231].

¹²¹ *Ibid* 76 [232].

exceptions of the United Kingdom and South Africa, have accepted the utility of the distinction between legislative and adjudicative facts. This does not mean that other jurisdictions should therefore adopt this taxonomy by weight of comparative numbers. The lesson is that there are distinctions between facts and that it is useful to be sensitive to them.

Secondly, there is substantial variety in the procedural rules that exist in this area. Most courts are willing to use judicial notice to determine legislative facts and they exert varying degrees of control over parties adducing evidence that was not led in the lower courts.

Thirdly, the burden of adducing sufficient evidence consistently falls first on the party claiming a limitation and then on the party seeking to establish justification for that limitation. In contrast, the standard of proof varies between jurisdictions and is often difficult to discern because it is often conflated, consciously or unconsciously, with the applicable standard of review.

IV FACTS UNDER THE *CHARTER* AND THE *HRA*

The text of the *Charter* and the *HRA* clearly makes facts relevant to a number of issues. Whether the Acts apply at all will depend on (adjudicative) facts about when the relevant conduct occurred, as the results of early *Charter* cases demonstrate.¹²² Whether a public authority ‘fail[ed] to give proper consideration to a relevant human right’¹²³ will depend on (adjudicative) facts about how the impugned decision was made.¹²⁴ And most significantly of all, whether a limitation of a right is justifiable¹²⁵ will depend on facts about the purpose and effects of the legislation in issue. None of the extensive background materials to the enactment,¹²⁶ and later reviews,¹²⁷ of the *Charter* and

¹²² See *Tomasevic v Travaglini* (2007) 17 VR 100, 113 [70] (Bell J); *R v Williams* (2007) 16 VR 168, 175–6 [40]–[48] (King J); *DPP (Vic) v Zierk* (2008) 184 A Crim R 582, 591 [43] (Warren CJ); *Guneser v Magistrates’ Court of Victoria* [2008] VSC 57 (5 March 2008) [62] (Habersberger J); *Ragg v Magistrates’ Court of Victoria* (2008) 18 VR 300, 308 [36] (Bell J); *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 (18 June 2009) [174]–[177] (Vickery J); *Slaveski v Victoria* [2010] VSC 441 (1 October 2010) [119] (Kyrou J); *Collier v Austin Health* [2011] VSC 344 (27 July 2011) [13]–[22] (Bell J). See also *Re Unumadu* [2007] VSC 258 (23 July 2007) [4] (Bongiorno J); *R v White* [2007] VSC 142 (7 May 2007) [4] (Bongiorno J).

¹²³ *Charter* s 38(1).

¹²⁴ See, eg, *Director of Housing v TK* [2010] VCAT 1839 (16 November 2010).

¹²⁵ See *HRA* s 28; *Charter* s 7(2).

¹²⁶ See ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003); Explanatory Statement, Human Rights Bill 2003 (ACT); ACT, *Parliamentary Debates*, Legislative Assembly, 18 November 2003, 4244 (Jon Stanhope); Human Rights Consultation

the HRA have addressed how relevant facts are to be proved and assessed in litigation. The courts (and tribunals in Victoria) have not been able to avoid this issue, and this Part surveys how they have dealt with legislative facts.

A Victoria

Given the infancy of the *Charter* and the lack of a legal tradition that pays express regard to legislative fact ascertainment, it is unsurprising that the cases provide little guidance on legislative facts. The Supreme Court has confirmed that facts are relevant to the question whether a limitation is demonstrably justified under s 7(2) and that the governmental party carries the burden of adducing evidence of these facts.¹²⁸ It has also discussed the standard of proof to apply in s 7(2) analysis. The standard of proof and the sorts of evidence required will vary depending on '[t]he nature and extent of the infringement of rights',¹²⁹ but the evidence should be 'cogent and persuasive' and 'make clear to the court the consequences of imposing or not imposing the limit'.¹³⁰ Consistent with a 'high' standard of proof and a 'degree of probability ... commensurate with the occasion',¹³¹ the 'mere assertion' by the government that a limitation is necessary is unlikely ever to carry the day and it will only be in 'exceptional' cases that the justification for interfering

Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2006); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289 (Robert Hulls); George Williams, 'The Victorian *Charter of Human Rights and Responsibilities: Origins and Scope*' (2006) 30 *Melbourne University Law Review* 880.

¹²⁷ See Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 124 [508] (simply noting in relation to *R v Momcilovic* (2010) 25 VR 436 that 'SARC makes no comment about the correctness of these holdings, which may be reviewed in the High Court. However, the Court of Appeal's ruling raises potentially difficult questions about the process for adducing such evidence, its nature and the role of other parties in questioning it'); ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009); Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review — Report* (2006).

¹²⁸ *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 448–9 [147] (Warren CJ); *R v Momcilovic* (2010) 25 VR 436, 475 [144], 476 [146] (Maxwell P, Ashley and Neave JJA).

¹²⁹ *R v Momcilovic* (2010) 25 VR 436, 476 [146] (Maxwell P, Ashley and Neave JJA).

¹³⁰ *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 449 [147] (Warren CJ), quoting *R v Oakes* [1986] 1 SCR 103, 138 (Dickson CJ, for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ); *ibid* 475 [144].

¹³¹ *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 448 [147] (Warren CJ) (citations omitted).

with rights in the manner chosen will be ‘self-evident’.¹³² These same principles have also been expressed to apply to the determination of adjudicative facts, with the caveat that in judicial review of a public authority’s conduct, the Court may give some weight to the authority’s view of the human rights compliance of its conduct.¹³³ The Supreme Court has not, however, explained how evidence of these facts is to be adduced in court. In the absence of any specific procedures, it is likely that the courts are falling back upon the usual rules of evidence and procedure, including judicial notice, for both adjudicative and legislative facts.¹³⁴ For example, the courts clearly rely at least in part upon the submissions of the parties.¹³⁵

Since these principles are only just emerging, it is useful to examine how the Victorian courts have approached legislative fact ascertainment in practice. Five cases are particularly instructive for that purpose.

The first case to consider the consistency of Victorian legislation with the *Charter* did so only in passing. In *Ferguson v Walkley*,¹³⁶ Harper J noted that the High Court in *Coleman v Power*¹³⁷ upheld the constitutional validity of s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld), which prohibited threatening, abusive or insulting words in or near a public place.¹³⁸ He observed that ‘[i]t doubtless follows that the equivalent provision in the *Summary Offences Act*’ can be justifiable under s 7(2) of the *Charter*.¹³⁹ This observation could be understood as simply an application of precedent,¹⁴⁰ but the better reading, given that *Coleman v Power* is distinguishable in fact and so not strictly binding, is that Harper J used the case as empirical evidence supporting the justifiability of equivalent legislation in Victoria.

The second case is *RJE v Secretary to the Department of Justice*.¹⁴¹ Section 11 of the *Serious Sex Offenders Monitoring Act 2005* (Vic) empowered a

¹³² *R v Momcilovic* (2010) 25 VR 436, 476 [146] (Maxwell P, Ashley and Neave JJA).

¹³³ Whether it is correct to apply the principles developed for legislative facts to administrative facts is not without doubt, but it is beyond the scope of this article.

¹³⁴ See, eg, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 40.

¹³⁵ For commendation of the latter, see *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc [No 2]* [2011] VSC 153 (19 April 2011) [97] (Pagone J).

¹³⁶ (2008) 17 VR 647.

¹³⁷ (2004) 220 CLR 1.

¹³⁸ (2008) 17 VR 647, 652 [20]–[23].

¹³⁹ *Ibid* 652 [23].

