SUBMISSION ON HOW BEST TO PROTECT AND PROMOTE HUMAN RIGHTS IN VICTORIA

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INTRODUCTION

This submission is in two parts: (a) the first part is this memorandum that answers the questions posed by the Human Rights Consultation Committee (the 'Committee') in brief and (b) the second part is my past research and publications that more fully explores the issues (see attached). The first part is to be read in conjunction with the second part. For ease of reference, in the first part I direct the Committee to specific page references in the second part.

QUESTION 1: IS CHANGE NEEDED IN VICTORIA TO BETTER PROTECT HUMAN RIGHTS?

Change is needed in Victoria to better protect human rights. Basically, under the domestic law of Victoria (and, for that matter, Australian law), the representative arms of government have an effective monopoly over the protection and promotion of human rights. The judiciary has a limited role in protecting and promoting rights.

This is due to three main factors, as discussed below:

1) The paucity of constitutionally protected human rights guarantees: The *Victorian Constitution* does not comprehensively guarantee human rights. Even if the Victorian government were to incorporate human rights guarantees into the *Victorian Constitution*, such provisions would have to be subject to a restrictive legislative procedure (i.e. a 'manner and form' provision) to be effective.

   Similarly, the *Commonwealth Constitution* does not comprehensively guarantee human rights. Although it contains three express human rights proper – the right to trial by jury on indictment (s 80), freedom of religion (s 116), and the right to be free from discrimination on the basis of interstate residence (s 117) – and two implied freedoms – the implied separation of the judicial arm from the executive and legislative arms of government, and the implied freedom of political communication – this falls *far short* of a comprehensive list of civil, political, economic, social and cultural rights. A cursory comparison of these rights with the *International Covenant of Civil and Political Rights* (1966) ('*ICCPR*') demonstrates this. Moreover, these rights have most often been interpreted narrowly by the courts.

   The result is that the representative arms of government have very wide freedom when creating and enforcing laws. That is, the narrower our rights and the narrower the restrictions on governmental activity, the broader the power to impact on our human rights.

   See further pages 12 to 16 of Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons*

for Australian from Canada and the United Kingdom, PhD Thesis, Monash University, 2004 ('*Human Rights and Institutional Dialogue*').

2) The partial and fragile nature of statutory human rights protection: Commonwealth and Victorian laws provide statutory protection of human rights. These statutory regimes, in part, implement the international human rights obligations successive Australian governments have voluntarily entered into.

   The main advantage of the statutory regimes is that they are more comprehensive than the constitutional protections offered. The disadvantages, however, far outweigh this advantage. The disadvantages are, *inter alia*, as follows:

   a) the scope of the rights protected by statute is much narrower than that protected by international human rights law;
   b) there are exemptions from the statutory regimes, allowing exempted persons to act free from human rights obligations;
   c) the interpretation of human rights statutes by courts and tribunals has generally been restrictive;
   d) the human rights commissions established under the statutes are only as effective as the representative arms of government allow them to be; and
   e) these are only statutory protections – parliament can repeal or alter these protections via the ordinary legislative process.

   See further pages 17 to 22 of *Human Rights and Institutional Dialogue*.

3) The domestic impact (or lack thereof) of our international human rights obligations: The representative arms of government enjoy a monopoly over the choice of Australia's international human rights obligations, and their implementation in the domestic legal regime. Moreover, these powers rest in the Commonwealth representative arms, not the Victorian representative arms. In terms of choice, the Commonwealth Executive decides which international human rights treaties Australia should ratify (s 61 of the *Commonwealth Constitution*). In terms of domestic implementation, the Commonwealth Parliament controls the relevance of Australia's international human rights obligations within the domestic legal system. The ratification of an international human rights treaty by the executive gives rise to international obligations *only*. A treaty does *not* form part of the domestic law of Australia until it is incorporated into domestic law by the Commonwealth Parliament.

   The judiciary alleviates the dualist nature of our legal system in a variety of ways:

   a) there are rules of statutory interpretation that favour interpretations of domestic laws that are consistent with our international human rights obligations;
   b) our international human rights obligations influence the development of the common law;
   c) international human rights obligations impact on the executive insofar as the ratification of an international treaty alone, without incorporation, gives rise to a legitimate expectation that an administrative decision-maker will act in accordance with the treaty, *unless* there is an executive or legislative indication to the contrary (*Teoh* decision).