¹⁴⁰ Lower courts are bound by High Court *rationes decidendi* and seriously considered *obiter dicta*: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 150–1 [134], 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁴¹ (2008) 21 VR 526.

court to make an ‘extended supervision order’ if satisfied to a high degree of probability that the offender is likely to re-offend. Agreeing with the majority in the result,¹⁴² Nettle JA held that ‘likely’ meant ‘at least more likely than not’ because a lower threshold of probability would unjustifiably limit *Charter* rights.¹⁴³ He observed that the evident purpose of s 11 was ‘to guard against the dire consequences of the commission of a relevant offence’,¹⁴⁴ but notwithstanding this purpose, he could not ‘conceive of the potentially far reaching restrictions on rights provided for in the Act as being capable of demonstrable justification’ if ‘likely’ did not mean ‘at least more likely than not’.¹⁴⁵ Nettle JA came to this conclusion on the basis of a hypothetical example to illustrate the laws of probability,¹⁴⁶ his perception of the effect of certain provisions of the Act on *Charter* rights,¹⁴⁷ and distinctions between the Act and valid Canadian legislation. Counsel had brought the Canadian law to the Court’s attention in their submissions.¹⁴⁸ Counsel had also submitted material about the orders and directions in fact given in this case as ‘evidence of the way in which the Act operates in fact and thus as legislative facts which may assist in the interpretation of the legislation.’¹⁴⁹ Nettle JA did not, however, determine the status or relevance of this material except to cite, somewhat cryptically, a Canadian case in which the Supreme Court agreed to receive from one of the parties studies, articles, reports and statistics that had not been submitted in the lower courts because the parties were not prejudiced by the Court doing so.¹⁵⁰

The third case — and the first to grapple with legislative facts in detail — is *Re Application under the Major Crime (Investigative Powers) Act 2004* (‘DAS’).¹⁵¹ Under the *Major Crime (Investigative Powers) Act 2004* (Vic), a person could be compelled to answer questions. Section 39(1) abrogated the privilege against self-incrimination, but s 39(3) provided that such evidence

¹⁴² Maxwell P and Weinberg JA did not consider it necessary to decide the *Charter* arguments: *ibid* 528 [2].

¹⁴³ *Ibid* 558 [119].

¹⁴⁴ *Ibid* 554 [107].

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid* 556 [113].

¹⁴⁸ *Ibid* 555–6 [109]–[113].

¹⁴⁹ *Ibid* 555 [109] (citations omitted).

¹⁵⁰ *Ibid*, citing *Ford v Quebec (A-G)* [1988] 2 SCR 712, 775–8 (Dickson CJ, Beetz, McIntyre, Lamer and Wilson JJ).

¹⁵¹ (2009) 24 VR 415.

would not be admissible in proceedings brought directly against the person. The Act did not provide further immunity against derivative uses of self-incriminating evidence.

Warren CJ held that the Act limited ss 24(1) and 25(2) of the *Charter*. She gave a series of hypothetical examples to illustrate that there was no material distinction between using a witness' compelled testimony against him or her and using evidence derived from that testimony against him or her,¹⁵² and she also referred to overseas practice to demonstrate that a failure to protect witnesses against derivative use of compelled evidence limits *Charter* rights.¹⁵³ Therefore, the Chief Justice had to consider justification under s 7(2). In orthodox fashion, she considered the statutory language and extrinsic materials to conclude that the object of the legislation was to prevent and prosecute organised crime by responding to 'perceived difficulties in investigating organised crime in circumstances where derivative evidence cannot be used.'¹⁵⁴ She also observed — and this does not appear from the Act or the extrinsic materials¹⁵⁵ and thus presumably derives from judicial notice — that organised crime is 'a substantial blight on our society' and is 'serious and significantly detrimental to society'.¹⁵⁶

The Chief Justice went on to note that the applicant could not 'assist the court to better understand the difficulty of investigating organised crime and did not present any evidence on the point.'¹⁵⁷ She was directed, 'without a great deal of precision', to observations in the Canadian Supreme Court and the High Court of Australia about the possible difficulties of excluding derivative evidence, but she concluded that these observations did not shed light on 'the importance of the *purpose* of the limitation.'¹⁵⁸ Accordingly,

¹⁵² Ibid 435–7 [84]–[95].

¹⁵³ Ibid 437–48 [96]–[143].

¹⁵⁴ Ibid 449–50 [151].

¹⁵⁵ The Chief Justice did not expressly name these 'extrinsic materials', but presumably they included: Explanatory Memorandum, Major Crime (Investigative Powers) Bill 2004 (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 5 October 2004, 613–20 (Sherryl Garbutt); Victoria, *Parliamentary Debates*, Legislative Council, 10 November 2004, 1220–5 (J M Madden).

¹⁵⁶ *DAS* (2009) 24 VR 415, 449 [151].

¹⁵⁷ Ibid 450 [151]. Indeed, Warren CJ later made a global observation that '[t]he applicant made limited submissions with regard to s 7. These are insufficient to meet the very stringent threshold I have described': at 452 [164].

¹⁵⁸ Ibid 450 [151] (emphasis in original). Under s 7(2)(b) of the *Charter*, 'the importance of the purpose of the limitation' is a relevant factor to justification.

Warren CJ determined the importance of the purpose without the assistance of evidence, relying instead upon what appears to be supposition:

It is conceivable that sophisticated criminal activity presents a number of difficulties to investigative authorities, one of which being that in all investigations of the type contemplated by the Act, there comes a point in time in which the investigator must seek explanations from those participating in the criminal activity. By virtue of the often hierarchical nature of organised crime, questions asked of a participant may be innocuous in themselves, but may relate to a chain of events which ultimately, when placed together, have the effect of compelling the conclusion that the witness is part of the criminal organisation. It may be that the indirect questions and their answers ultimately assist the investigator to piece other evidence together.¹⁵⁹

Warren CJ also determined, without evidence, that the limitation was rationally connected to this purpose:

Investigative authorities are no doubt greatly assisted by the power to compel suspected participants to answer questions, and to use the information obtained from those answers derivatively to prosecute a person for serious offences. It is apparent that the limitation increases the ability of the State to investigate organised crime offences.¹⁶⁰

The Chief Justice ultimately concluded that the Act failed the proportionality test because it was not the least restrictive means available. In her view, the Canadian approach in *R v S (RJ)*¹⁶¹ was less restrictive¹⁶² and appropriate (referring again to her earlier series of hypotheticals).¹⁶³ Significantly, she referred to the subsequent Canadian practice as empirical evidence that the *R v S (RJ)* approach was fit for the purpose. Referring to a sole Canadian case, she observed that '[i]n Canada, it has been possible to effectively investigate offences as serious as terrorism while respecting derivative use immunity. The applicant has shown no real reason why this should not be the case in Victoria.'¹⁶⁴ The judgment suggests that it was the Victorian Human Rights and Equal Opportunity Commission as intervener that relied upon Canadian authority. Whether the Commission specifically established that the Canadian

¹⁵⁹ *DAS* (2009) 24 VR 415, 450 [152].

¹⁶⁰ *Ibid* 450 [153].

¹⁶¹ [1995] 1 SCR 451.

¹⁶² *DAS* (2009) 24 VR 415, 451 [156].

¹⁶³ *Ibid* 451 [157].

¹⁶⁴ *Ibid* 451 [160], citing *Re an Application under s 83.28 of the Criminal Code* [2004] 2 SCR 248.

law was appropriate for the Victorian context is not clear, but the burden fell on Victoria Police as the party supporting justifiability to lead evidence that the Canadian approach was inappropriate once it was proposed by another party. In addition to the Canadian position, the Chief Justice noted that derivative use immunity was ‘not uncommon’ in Australian statutes,¹⁶⁵ and she drew on these as empirical evidence that derivative use immunity did not prevent the investigation of offences: ‘These provisions have operated in this form for significant periods of time. It may be assumed that if they were unworkable, they would have been revisited, even removed, by the legislature.’¹⁶⁶

The fourth case is *R v Momcilovic* in the Victorian Court of Appeal.¹⁶⁷ Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) deemed a person to possess drugs if the drugs were found on their premises ‘unless the person satisfies the court to the contrary’. The Attorney-General submitted that this provision did not limit the presumption of innocence in s 25(1) of the *Charter*, although it was conceded in oral argument that it did so when read with the possession offence.¹⁶⁸ It was not therefore necessary for the Court to determine this point, but it nonetheless held that the provisions did limit the presumption of innocence. It reached this conclusion on the face of the legislation,¹⁶⁹ but the Court also referred to overseas cases as ‘helpful illustrations’.¹⁷⁰ Given that the Court recognised that these cases ‘are not determinative in interpreting s 5’,¹⁷¹ the best reading of how the Court used this comparative case law is as evidence that reverse onus provisions can limit the presumption of innocence.

The Court thus turned to justification under s 7(2). The Solicitor-General for Victoria submitted that the purpose of s 5 was to facilitate the prosecution of drug offences by overcoming evidentiary obstacles where the offence allegedly occurred on private premises. She relied upon overseas cases in support of the importance of this legislative purpose and invited the Court ‘to have regard to the widespread suffering caused by the social evil of drug trafficking’.¹⁷² She also submitted that ‘the efficacy of s 5 in aiding prosecu-

¹⁶⁵ *DAS* (2009) 24 VR 415, 453 [164].

¹⁶⁶ *Ibid.*

¹⁶⁷ (2010) 25 VR 436.

¹⁶⁸ *Ibid* 470 [123] (Maxwell P, Ashley and Neave JJA).

¹⁶⁹ *Ibid* 473 [135]–[136].

¹⁷⁰ *Ibid* 470 [124].

¹⁷¹ *Ibid.*

¹⁷² *Ibid* 474 [137].

tions for trafficking was “of a very high order”¹⁷³ although there was no ‘attempt to place evidence before the court to establish that effective prosecution of trafficking (or possession) offences depended upon the ability to rely on the reverse onus.’¹⁷⁴ Indeed, the Chief Crown Prosecutor had ‘candidly acknowledged’ that the onus of proof made ‘little difference’ to drug trafficking prosecutions,¹⁷⁵ and that ‘empirical evidence of the efficacy of the persuasive onus would have been virtually impossible to obtain. It was mere speculation’ whether the reverse onus had affected the outcome of trials.¹⁷⁶ Unsurprisingly, the Court concluded that the Attorney-General did not ‘come close to justifying the infringement of the presumption in relation to the trafficking offence.’¹⁷⁷ As noted earlier, the High Court on appeal against this decision did not resolve the role of facts and evidence under the *Charter* in any particular detail.

Finally, in *Director of Housing v Sudi*, the Court of Appeal held that the Victorian Civil and Administrative Tribunal (‘VCAT’) did not have jurisdiction to collaterally review a landlord’s conduct pursuant to the *Residential Tenancies Act 1997* (Vic) (‘RTA’) for consistency with the *Charter*.¹⁷⁸ Consequently, a tenant would have to bring *Charter* claims to the Supreme Court. Warren CJ held that if the denial of VCAT’s jurisdiction limited s 13(a) of the *Charter*, such a limitation would be justifiable under s 7(2) due to ‘the policy benefits of maintaining VCAT’s role as a forum for quick, efficient and inexpensive resolution of issues arising under the RTA that properly fall within VCAT’s jurisdiction.’¹⁷⁹ She deduced this role from the text of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and the RTA.¹⁸⁰ She then described the nature of collateral review of an administrative decision, presumably drawing upon judicial experience:

VCAT would have to, in effect, conduct a trial within a trial. VCAT would need to leave the subject of tenancy law and enter the domain of administrative law. It would have to make difficult decisions about whether the challenge falls within the limits (if any) of permissible collateral attack, whether the impugned

¹⁷³ Ibid 475 [142].

¹⁷⁴ Ibid.

¹⁷⁵ Ibid 475–6 [145].

¹⁷⁶ Ibid 476 [145].

¹⁷⁷ Ibid 477 [153].

¹⁷⁸ [2011] VSCA 266 (6 September 2011).

¹⁷⁹ Ibid [56].

¹⁸⁰ Ibid [19], [34].

administrative decision is affected by error and whether the alleged error is jurisdictional. Such a complex, technical and time-consuming inquiry would destroy the advantages of litigating the tenancy dispute in VCAT rather than in a court.¹⁸¹

The appellant submitted that denying VCAT's jurisdiction would result in its own procedural difficulties because tenants would have to commence separate proceedings in the Supreme Court, with all the inconvenience associated with fragmenting proceedings in this way.¹⁸² Warren CJ dismissed these concerns as 'a necessary consequence of setting up a specialist forum of limited jurisdiction',¹⁸³ and she gave examples of how limiting the jurisdiction of any tribunal could lead to fragmentation. She concluded that

[t]hese difficulties are the flipside of the policy benefits derived from limiting VCAT's jurisdiction — the quick, efficient, inexpensive and informal resolution of issues arising under the *RTA* that do fall within VCAT's jurisdiction.¹⁸⁴

B ACT

The applicable principles in the ACT are even less developed than in Victoria. It was only in 2010 that the Supreme Court expressly confirmed that the party justifying a limitation of a right carries the burden of proof,¹⁸⁵ although this was probably clear from practice in any event. Additionally, the Court in this case quoted Warren CJ's judgment in *DAS* on the standard of proof required, which thus brought the ACT into line with Victoria.¹⁸⁶ That is the extent of the express guidance on legislative fact ascertainment in the ACT.¹⁸⁷

A not insignificant body of ACT cases do touch upon legislative facts, but most do not shed much light on the issue. In several cases the effect of the legislation upon *HRA* rights was treated as sufficiently obvious on the face of

¹⁸¹ *Ibid* [35] (citations omitted).

¹⁸² *Ibid* [37]–[38].

¹⁸³ *Ibid* [39].

¹⁸⁴ *Ibid*.

¹⁸⁵ See *Re Application for Bail by Islam* (2010) 4 ACTLR 235, 290 [241] (Penfold J).

¹⁸⁶ *Ibid*.

¹⁸⁷ See also Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 136, 150.

the legislation.¹⁸⁸ For example, in *Pappas v Noble*,¹⁸⁹ Master Harper treated it as self-evident that legislation making inadmissible evidence that would otherwise be determinative was inconsistent with s 21 of the *HRA*.¹⁹⁰ In other cases the consistency of the relevant legislation was not seriously in issue¹⁹¹ and the Court accordingly provided only limited reasons on the point. For example, the Court has frequently held that taken in its entirety, the *Bail Act 1992* (ACT) does not impermissibly limit the right to liberty. The first such case simply referred to a New Zealand Court of Appeal discussion of how to approach bail applications in the shadow of the *New Zealand Bill of Rights Act 1990* (NZ),¹⁹² and subsequent cases have merely cited this first case.¹⁹³ Leaving these cases to one side, there are five ACT cases that merit closer attention to illustrate legislative fact finding in the ACT.