   Basically, Australia's international human rights obligations offer very little protection within the domestic system, whether one is considering the Commonwealth or Victorian jurisdictions. In particular, the rules of statutory interpretation are weak, especially because clear legislative intent can negate them. Moreover, reliance on the common law is insufficient, especially given

that judges can only protect human rights via the common law when cases come before them, which means that protection will be incomplete. The common law can also be overturned by statute. Furthermore, the decision of *Teoh* offers only procedural (not substantive) protection, and its effectiveness and status is in doubt – the Commonwealth legislature is poised to override it by legislation and a majority of judges on the High Court have recently questioned its correctness (see pages 26 to 27 of *Human Rights and Institutional Dialogue*).

See further pages 22 to 36 of *Human Rights and Institutional Dialogue*.

It is important to note that the representative monopoly over the protection and promotion of human rights results in problematic consequences. First, human rights in Australia are under-enforced. The Commonwealth has signed the six major international human rights treaties.[1] Despite this international commitment to the promotion and protection of human rights, there are insufficient mechanisms to enforce those basic human rights within the domestic system, whether within the Commonwealth or Victorian jurisdictions. Secondly, and consequently, aggrieved persons and groups are denied an effective non-majoritarian forum within which their human rights claims can be assessed.[2] This, in turn, has lead to increasing recourse to the judiciary, placing pressures on the judiciary which ultimately test the independence of the judiciary and the rule of law. In particular, when individuals turn to the judiciary as a means of final recourse to resolve human rights disputes, the judiciary is often accused of illegitimate judicial law-making or judicial activism. See further pages 37 to 48 of *Human Rights and Institutional Dialogue*.

Finally, it must be acknowledged that the conventional safeguards against human rights abuses under the Australian system – parliamentary sovereignty and responsible government – are inadequate bulwarks for human rights. See further pages 48 to 52 of *Human Rights and Institutional Dialogue*.

QUESTION 2: IF CHANGE IS NEEDED, HOW SHOULD THE LAW BE CHANGED TO ACHIEVE THIS?

The law in Victoria needs to be changed to address the lack of effective human rights protections. Ideally, a comprehensive statement of rights should be inserted into the *Victorian Constitution* and protected by a valid restrictive procedure. If the constitutional route is to be taken, it should be modelled on the *Canadian Charter of Rights and Freedoms* (1982) (the '*Charter'*). Despite being a constitutional document, the *Charter* has mechanisms that protect the sovereignty of parliament, thus addressing the need to preserve the sovereignty of parliament evident in the *Statement of Intent*. The reasons for this will be discussed below in Question 4.

[1] The *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'); the *Convention on the Elimination of All Forms of Racial Discrimination*, open for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD'*); the *Convention on the Elimination of All Forms of Discrimination Against Women* ('*CEDAW*'), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*'); and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*').

[2] The domestic fora have limited rights jurisdictions only and are vulnerable to change; the international fora are non-binding and increasingly ignored.

If constitutional protection was not supported, the next best alternative would be to protect and promote human rights via an ordinary statute. If the statutory protection route is taken, it should be modelled on the *Human Rights Act 1998* (UK) (the '*HRA*'). The reasons for this will be discussed below in Question 4.

The *Bill of Rights 1990* (NZ) does not offer adequate protection. This model offers little more protection than the current common law of Victoria and Australia. The *Human Rights Act 2004* (ACT) (the 'ACT-HRA') does not go as far as the *HRA*, in that does not apply to 'public authorities' in the same way as the *HRA*. Under ss 6 to 9 of the *HRA*, it is unlawful for a public authority to exercise its powers under compatible legislation in a manner that is incompatible with rights. This gives rise to various causes of actions against the public authorities, without which the *HRA* would be less effective. This is further discussed below in Question 5.

QUESTION 3: IF VICTORIA HAS A CHARTER OF HUMAN RIGHTS, WHAT RIGHTS SHOULD IT PROTECT?

Any Victorian Charter of Human Rights should protect all human rights and should have some recognition of the special rights of Indigenous Australians. The *Statement of Intent* seems to limit the community consultation to consideration of civil and political rights. This is disappointing, given that civil, political, economic, social, cultural, developmental, environmental and other group rights are indivisible, interdependent and inter-related.[3]: Any human rights package must comprehensively protect and promote all categories of human rights for it to be effective.[4]

Due to time constraints, I will address in brief the two inter-related arguments against economic, social and cultural rights contained in the *Statement of Intent*: (a) that 'Parliament rather than the courts should continue to be the forum where issues of social and fiscal policy are scrutinised and debated'; and (b) that 'such rights can raise difficult issues of resource allocation'.

These arguments are basically about justiciability – civil and political rights have historically been considered to be justiciable, whereas economic, social and cultural rights have not been regarded to be justiciable. This has been based on the absence or presence of certain qualities. What qualities must a right, and its correlative duties, possess in order for the right to be justiciable? To be justiciable, a right is to be stated in the negative, cost-free, immediate and precise. A non-justiciable right imposes positive obligations, is costly, is to be progressively realised and vague. Traditionally civil and political rights are considered to fall within the former category, whilst economic, social and cultural rights fall within the latter category. These are artificial distinctions. All rights have

[3] See the *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993) amongst others.

[4] Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000), especially ch 3, ch 4, 110, 116; K D Ewing, 'The Charter and Labour: The Limits of Constitutional Rights', in Gavin W Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press Ltd, Great Britain, 1999) 75; K D Ewing, 'Human Rights, Social Democracy and Constitutional Reform', in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights*, (Mansell Publishing Ltd, London, 1996) 40; Dianne Otto, 'Addressing Homelessness: Does Australia's Indirect Implementation of Human Rights Comply with its International Obligations?' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) 281; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, Toronto, 1997).

positive and negative aspects, have cost-free and costly components, are certain of meaning with vagueness around the edges, and so on.[5]

Let us consider some examples. The right to life – a classic civil and political right – highlights this. Assessing this right in line with the Maastricht principles,[6] first, States have the duty to *respect* the right to life, which is largely comprised of negative, relatively cost-free duties such as the duty not to take life. Secondly, States have the duty to *protect* the right to life. This is a partly negative and partly positive, and partly cost-free and partly costly, duty to regulate society so as to diminish the risk that third parties will take each other's lives. Thirdly, States have a duty to *fulfil* the right to life, which is comprised of positive and costly duties such as the duty to ensure low infant mortality, to ensure adequate responses to epidemics and so on.

The right to adequate housing – a classic economic and social right – also highlights this. First, States have a duty to *respect* the right to adequate housing, which is a largely negative, cost-free duty, such as the duty not to forcibly evict people. Secondly, States have a duty to *protect* the right to adequate housing, which is the partly negative and partly positive, partly cost-free and partly costly, duties, such as the duty to regulate evictions by third parties (such as, landlords and developers). Thirdly, States have a duty to *fulfil* the right to adequate housing, which is a positive and costly duty, such as the duty to house the homeless and ensure a sufficient supply affordable housing.

Furthermore, the experience of South Africa highlights that economic, social and cultural rights are justiciable. The South African Constitutional Court has and is enforcing economic, social and cultural rights. The Constitutional Court's decisions highlight that enforcement of economic, social and cultural rights is about the *rationality* and *reasonableness* of decision making; that is, the State is to act rationally and reasonable in the provision of social and economic rights. So, for example, the government need not go beyond its available resources in supplying adequate housing and shelter; rather, the court will ask whether the measures taken by the government to protect the right to adequate housing were reasonable.[7] This type of judicial supervision is well known to the Victorian and Australian legal systems, being no more and no less than what we require of administrative decision makers. For this reason, economic, social and cultural rights ought to be included in the Victorian Charter of Human Rights.

Particularly in Australia, a bill of rights should contain some recognition of the rights of indigenous peoples, which must include the right to self-determination and the economic, social and cultural rights that flow from this. The linguistic rights of the *Charter* exemplify constitutionally entrenched human rights specifically pertaining to indigenous peoples. The broader settlement of the rights of indigenous peoples in Canada did not take place within the *Charter*; rather, the rights of indigenous peoples are included in s 35 of the *Constitution Act 1982*. The symbolism of this has caused much controversy in Canada. In Victoria, indigenous peoples' rights should be protected within the Charter of Human Rights proper, and the rights protected must be broad enough to counter the dispossession, discrimination and inequalities suffered.