*R v Fearnside*¹⁹⁴ concerned s 68B(1)(c) of the *Supreme Court Act 1933* (ACT), which allowed an accused to elect a trial by a single judge if ‘the election is made before the court first allocates a date for the person’s trial’. The Court of Appeal dismissed the claim that s 68B(1)(c), by requiring trial by jury where the election is made too late, contravened s 21(1) of the *HRA*. Writing the leading judgment, Besanko J observed that ‘it would be a surprising conclusion that a trial by jury would not secure’ a fair hearing, given that some Australian jurisdictions (including the ACT prior to 1993) mandate trial by jury, as does s 80 of the *Constitution*.¹⁹⁵ Overseas cases also showed

¹⁸⁸ See, eg, *Spatolisano v Hyde* [2009] ACTSC 161 (9 December 2009) [53] (Refshauge J); *R v JA* (2007) 1 ACTLR 126, 132 [30], [32]–[33] (Higgins CJ); *Griggs v Sentence Administration Board of the Australian Capital Territory* (2010) 5 ACTLR 185, 193 [32]–[33] (Gray J); *Zardo v Parisi* (2007) 1 ACTLR 68, 72 [15] (Connolly J); *S v DPP (ACT)* (2007) 1 ACTLR 206, 208 [7] (Higgins CJ); *Lucas-Smith v Coroner’s Court (ACT)* (2009) 166 ACTR 42, 48 [44] (Higgins CJ); *Lander v Council of the Law Society of the Australian Capital Territory* (2009) 168 ACTR 32, 51 [37]–[38] (Higgins CJ, Gray and Refshauge JJ); *SI bhnf CC v KS bhnf IS* (2005) 195 FLR 151, 157 [24] (Higgins CJ); *Temoannui v Ford* (2009) 231 FLR 216, 220 [27], [29] (Higgins CJ).

¹⁸⁹ (2006) 199 FLR 116.

¹⁹⁰ *Ibid* 118 [14], 119 [17].

¹⁹¹ See, eg, *R v Kain* [2009] ACTSC 103 (26 August 2009) [21] (Gray J); *Sleiman v Murray* (2009) 231 FLR 224, 228 [20] (Refshauge J); *R v Austin [No 2]* (2010) 5 ACTLR 70, 73 [3] (Refshauge J).

¹⁹² *Re Application for Bail by Paul Blundell* [2008] ACTSC 138 (3 December 2008) [2] (Refshauge J), quoting *B v Police [No 2]* [2000] 1 NZLR 31, 34 (Blanchard J).

¹⁹³ See also *Re Application for Bail by Samnang Oeur* [2011] ACTSC 108 (10 June 2011) [7] (Refshauge J); *Re Application for Bail by Breen* (2009) 172 ACTR 21, 26 [49] (Refshauge J).

¹⁹⁴ (2009) 3 ACTLR 25.

¹⁹⁵ *Ibid* 49–50 [100].

that ‘a jury is a competent, independent and impartial body for the purpose of the trial of criminal charges’.¹⁹⁶ Besanko J then held that fairness cannot ‘turn on the perception of the defendant’ because it is ‘a question of objective fact’.¹⁹⁷ He therefore dismissed the respondent’s claim that the evidence would have a prejudicial effect on a jury, because discretions existed to protect the accused at trial from such prejudice. Although ‘no submissions were made identifying the precise provisions of the relevant Territory laws’, Besanko J considered that the existence of such discretions was ‘clear’, citing a leading text and a High Court case.¹⁹⁸ Had the Act limited s 21, Besanko J added (by way of justification):

No doubt a time limit such that the making of an election before a trial commences is necessary. At the same time, as the legislation and rules in other jurisdictions in Australia make clear, other time limits can be prescribed or, alternatively, a different approach can be taken involving the conferring of a discretion on the Court to relax the time limit in appropriate circumstances.¹⁹⁹

In *Re Application for Bail by Islam* (*Re Islam*),²⁰⁰ Penfold J held that s 9C of the *Bail Act 1992* (ACT) was incompatible with s 18(5) of the *HRA*.²⁰¹ Section 9C provided that a person accused of murder, attempted murder or other serious drug offences carrying maximum penalties of life imprisonment could not be granted bail unless the court or authorised officer is ‘satisfied that special or exceptional circumstances exist favouring the grant of bail.’ Legislative facts and evidence became relevant at four crucial junctures in the judgment.

First, the Director of Public Prosecutions submitted that s 9C did not contravene s 18(5) of the *HRA* because it was not ‘a general rule’: ‘The number of individuals who are charged with murder or a derivative of murder in the ACT proportionate to other crimes is miniscule.’²⁰² The Director thus attempted to use facts to argue that no limitation occurred.

¹⁹⁶ *Ibid* 50 [100].

¹⁹⁷ *Ibid* 50 [101].

¹⁹⁸ *Ibid*, citing J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 7th Australian ed, 2004) 352–6 [11 125] and *R v Swaffield* (1998) 192 CLR 159.

¹⁹⁹ *R v Fearnside* (2009) 3 ACTLR 25, 50 [103].

²⁰⁰ (2010) 4 ACTLR 235.

²⁰¹ Section 18(5) provides: ‘Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.’

²⁰² *Ibid* 304 [319].

Penfold J dismissed this submission because the claimed fact was ‘not “evidence” of anything’.²⁰³ On her Honour’s interpretation of s 18(5), a ‘general rule’ could still apply to ‘a relatively small number of people’.²⁰⁴

Secondly, Penfold J held that s 9C limited s 18(5) based on her reading of the *Bail Act 1992* (ACT) itself.²⁰⁵ That she relied upon the face of the legislation reflects her framing of the question in legal terms, namely ‘whether a provision ... *as such, structured in the form of ss 9C read with 9G, offends a right*’.²⁰⁶ However, her Honour also pointed to the outcomes of two ACT cases to demonstrate empirically ‘the odd effect of s 9C’.²⁰⁷

Thirdly, evidence played (or should have played) a role in ascertaining the purpose of s 9C (a crucial integer in both statutory interpretation and justification analysis). Penfold J ultimately accepted that s 9C was designed either to reduce the risk of accused persons absconding or tampering with witnesses, or to protect the community from persons accused of serious offences. The Act and its extrinsic materials did not conclusively point in either direction. What is interesting for present purposes is how Penfold J explained why she could not accept the Director of Public Prosecution’s submissions in favour of only the latter purpose. Without any evidence having been led, she accepted the Director’s point that drug offences and murder might have ‘wide ranging and detrimental effects on the community’.²⁰⁸ Similarly, she observed without evidence that attempted murder may not have such a wide impact, or at least not more than some offences not caught by s 9C.²⁰⁹ In contrast, Penfold J relied on evidence to observe that focusing on murder rather than other violent offences ‘is not necessarily a rational response to the need for community protection’.²¹⁰ She cited homicide statistics prepared by the Australian Institute of Criminology that showed that ‘most murderers are known to their victims’.²¹¹ From this, she inferred that murderers may pose less danger to the community than other

²⁰³ Ibid 304 [320].

²⁰⁴ Ibid.

²⁰⁵ Ibid 305–6 [325]–[330].

²⁰⁶ Ibid 305 [326] (emphasis altered).

²⁰⁷ Ibid 306 [332].

²⁰⁸ Ibid 297 [276].

²⁰⁹ Ibid.

²¹⁰ Ibid 297 [277].