5 See generally D. Warner, "An Ethics of Human Rights", (1996) 24 *Denver Journal of International Law and Policy* 395. See further P. Hunt, "Reclaiming Economic, Social and Cultural Rights", (1993) *Waikato Law Review* 141.

6 The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

7 See further *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997, *Government of South Africa v Grootboom* 2001, *Minister of Health v Treatment Action Campaign* 2002.

QUESTION 4: WHAT SHOULD BE THE ROLE OF OUR INSTITUTIONS OF GOVERNMENT IN PROTECTING HUMAN RIGHTS?

When contemplating human rights protection within a domestic setting, we must consider the institutional model to be adopted. One issue dominates the institutional design question. Human rights must be reconciled with democracy. In particular, judicial enforcement of human rights against the representative arms of government may produce anti-democratic tendencies.

Traditional Approaches to the Role of the Institutions of Government

Let us consider two traditional approaches to domestic protection of human rights, that of Australia and the United States of America ('United States'), both of which illustrate the institutional debates.

1) Australia:

In Australia, as discussed above in Question 1, the representative arms of government – the legislature and executive – have an effective monopoly on the promotion and protection of human rights. This effective representative monopoly over human rights is problematic. There is no systematic requirement on the representative arms of government to assess their actions against minimum human rights standards. Where the representative arms voluntarily make such an assessment, it proceeds from a narrow viewpoint – that of the representative arms, whose role is to negotiate compromises between competing interests and values, which promote the collective good, and whom are mindful of majoritarian sentiment.

There is no constitutional, statutory or other requirement imposed on the representative arms to seek out and engage with institutionally diverse viewpoints, such as that of the differently placed and motivated judicial arm of government. In particular, there is no requirement that representative actions be evaluated against matters of principle in addition to competing interests and values; against requirements of human rights, justice, and fairness in addition to the collective good; against unpopular or minority interests in addition to majoritarian sentiment. There is no systematic, institutional check on the partiality of the representative arms, no broadening of their comprehension of the interests and issues affected by their actions through exposure to diverse standpoints, and no realisation of the limits of their knowledge and processes of decision-making.

These problems undermine the protection and promotion of human in rights in Victoria and Australia. Despite Australia's commitment to the main body of international human rights norms, there is no domestic requirement to take human rights into account in governmental decision-making; and, when human rights are accounted for, the majoritarian-motivated perspectives of the representative arms are not necessarily challenged by other interests, aspirations or views. Moreover, the effective representative monopoly over human rights tends to de-legitimise judicial contributions to the human rights debate. When judicial contributions are forthcoming – say, through the development of the common law – they are more often viewed as judicially activist interferences with majority rule and/or illegitimate judicial exercises of law-making power, than beneficial and necessary contributions to an inter-institutional dialogue about human rights from a differently placed and motivated arm of government.

One way to move beyond the effective representative monopoly about human rights is by the adoption of a comprehensive human rights instrument which requires governmental actions to

be justified against minimum human rights standards, and gives each arm of government a role in the refinement and enforcement of the guaranteed human rights. This is not, however, without controversy. We return to the debate over institutional design. Human rights and democracy are often characterised as irreconcilable concepts – the protection of the rights of the minority is supposedly inconsistent with democratic will formation by the process of majority rule. In particular, judicial review of the decisions of the representative arms against human rights standards is often characterised as anti-democratic – allowing the unelected judiciary to review and invalidate the decisions of the elected arms supposedly undermines democracy. It is assumed that a judicially enforceable human rights instrument replaces a representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); or, more simply, replaces parliamentary supremacy with judicial supremacy.

2) United States:

This brings us to the United States. The anti-democratic concerns relating to judicial enforcement of human rights are grounded in this model. The United States adopted the traditional model of domestic human rights protection, which relies heavily on judicial review of legislative and executive actions on the basis of human rights standards. Under the *United States Constitution* ('*US Constitution*'), the judiciary is empowered to invalidate legislative and executive actions that violate the rights contained therein.

If the legislature or executive disagree with the judicial vision of the scope of a right or its applicability to the impugned action, their choices for reaction are limited. The representative arms can attempt to limit human rights by changing the *US Constitution*, an onerous task that requires a Congressional proposal for amendment which must be ratified by the legislatures of three-quarters of the States of the Federation.[8] Alternatively, the representative arms can attempt to limit human rights by controlling the judiciary. This can be attempted through court-stacking and/or court-bashing. Court-stacking and/or court-bashing are inadvisable tactics, given the potential to undermine the independence of the judiciary, the independent administration of justice, and the rule of law – all fundamental features of modern democratic nation States.

Given the difficulty associated with representative responses to judicial invalidation, the *US Constitution* essentially gives judges the final word on human rights and the limits of democracy. Hence, the perception that comprehensive protection of human rights transfers supremacy from the elected arms of government to the unelected judiciary; replaces the representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); and results in illegitimate judicial sovereignty, rather than legitimate representative sovereignty. At this stage you may be wondering why the representative arms should be able to respond to a judicial invalidation – the answer to this question lies in the features of human rights and democracy, as discussed on the following page.

Modern Approaches to the Role of the Institutions of Government

The traditional models discussed either support a representative monopoly (Australian) or a judicial monopoly (American), both of which pose problems. Rather than adopting a representative or

[8] *US Constitution* (1787), art V. An alternative method of constitutional amendment begins with a convention; however, this method is yet to be used. See further Lawrence M Friedman, *American Law: An Introduction* (2nd edition, W W Norton & Company Ltd, New York, 1998). The Australian and Canadian Constitutions similarly employ restrictive legislative procedures for amendment: see respectively *Constitution 1900* (Imp) 63&64 Vict, c 12, s 128; *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 38.

judicial monopoly over human rights, I propose Victoria pursue a model that promotes an inter-institutional dialogue about human rights. This brings us to the Canadian *Charter* and the British *HRA*. These modern human rights instruments establish an inter-institutional dialogue between the arms of government about the definition, scope and limits of democracy and human rights. Each of the three arms of government has a legitimate and beneficial role to play in interpreting and enforcing human rights. Neither the judiciary, nor the representative arms have a monopoly over the rights project. This dialogue is in contrast to both the representative monologue that we have in Victoria, and the judicial monologue that exists under the US Bill of Rights.

1) Human Rights and Democracy – reconcilable?

Before considering the *Charter* and the *HRA* in detail, let us think a little more about human rights and democracy. First, human rights and democracy are not irreconcilable ideals. There certainly are tensions between modern notions of democracy and human rights, with human rights constituting and limiting democracy, and democratic values being capable of justifiably limiting human rights under modern human rights instruments. However, tensions between human rights and democracy are healthy and constructive ones that are necessary in diverse, inclusive, modern polities.

2) Features of Human Rights and Democracy?

Secondly, when we seek to define grand notions, such as democracy and human rights, we must remember that democracy and human rights are (a) indeterminate concepts, (b) subject to persistent disagreement, (c) continually evolving, and (d) should be used as tools to critique governmental action.[9] In other words, human rights and democracy are not subjects of consensus.

Given these features, allowing many varied institutional perspectives to contribute to the resolution of conflicts between human rights and democracy is imperative. These features highlight why the Australian representative monopoly and the United States judicial monopoly are inappropriate – why should one arm of government have the final say over disputes about human rights and democracy that are by definition incapable of consensus, let alone objectively correct solutions.

See further pages 59 to 69 of *Human Rights and Institutional Dialogue*.

The Charter

It is necessary to briefly outline the main features of the *Charter* and the *HRA* before fully exploring the notion of an inter-institutional dialogue.

The *Charter* is contained within the Canadian Constitution. Section 1 guarantees a variety of essentially civil and political rights;[10] however, under s 1, limits may justifiably be imposed on the

[9] See generally James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204; Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000); Susan Marks, 'International Law, Democracy and the End of History' in Fox, G H and Roth, B R (eds), *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000) 532.

[10] Such as fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, official language rights, and minority language educational rights: see *Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 2–23.

protected rights. The judiciary is empowered to invalidate legislation that offends a *Charter* right and which cannot be justified under s 1.[11] The *Charter* also contains an 'override clause'. Section 33(1) allows the parliament to enact legislation notwithstanding the provisions of the Charter. Thus, if the judiciary invalidate a law, parliament can respond by re-enacting the law notwithstanding the *Charter*.

The HRA

The *HRA* incorporates the rights contained in the *European Convention on Human Rights* (1951) ('*ECHR*') into the domestic law of Britain. It is an ordinary Act of Parliament, but there is a general consensus that it will be close to impossible to repeal. There are two aspects to the *HRA*. The first of the two relates to the institutional question currently being considered. The second aspect relates to the enforceability of the *HRA* against public authorities which will be discussed below in Question 5.