²¹¹ Ibid, citing Jack Dearden and Warwick Jones, ‘Homicide in Australia: 2006–07 National Homicide Monitoring Program Annual Report’ (Monitoring Report No 1, Australian Institute of Criminology, January 2009) 10–11.

violent offenders. To support this inference, she cited a hypothetical example given by the applicant of a 'battered woman' who murders her abusive partner compared to an offender with multiple aggravated assault charges.²¹²

Fourthly, in the justification analysis proper, Penfold J began by noting that 'neither party tendered any evidence in support of its submissions about the need for a provision to the effect of s 9C or about s 9C's suitability for its purpose.'²¹³ Her Honour concluded that s 9C was not rationally connected to either purpose identified above. She reached this conclusion by considering the operation of the Act by reference to hypothetical situations, by comparison with the position in South Africa, and by noting the range of seemingly comparable offences to which s 9C did not apply.²¹⁴ Her Honour also concluded that s 9C was not the least restrictive means available for achieving its purpose, based on a comparison with other Australian jurisdictions and South Africa. She rejected the Attorney-General's reliance on 'the developed wisdom of the common law'²¹⁵ because 'some form of evidence, or analysis of the ACT situation, would be required'²¹⁶ to conclude that the common law preference for 'exceptional circumstances' developed in 1850 was appropriate for the ACT today. The empirical flavour of Penfold J's judgment on this point is captured in the following passage:

It is clear from the foregoing discussion of both the legislative approaches taken in other Australian jurisdictions and the judicial approaches taken overseas that there are many other ways, many if not all of them more rational, of dealing with the possible grant of bail for persons accused of very serious offences. What is not clear is that there is anything special about 'the problem confronted' in the ACT (whatever that problem is) such that only the s 9C approach of imposing an apparently irrelevant threshold test for consideration of such a bail application is adequate to meet that problem.²¹⁷

Accordingly, Penfold J held that s 9C could not be interpreted consistently with s 18(5) and issued a declaration of incompatibility.²¹⁸

Blundell v Sentence Administration Board of the Australian Capital Territory ('*Blundell*')²¹⁹ concerned s 150 of the *Crimes (Sentence Administration)*

²¹² *Re Islam* (2010) 4 ACTLR 235, 297 [277].

²¹³ *Ibid* 307 [338].

²¹⁴ *Ibid* 311 [356].

²¹⁵ *Ibid* 314 [374].

²¹⁶ *Ibid* 315 [375].

²¹⁷ *Ibid* 315 [377].

²¹⁸ *Ibid* 318–19 [399]–[403].

Act 2005 (ACT), which authorised the Sentence Administration Board to cancel an offender's parole if he or she is convicted of an offence while on parole. Refshauge J held that s 150 only authorised cancellation where the offender is convicted of an offence that was committed while on parole because automatic cancellation for offences committed before the grant of parole would limit s 18 of the *HRA*.²²⁰ It would not take into account important features of individual cases (essentially a legal proposition) and it was 'likely to be disproportionate in a number of cases'²²¹ (an empirical claim for which no evidence was given). His Honour illustrated the arbitrary operation of the Act by using the facts of this case itself.²²²

As to any possible justification for this limitation, Refshauge J noted that the 'only such justification offered' by the defendants was that 'the legislature was to be taken to have held that the public needed to be protected by an automatic cancellation' of parole.²²³ The defendants' written submissions explained that the purpose of the legislation was 'protecting the community from persons who, while on parole, are likely to reoffend'.²²⁴ This was said to be 'an important purpose' as 'it reflects one of the principal reasons' for criminal law and sentencing.²²⁵ The submissions then claimed that '[t]here is a clear relationship between the offender's recommittal to prison and the purpose of the limitation on his or her rights', given that the 'original sentencing court had clearly seen fit to impose a custodial sentence'.²²⁶ Where the offender is convicted again, whenever the offence itself was committed, 'it is clearly the case that a return to custody (a) will achieve the purpose of protecting the community and (b) is an appropriate response to a repeat offender.'²²⁷ Any 'harsh result' can be ameliorated by the Board's continued power to grant parole upon application by an offender.²²⁸ As reproduced in the judgment, these submissions were unsupported by evidence.

According to Refshauge J, these submissions 'assume[d] that an offence committed prior to the commencement of the parole period is evidence of the

²¹⁹ (2010) 5 ACTLR 88.

²²⁰ *Ibid* 118–19 [170]–[175].

²²¹ *Ibid* 119 [172].

²²² *Ibid* 119 [173]–[174].

²²³ *Ibid* 119 [177].

²²⁴ *Ibid* 119 [178].

²²⁵ *Ibid*.

²²⁶ *Ibid* 120 [178].

²²⁷ *Ibid*.

²²⁸ *Ibid*.

likelihood of re-offending. Clearly past behaviour is material on which such a decision can legitimately be made,²²⁹ but it provides weaker support than an offence committed while on parole.²²⁹ This observation cried out for empirical evidence but none was cited (or perhaps submitted). Nonetheless, his Honour seemingly accepted that there was at least a rational connection between a pre-parole offence and the likelihood of now re-offending because he moved on to ‘issues of proportionality.’²³⁰ He concluded that this interpretation of s 150 would not be proportionate to the legislative object by relying on the current case as an illustration of the Act’s operation:

In a sense, [proportionality] is demonstrated in this case to be problematic. The section provides for automatic cancellation and reimprisonment but in this case that did not occur till over three months after the conviction. If there is a need for automatic cancellation, it is hard to see that it is proportionate to permit the offender to be at large for three months, apparently, on the basis argued for such cancellation, a risk to public safety during this time, when finally, after apparently meeting his parole conditions for that time, the offender’s rehabilitation is interrupted by a conviction for an offence that occurred in this case over three years earlier. It is difficult to see that as proportionate.²³¹

Two other cases, both on domestic violence orders, may be mentioned briefly. In *SI bhmf CC v KS bhmf IS*,²³² Higgins CJ interpreted s 51A of the *Domestic Violence and Protection Orders Act 2001* (ACT) in a way that allowed ex parte final protection orders to be set aside so as not to contravene ‘human rights standards.’²³³ The main reason for adopting this construction was that s 51A established a regime analogous to certain civil and criminal procedures that did allow the courts to set aside the orders made.²³⁴ The Chief Justice used these procedures as evidence of a human rights compatible interpretation of the legislation in question. In *R v AM*,²³⁵ AM contravened Interim Domestic Violence Orders purportedly in accordance with her conscience, which is protected by s 14 of the *HRA*. Refshauge J held that even

²²⁹ Ibid 120 [179].

²³⁰ Ibid 120 [180].

²³¹ Ibid.

²³² (2005) 195 FLR 151.

²³³ Ibid 164 [71].

²³⁴ Ibid 163–4 [66]–[70].

²³⁵ (2010) 5 ACTLR 170.

if her right had been limited,²³⁶ protection orders are demonstrably justified because they uphold public safety and order.²³⁷ How did Refshauge J support this conclusion? He noted that ‘the constitutions of India and Ireland express such limitations of safety, health and morals on the freedom of religion protected in those constitutions’.²³⁸ He referred to Canadian and United Kingdom authorities that upheld the constraint of other ‘[e]ven more serious issues of conscience, such as abortion, to which many in our community have a strong conscientious objection’.²³⁹ Finally, he asserted, presumably based on judicial notice, that ‘the fact is that in a free and democratic society, the government has some obligation to protect its subjects and those in its jurisdiction.’²⁴⁰

V INSIGHTS FROM VICTORIA AND THE ACT

A startling feature of the above cases is the frequency with which governmental parties provide no evidence to justify the legislation in issue. The judgments expressly noted this in *R v Momcilovic*, *DAS* and *Re Islam*, and the judgment in *Blundell* suggests the same. That these cases ultimately turned on justification makes this omission all the more surprising. In all four cases the courts were not willing to bridge the evidentiary gap through judicial notice or other means, but the courts can and have done so in other cases by drawing upon a smorgasbord of techniques and sources of evidence: judicial notice, common sense, judicial experience, hypothetical examples, domestic and foreign case law, statutes and constitutions. Assuming the current practice of the Victorian and ACT courts is correct, it thus tends to suggest that some criticisms of s 7(2) in *Momcilovic* miss the mark. In particular, Heydon J observed that s 7(2) ‘contemplates evidence or material of a kind going far beyond the evidence or material ordinarily considered by courts’ in determining legislative facts,²⁴¹ and that leading such evidence in a criminal trial, for example, would impair the ability to run trials ‘expeditiously and smoothly.’²⁴² Echoes of Heydon J’s first criticism also appear in other judg-

²³⁶ Refshauge J held that she had failed to lead sufficient evidence to establish a limitation: *ibid* 181 [48]–[53].