In relation to the institutional question, section 3 imposes an interpretative obligation on the judiciary. The judiciary must interpret primary legislation, so far as it is possible to do so, in a way that is compatible with the incorporated Convention rights.[12] However, under s 4, the judiciary is *not* empowered to invalidate legislation that cannot be read compatibly with Convention rights. Rather, primary incompatible legislation stands and must be enforced. All the judiciary can do is issue a 'declaration of incompatibility'. A declaration is supposed to be the warning bell to parliament and the executive that something is wrong. It is up to the parliament or executive to then act. The ACT-HRA basically mimics these provisions of the *HRA*: it incorporates the *ICCPR* into ACT law; it imposes a similar interpretative obligations; and it allows the judiciary to issues declarations of incompatibility.

The Inter-Institutional Dialogue approach

Both the *Charter* and the *HRA* employ various mechanisms to establish an inter-institutional dialogic approach to human rights enforcement.

1) Specification of Human Rights

First, human rights specification is broad, vague and ambiguous under the *Charter* and the *HRA*. This accommodates the features associated with human rights and democracy. The ambiguity of human rights specification recognises the indeterminacy of, the intractable disagreement about, and the evolutionary nature of, democracy and human rights. This is deliberate to accommodate the uncertainty associated with unforeseeable future situations and needs, as well as to manage diversity and disagreement within pluralistic communities.

In relation to inter-institutional dialogue, refining the ambiguously specified human rights should proceed with the broadest possible input, ensuring all interests, aspirations, values and concerns are part of the decision matrix. This is achieved by ensuring that *more than one* institutional perspective has influence over the refinement of rights specification, and arranging a *diversity* within the contributing perspectives.

[11] *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 51–52.

[12] *Human Rights Act 1998* (UK) c 42, s 3. See also United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [2.7].

Rather than having almost exclusively representative views (such as in Australia) or judicial views (such as in the United States), the Canadian and British models ensure all arms of government contribute to the refining the meaning of the rights. This seems vital, given that rights are indeterminate, subject to irreducible disagreement, and continuously evolving.

Each arm of government will influence the definition and scope of the rights. The executive does this in policy making and legislative drafting; the legislature does this in legislative scrutiny and law-making; and the judiciary does this when interpreting legislation and adjudicating disputes. In the process of policy-making and drafting legislation, scrutinizing legislation and passing laws, and adjudicating disputes, each arm articulate *its* distinct understanding of the rights. That is, whether expressly or implicitly, they articulate their understanding of the objectives of the rights; the purposes to be served by the rights; and the linguistic meaning of the rights.

At this juncture, it is important to discuss pre-legislative scrutiny measures. The *Statement of Intent* indicates that the Victorian Government is attracted to pre-legislative scrutiny measures. Whilst I support the use of pre-legislative scrutiny measures, there are difficulties in their practical application that must be considered.

In Canada, the Minister for Justice has a statutory reporting requirement to Parliament under the *Department of Justice Act*.[13] The Minister must certify that bills presented to Parliament have been compared with the *Charter* and any inconsistencies with the purposes or provisions of the *Charter* must be reported. To date, the Minister has *not* reported any inconsistencies with the *Charter*.

Once Cabinet agrees on a policy agenda, the Department of Justice drafts the legislation and makes an assessment of the *Charter* implications of the legislation. This involves assessing whether a *Charter* right is limited and, if so, the level of difficulty associated with justifying the limitation. This departmental inquiry is based on the Supreme Court's two-step approach to *Charter* challenges. The departmental assessments range from minimal, to significant, to serious, to unacceptable risks.[14] If a 'credible *Charter* argument'[15] can be made in support of legislation, the legislation will be pursued. Where there is a serious *Charter* risk, two options exist: either a less risky means to achieve the policy objective will be sought, or a political decision will be made about whether to proceed with the legislation as drafted.[16]

[13] *Department of Justice Act*, RSC 1985, c J-2, s 4. These obligations also apply to regulations under the *Statutory Instruments Act*, RSC 1985m c S-22: see Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 597-8.

[14] Janet L Hiebert, 'Wrestling With Rights: Judges, Parliaments and the Making of Social Policy' (1999) 5(3) *Choices* 7. See also Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 597-8; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 12.

[15] Janet L Hiebert, 'Wrestling With Rights: Judges, Parliaments and the Making of Social Policy' (1999) 5(3) *Choices*, 8; Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002), 10.

[16] Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 12. For a detailed analysis of the policy-making changes introduced federally and within a select number of provinces post-*Charter*, see Patrick J Monahan and Marie Finkelstein, 'The *Charter* of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501. For further analysis of the pre-legislative scrutiny process, see Spencer M Zifcak, 'The *Charter* as a Dialogue: An Analysis of Canada's Experience with the Constitutional *Charter of Rights and Freedoms*' (1988) 6 *Law in Context* 62, 66-7; Mary

According to a departmental employee:

> The *Charter* has had a salutary effect on the policy-development process. Certainly, it has complicated the responsibilities of the policy planner. However, the need to identify evidence, rationales, and alternatives, when assessing policies for *Charter* purposes, has enhanced the rationality of the policy-development process.[17]

The Canadian ministerial reporting requirement is an important part of the inter-institutional dialogue about democracy and human rights. Pre-legislative scrutiny ensures that the executive is actively engaged in the process of interpreting and refining the scope of the broadly-stated *Charter* rights. Such assessments by the policy-driven arm of government are a vital contribution to the inter-institutional dialogue about *Charter* rights. The executive can influence the legislative and judicial understandings of particular *Charter* issues with the information and analysis contained in the pre-legislative record, particularly if it contained 'policy objectives, consultations with interested groups, social-science data, the experiences of other jurisdictions with similar legislative initiatives, and testimony before parliamentary committees by experts and interest groups.'[18] This capacity to influence the inter-institutional dialogue has motivated the executive to undertake serious pre-legislative scrutiny.[19] Consistent and thorough pre-legislative scrutiny also ensures that the legislative drafters 'identify ways of accomplishing legislative objectives in a manner that is more likely both to survive a *Charter* challenge and to minimize disruption in attaining the policy goal.'[20]

From an inter-institutional dialogic perspective, however, the biggest problem with Canadian executive pre-legislative scrutiny is its secretive character. Understandably, the Department of Justice is reluctant to divulge precise details about *Charter*-problematic policy objectives, assessments given by the Department of Justice, and the departmental and political responses to those assessments. In addition, cabinet deliberations are secret.[21]

Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 595-600; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 3-6. For an analysis of the government's approach to *Charter* litigation and its influence over policy review, see Elizabeth J Shilton, '*Charter* Litigation and the Policy Processes of Government: A Public Interest Perspective' [1992] 30 *Osgoode Hall Law Journal* 653; Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 600-01; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 6-11, 17-20; Patrick J Monahan and Marie Finkelstein, 'The *Charter* of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501, 515-6, 522-3, 526, 528-9.

17 Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 603.

18 Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002), 10. The pre-scrutiny legislative record can be used 'to anticipate possible *Charter* challenges and consciously develop a legislative record for addressing judicial concerns': at 10.

19 Ibid 7.

20 Ibid 10.

21 Patrick J Monahan and Marie Finkelstein, 'The *Charter* of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501, 503; Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002) 8.

However, this hinders the inter-institutional dialogue. The legislature does not fully benefit from the executive assessments of policies and their legislative translations. The legislature only has access to the parliamentary report of the Minister which discloses the *outcome* of the executive pre-legislative scrutiny, not the reasons for such assessments. The legislature's only access to pre-legislative deliberations is via evidence given by departmental lawyers during parliamentary committee scrutiny of proposed legislation. The culture of secrecy also hampers the inter-institutional dialogue with the judiciary. Any attempt by the executive to construct a pre-legislative scrutiny record after legislation has been challenged 'to support the government's claim that *Charter* issues were duly considered, may be discounted by judges if viewed as perfunctory.'[22] The full benefit that could flow from the distinct executive contribution to the refinement and interpretation of the *Charter* rights is not realised.

Overall, the value of pre-legislative scrutiny comes from disclosure of the reasoning behind the assessment of proposed legislation, as it discloses the executive's perspective on the definition and scope of *Charter* rights, whether a proposed law limits the *Charter* rights so conceived, and the justifications for such limitations. When law-making, the legislature does not benefit from the executive's analysis and distinct perspective; nor does the judiciary if required to undertake judicial review. Any Victorian Charter should consider requiring the reasoning behind pre-legislative assessments to be divulged.