²³⁷ *Ibid* 183 [68].

²³⁸ *Ibid* 183 [67].

²³⁹ *Ibid* 183 [74].

²⁴⁰ *Ibid* 183 [73].

²⁴¹ *Momcilovic* (2011) 280 ALR 221, 347 [431].

²⁴² *Ibid*. See also *Re Islam* (2010) 4 ACTLR 235, 287 [225] (Penfold J).

ments.²⁴³ Yet the Victorian and ACT courts have so far relied upon thoroughly typical sources of evidence in their justification analysis, and there is no indication that proceedings have been delayed (perhaps because the courts have tended to rely upon submissions, judicial notice and assumptions based upon experience). What conclusions can be drawn from the Victorian and ACT experiences for Heydon J's more fundamental criticism of s 7(2) — that it requires the courts to decide questions that are better left to the legislature²⁴⁴ — are less obvious. On the one hand, that the courts use a wide variety of techniques and sources of evidence to determine legislative facts might suggest that the task of adjudicating rights claims is better left to the legislature. On the other hand, this is not a phenomenon unique to rights claims. That the Victorian and ACT courts have determined legislative facts by using a multitude of practices and sources of evidence is therefore not a sound reason to take rights claims away from the courts while allowing them to determine other disputes that engage similar legislative fact finding methods.

The references to foreign law — be it case law, statutes or constitutions — implicate the broader debate on comparativism in constitutional law. The academic literature contains numerous attempts to categorise the different uses to which foreign law can be put by the courts.²⁴⁵ A common use identified in most frameworks is reliance upon foreign law in an 'empirical sense'. In this mode, foreign law can be cited 'as part of the evidence to support an empirical conclusion that a particular approach is or is not workable in practice, or has particular unintended effects.'²⁴⁶ In the terminology used in

²⁴³ *Momcilovic* (2011) 280 ALR 221, 239 [36] (French CJ), 386–7 [575]–[576] (Crennan and Kiefel JJ).

²⁴⁴ *Ibid* 346–7 [431].

²⁴⁵ See, eg, Joan L Larsen, 'Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation' (2004) 65 *Ohio State Law Journal* 1283; Taavi Annus, 'Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments' (2004) 14 *Duke Journal of Comparative & International Law* 301; Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37; David Fontana, 'Refined Comparativism in Constitutional Law' (2001) 49 *UCLA Law Review* 539; Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing, 2007) 371.

²⁴⁶ McCrudden, above n 245, 378. See also Adrienne Stone, 'Comparativism in Constitutional Interpretation' [2009] *New Zealand Law Review* 45, 59; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 62.

this article, foreign law is thus one source of evidence of legislative facts.²⁴⁷ This appears to be how the Victorian and ACT courts have used foreign law in their judgments. The courts do not articulate their methodology in these terms, but it seems tolerably clear that they are using foreign law in this empirical mode because they do not treat the foreign law as an authority as such for reaching a particular conclusion. Rather, the foreign law is discussed as evidence that a particular Victorian or ACT approach limits a right or is (or is not) justifiable. This explains, for example, Refshauge J's reference in *R v AM* to the constitutions of India and Ireland, which clearly have no binding or persuasive legal authority in Australia.²⁴⁸

There should be no in principle objection to this practice because it is no different to the courts drawing on domestic law as empirical evidence (also a common practice in Victoria and the ACT). There are also practical advantages in using foreign law as evidence. Counsel can usually be relied upon to bring foreign law to the court's attention, which cannot yet be said about other empirical evidence. Foreign law is often therefore readily at hand to bridge any evidentiary gaps. Moreover, an empirical approach avoids the High Court's clear lack of enthusiasm for comparativism in *Momcilovic*, which appeared to be targeted at more substantive uses of foreign law (as some sort of persuasive authority) in judicial decision-making.

Although empirical comparativism may be unobjectionable in principle, there are obviously substantial practical obstacles in the way of *appropriately* using foreign law as evidence. When referring to foreign law empirically, the courts assume that the consequences of a law in one country shed light on the consequences that the legislation in issue will have at home. A detailed knowledge and understanding of the comparator jurisdiction and the circumstances surrounding the foreign law referred to is needed before a court can hope accurately to identify the consequences of a foreign law, to distinguish between causality and coincidence.²⁴⁹ Whether domestic courts have the competence to carry out this analysis may be questioned, although this can be remedied over time.²⁵⁰ On this score, the Victorian and ACT courts do not measure up well. They have generally referred to foreign law without explaining the social facts applicable at the time of the case (or statute

²⁴⁷ Fontana, above n 245, 553–6, 570, 600.

²⁴⁸ (2010) 5 ACTLR 170, 183 [67]. See above n 238 and accompanying text.

²⁴⁹ See Annus, above n 245, 338–42. In the context of a more general discussion of judicial decision-making under human rights instruments, see Feldman, above n 23, 90–1.

²⁵⁰ Vicki C Jackson, 'Narratives of Federalism: Of Continuities and Comparative Constitutional Experience' (2001) 51 *Duke Law Journal* 223, 268.

or constitution) and without investigating how the foreign law has operated in practice. A step in the right direction is Warren CJ's judgment in *DAS*.²⁵¹ The Chief Justice relied upon *R v S (RJ)*²⁵² as a less restrictive alternative to the legislation at issue, and then at least made an attempt to consider how *R v S (RJ)* had operated in practice afterwards (unfortunately, by reference only to one later case).²⁵³

The Victorian and ACT experiences also enter the fraught territory of whether judicial review is legitimate at all, particularly but not exclusively²⁵⁴ in the rights context.²⁵⁵ According to Waldron, the core of the case against judicial review on rights grounds is that there is no reason to assume that the courts are better placed than the legislature to determine rights issues, and furthermore that judicial review of legislation passed by the representatives of the people is undemocratic.²⁵⁶ Both criticisms are diminished (but not parried by any stretch of the imagination)²⁵⁷ to the extent that the courts rely on 'objective'²⁵⁸ evidence in applying the law rather than relying on purely legalistic reasoning that can be characterised, fairly or not, as legal sophistry.²⁵⁹ The courts and statutory human rights proponents have therefore done themselves a disservice by relying too readily upon alternative means to determine the essential legislative facts in cases rather than demanding evidence. Objective evidence can serve a legitimising function (at least in

²⁵¹ (2009) 24 VR 415, 451–2 [156]–[160].

²⁵² [1995] 1 SCR 451.

²⁵³ See above n 164 and accompanying text.

²⁵⁴ See Adrienne Stone, 'Judicial Review without Rights' (2008) 28 *Oxford Journal of Legal Studies* 1; Adrienne Stone, 'Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law' (2010) 60 *University of Toronto Law Journal* 109; Jeffrey Goldsworthy, 'Structural Judicial Review and the Objection from Democracy' (2010) 60 *University of Toronto Law Journal* 137.

²⁵⁵ See generally Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999).

²⁵⁶ See Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

²⁵⁷ For example, if one does not accept that the courts have the capacity to weigh such 'objective' evidence: see *Re Islam* (2010) 4 ACTLR 235, 287 [227] (Penfold J).

²⁵⁸ This article assumes that 'objective' facts do exist. On the scientific debate, see Faigman, above n 16, ch 2. See also Timothy Zick, 'Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths' (2003) 82 *North Carolina Law Review* 115.

²⁵⁹ Similarly, Fordham and de la Mare distinguish between evidence as the 'operative rationale' for the limitation and legal submissions as the 'subsequent rationalisation' of that limitation: Michael Fordham and Thomas de la Mare, 'Identifying the Principles of Proportionality' in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing, 2001) 27, 29.

comparison to unparticularised generalisations), although to do so the procedures and principles for adducing that evidence also need to be consistent, transparent and fair.

Both criticisms are also diminished (but again by no means fully so) to the extent that the courts take the legislature's views of the legislative facts into account. Of course, one must be wary of views articulated during litigation or where litigation is in contemplation because such views are likely to be self-serving. However, the same risk does not apply with the same potency (although it cannot be completely eradicated) to views articulated during the legislative process. In particular, now that the legislature must prepare a statement of compatibility with each Bill, surely they (and any other committee scrutiny process) would be relevant, but not binding,²⁶⁰ sources of legislative facts. Yet the Victorian and ACT courts have never used compatibility statements in their justification analysis.²⁶¹ Of course, there are limits to which the courts can take at face value any recitations of fact in statements of compatibility,²⁶² but there does not appear to be any in principle objection to referring to material contained in those statements. Using statements of compatibility as one source of evidence, amongst many, is surely an important instance of 'dialogue'²⁶³ between the branches of government. On this score, some of the fault lies at the door of the legislature. If their findings of compatibility are to be given some credence by the courts, statements of compatibility need to do more than simply recite that the legislation is compatible. More fulsome reasons are needed, but unfortunately full explanations are not common. If the legislature puts more effort into explaining the rights compatibility of its legislation, only then can its claims about legislative

²⁶⁰ *Charter* s 28(4).

²⁶¹ One explanation is that the Victorian and ACT courts have largely been concerned with legislation that pre-dated the requirement to issue compatibility statements. This explanation applies to most of the cases specifically discussed in this article (an exception is *SI bhmf CC v KS bhmf IS* (2005) 195 FLR 151, 165 [80] (Higgins CJ), in which the relevant compatibility statement was mentioned in passing), but it does not adequately explain why compatibility statements have rarely been considered in any Victorian or ACT case for any purpose.

²⁶² See *Australian Communist Party v Commonwealth* (1953) 83 CLR 1.

²⁶³ The High Court has recently criticised the terminology of 'dialogue' in *Momcilovic* (2011) 280 ALR 221, 259 [95] (French CJ), 273–4 [146(iii)] (Gummow J), 375 [533]–[534] (Crennan and Kiefel JJ), but that criticism expressly did not deny that the legislature, the executive and the judiciary are related as the three branches of government. Extreme positions — ignoring statements of compatibility completely and following those statements completely — give insufficient effect to the legislative and the judicial function respectively. In this as in many other areas a middle ground is appropriate.

facts merit weight.²⁶⁴ To be clear, this is not a call for deference. Rather, one element of the judicial function must be to consider any legislative statements of legislative fact in order to show respect to a coordinate branch of government. What weight should be given to such statements, and any other evidence, is properly a question for the courts. Whether notions of ‘deference’ assist in that question, as some have suggested,²⁶⁵ is probably doubtful in Australia,²⁶⁶ and certainly the Victorian and ACT cases have not resorted to concepts of ‘deference’ when dealing with legislative facts.²⁶⁷

The Victorian and ACT experiences also have obvious potential relevance to judicial method and constitutional fact finding, but there are reasons to be cautious about whether these experiences will ultimately influence fact finding in the constitutional context. First, the Victorian and ACT sample is simply too small to draw firm conclusions, and the sample may not be greatly added to if justification analysis is not part of the interpretative exercise in s 32 of the *Charter* and s 30 of the *HRA*.²⁶⁸ Secondly, it may be the case that state supreme court practice has little appeal to the High Court as a constitutional court.²⁶⁹ This is not to say that both do not feel the same rule of law imperative to determine what the law is, and thus any facts essential to that determination. The point is that the elusive dynamics of institutional culture, which will likely influence a court’s approach to judicial method, may be different. Thirdly, the question whether a law is constitutionally valid is not the same as the question whether a law can be interpreted consistently with

²⁶⁴ See Burmester, above n 25, 290, 294–7; Foley, above n 15; Alison L Young, ‘Deference, Dialogue and the Search for Legitimacy’ (2010) 30 *Oxford Journal of Legal Studies* 815. Cf Colm O’Cinneide, ‘Publication Review: *Deference and the Presumption of Constitutionality*’ [2011] *Public Law* 453, 455.

²⁶⁵ See Kavanagh, above n 85, 237; Foley, above n 15; Young, above n 264. Cf Superstone, Goudie and Walker, above n 85, 286–7 [9.22.2].

²⁶⁶ See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 262–3 [237]–[238] (Kirby J); Hayne, above n 6, 88–9.

²⁶⁷ For a rejection of the terminology, but not perhaps the substance, of deference in the context of adjudicative facts and judicial review of administrative action, see *P J B v Melbourne Health* [2011] VSC 327 (19 July 2011) [322]–[324] (Bell J).

²⁶⁸ The High Court split on this issue in *Momcilovic*: see (2011) 280 ALR 221, 239 [34] (French CJ), 280 [168] (Gummow J), 306 [280] (Hayne J), 345 [427] (Heydon J), 386 [573]–[575] (Crennan and Kiefel JJ), 411–12 [683]–[684] (Bell J). See also *W K v The Queen* [2011] VSCA 345 (30 November 2011) [55]–[59] (Nettle JA); *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91 (11 May 2012) [24]–[31] (Warren CJ and Cavanough AJA), [139]–[142] (Nettle JA).

²⁶⁹ Cf *Bel Porto School Governing Body v Premier, Western Cape* [2002] 3 SA 265, 299 [119] (Chaskalson CJ) (the South African Constitutional Court may have greater flexibility to allow additional evidence than the Supreme Court of Appeal).

human rights. The former involves the courts in judicial review of legislation in a strict sense, whereas the latter simply directs courts to undertake an interpretative exercise.²⁷⁰ This distinction gives a reason to pause before assuming that the courts will approach legislative fact finding in the same way in both contexts, but the better view is that they should do so. Determining what the law is (the constitutional question) and ascertaining what the law means (the *HRA/Charter* question) is a distinction without a difference; the former may be the judiciary's 'overriding duty',²⁷¹ but statutory interpretation is no less at the essence of the judicial function.²⁷² On the other hand, if the High Court is correct that a declaration of inconsistent interpretation is not a judicial function,²⁷³ this suggests that Victorian and ACT courts could approach evidence in a manner that the High Court should not or cannot. Yet if there were to be any divergence in approach, its extent will clearly depend on how the courts ascertain constitutional facts. On the current expansive approach to constitutional facts,²⁷⁴ there might be little practical distinction between the constitutional question of validity and the *HRA/Charter* question of interpretation, keeping in mind statutory interpretation always draws upon a liberal base of evidence: courts frequently take into account any extrinsic evidence relevant to the interpretative question.²⁷⁵ At a minimum, it is not unreasonable to hope that the *Charter* and *HRA* experiences might expose the similarly fact-dependent standards that exist in other areas of constitutional law and in this way prompt the High Court to clarify its processes in constitutional cases.

Finally, the overseas, Victorian and ACT experiences suggest that a number of steps could be taken to improve legislative fact finding in human rights cases. First and most importantly, litigants should be encouraged to lead evidence of relevant facts. Where doctrines are framed to make facts relevant, it is obvious that litigants place themselves at peril if they do not lead evidence of those facts. Secondly, court rules should require parties to lead

²⁷⁰ See *Momcilovic* (2011) 280 ALR 221, 383 [564] (Crennan and Kiefel JJ).

²⁷¹ *Thomas v Mowbray* (2007) 233 CLR 307, 516 [625] (Heydon J).

²⁷² See *Momcilovic* (2011) 280 ALR 221, 239–40 [38], 241 [42] (French CJ).

²⁷³ See *ibid* 257 [89] (French CJ), 282–3 [178]–[181] (Gummow J), 306 [280] (Hayne J), 357 [457] (Heydon J), 388 [584] (Crennan and Kiefel JJ), 404–5 [661] (Bell J).

²⁷⁴ See above Part IIIA.

²⁷⁵ See generally D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) ch 3 (extrinsic aids to interpretation). See also Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26.

relevant evidence of legislative facts as soon as possible in the proceedings. In Victoria, this can leverage the more liberal evidence procedures that apply in VCAT to ensure that a full factual record is before the Supreme Court on appeal. Thirdly, practice notes or court rules should address procedures for adducing fresh evidence of legislative facts on appeal.²⁷⁶ Such rules are likely to bring clarity to this area for only a short time before a body of case law congeals around and complicates these rules. This cannot be helped.²⁷⁷ The foreign case law suggests that having such rules can help to focus the minds of both courts and litigants alike on evidence and for this reason alone is to be welcomed. Fourthly, courts should explain when judicial notice may be taken of facts and give the parties notice that the court intends to take judicial notice of an essential fact or where the court intends to use its own hypotheticals or experience to assist in the determination of key issues. This is particularly important because judicial notice and judicial experience have so far proved to be central to how Victorian and ACT courts have decided human rights cases. Of course, courts have often relied on judicial notice and common experience to decide cases in other contexts, and so this practice is by no means unique to *Charter* and *HRA* litigation.²⁷⁸ But particularly because human rights are so contentious, it is incumbent upon courts to explain and give notice of their use of judicial notice and experience in human rights cases. Finally, courts and litigants should take care to explain how foreign and domestic law is being used. Where a foreign or domestic law is being used empirically, the courts should explain the social facts surrounding it and investigate what impact that law has had in its own jurisdiction.

These proposals are by no means novel. For the most part they are tried and tested mechanisms for improving legislative fact ascertainment in other jurisdictions. It is well to remember, though, the comments of Sir Harry

²⁷⁶ Of course, the difficulties presented by parties wishing to lead fresh evidence of legislative facts in appeals brought in relation to the *Charter* and the *HRA* are simply manifestations of the more general problem of fresh evidence of any fact in any appeal. Common law courts, and some statutes, have adopted procedures to address that general problem: see generally *CDJ v VAJ* (1998) 197 CLR 172, 184–5 [51] (Gaudron J), 196–9 [95]–[100] (McHugh, Gummow and Callinan JJ). One option is to apply those same rules to legislative facts but that is not the only option.

²⁷⁷ A good example of this tendency is the *Administrative Decisions (Judicial Review) Act 1977* (Cth): see Anthony E Cassimatis, 'Judicial Attitudes to Judicial Review: A Comparative Examination of Justifications Offered for Restricting the Scope of Judicial Review in Australia, Canada and England' (2010) 34 *Melbourne University Law Review* 1.

²⁷⁸ See generally Heydon, *Cross on Evidence*, above n 19, ch 2.

Gibbs in a paper delivered at a conference of Australian Supreme Court judges in the 1970s on the general topic of fact finding:

It is no disparagement of attempts at reform to say that whatever improvements are made in law or procedure the nature of fact finding is such that the personal qualities of the judge by whom the case is tried will continue to be more important than anything else in determining whether a true result is reached. Of almost equal importance will be the degree of care and skill shown by the members of the legal profession concerned in presenting, marshalling, analysing and criticizing the evidence. The best safeguard against errors of decision on questions of fact lies in maintaining the strength of the bench and of the legal profession generally.²⁷⁹

The optimistic tenor of this passage must be read with an awareness of Sir Harry's audience, but foreign and Australian experiences bear out the truth of what he said. There are limits to the principles and procedures that can be set down to regulate fact finding, particularly in respect of legislative and constitutional facts that implicate the judicial duty to determine what the law is. It is impractical and undesirable to expect a judge to point to evidence or to judicial notice for each and every factual assertion in his or her reasons. And it can be difficult, and at times artificial, to identify a particular assertion as a 'factual' one. But it is highly desirable and indeed imperative that each judge should have turned his or her mind to these issues in the course of preparing his or her reasons, and that counsel should have turned their minds to what evidence, procedural rules and principles of judicial notice are needed to support the legal conclusions that they assert. In examining how Victorian, ACT and other courts have gone about the task of ascertaining legislative facts, it is suggested that something has gone awry when so many factual claims are being made (in reasons and in submissions) without an explanation of their evidential basis. It is hoped that the profession can discharge its duties with a keener awareness of its own role and what is at stake.

²⁷⁹ Sir Harry Gibbs, 'Fact Finding' in Justice Blackburn (ed), *Judicial Essays: Being a Selection from the Papers Read to the Conferences of Australian Supreme Court Judges Held in 1972, 1973 and 1974* (Law Foundation of New South Wales and Victoria Law Foundation, 1975) 1, 5. See also Justice Beverley McLachlin, 'The Role of Judges in Modern Commonwealth Society' (1994) *Law Quarterly Review* 260, 265.

VI CONCLUSION

It is timely to reflect on how the Victorian and ACT courts determine legislative facts, notwithstanding the small sample of cases available for examination. In the fallout after *Momcilovic*, it is possible that this aspect of judicial method will be forgotten in the scramble to decipher what the High Court meant about the meaning of and relationship between ss 7(2), 32 and 36 of the *Charter* and the equivalent provisions of the *HRA*.²⁸⁰ It would be a pity if this were to be the legacy of *Momcilovic* because an understanding of the factual basis of legislation is crucial to the development and application of the law. Indeed, *Momcilovic* could be viewed as presenting an auspicious moment for considering legislative fact ascertainment, because *Momcilovic* will require a reappraisal of how courts go about applying the *Charter* and the *HRA* in any event. The Victorian and ACT experiences reveal that there is considerable work to be done in this area. This is no embarrassment to the courts or to counsel. As comparative practice shows, the factual nature of public law claims and the consequential desirability of clear principles about how to deal with facts have proved to be ideas that are slow to bear fruit. Although the courts of other jurisdictions have a head-start on Australian courts, they too tend to perform the task of ascertaining (legislative) facts in a rather haphazard fashion. Yet to continue to lurch through the darkness for much longer would not be something of which Australian courts or counsel could be proud.

²⁸⁰ See, eg, *W K v The Queen* [2011] VSCA 345 (30 November 2011) [55]–[59] (Nettle JA); *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91 (11 May 2012) [24]–[31] (Warren CJ and Cavanough AJA), [139]–[142] (Nettle JA).