Similar problems face the British pre-legislative scrutiny measures. Under section 19(1)(a), the minister responsible for a bill before parliament must make a statement that the provisions of the bill are compatible with the Convention rights. If such a statement cannot be made, the responsible minister must make a statement that the government wants parliament to proceed with the bill regardless of the inability to make a statement of compatibility, under s 19(1)(b).[23] A s 19(1)(b) statement is expected to 'ensure that the human rights implications [of the bill] are debated at the earliest opportunity'[24] and to provoke 'intense'[25] parliamentary scrutiny of the bill. Ministerial statements of compatibility are likely to be used as evidence of parliamentary intention.[26]

Section 19(1) statements allow the executive to effectively contribute to the inter-institutional dialogue about the definition and scope of the Convention rights. Statements of compatibility allow the executive to assert *its* understanding of the open-textured Convention rights in the context of policy formation and legislative drafting.[27] However, the effectiveness of the contribution depends on many factors, including the test used to assess the compatibility of proposed legislation and the quality of the explanation given for such assessments. In relation to

22 Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002) 17.

23 In general, s 19(1)(a) and (b) statements are to be made before the second reading speech. Either statement must be made in writing and published in such manner as the Minister making it considers appropriate: s 19(2).

24 United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [3.3].

25 United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, col 1233 (Lord Irvine, Lord Chancellor).

26 This is similar to the rule in *Pepper v Hart* [1993] AC 59.

27 Section 19(1) statements ensure 'that someone has thought about human rights issues during the process of drafting a Bill': David Feldman, 'Whitehall, Westminster and Human Rights' (2001) 23(3) *Public Money and Management* 19, 22.

the test, the Home Secretary indicated that 'the balance of argument'[28] must support compatibility – is it 'more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the European Court.'[29]

In relation to the quality of the explanation, the *HRA* does *not* impose an obligation on the responsible minister to explain their reasoning as to compatibility. The White Paper did, however, indicate that where a s 19(1)(b) statement was made, 'Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the bill.'[30] During debate on the Human Rights Bill, it was suggested that the reasoning would be disclosed *only if* raised in parliamentary debate.[31] The Home Office has indicated that a minister 'is generally not in a position to disclose detailed legal advice, nor should it be necessary to do so.'[32] Rather, s 19(1) statements should only indicate which Convention issues were considered and 'the thinking which led to the conclusion reflected in the statement.'[33] The detail of the compliance issue 'is most suitably addressed in context, during debate on the policy and its justification.'[34] During debate, the 'Minister should be ready to give a general outline of the arguments which led him or her to the conclusion reflected in the [s 19] statement'; in particular, the Minister must 'at least identify the Convention points considered and the broad

28 Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41 (citation omitted). See also *The HRA Guidance for Departments* (2nd ed, Home Office and Cabinet Office, 2000) [36] (*HRA Guidance* (2nd ed)), as referred to by David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Summer *Public Law* 323, 338; Lord Anthony Lester, 'Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998' [2002] *European Human Rights Law Review* 432, 435. Periodic "guidance" about the implementation of the *HRA* has been issued by the departments with responsibility for the *HRA* to all government departments: *The HRA 1998 Guidance for Departments* (1st ed, Home Office and Cabinet Office, 1998); *HRA Guidance* (2nd ed); *The HRA Guidance for Departments* (3rd ed, Lord Chancellor's Department, 2002) (the Lord Chancellor's Department took over responsibility for the *HRA* in June 2001). See David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Summer *Public Law* 323, 338-9.

29 Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41 (citation omitted). The Home Office describes the test as 'whether, on the balance of probabilities, the provisions of the Bill would be found compatible with the Convention rights if challenged in court': Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [15]. Outside of government, this has become known as the '51 per cent rule': Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41.

30 United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [3.3].

31 United Kingdom, *Parliamentary Debates*, House of Lords, 17 December 1998, col WA186 (Lord Williams).

32 Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [14]. See United Kingdom, *Parliamentary Debates*, House of Lords, 28 June 2000, Col WA80 (Lord Bassam of Brighton):

> Ministers making s 19 statements will do so in the light of the legal advice they have received... However, by long-standing convention adhered to by successive Governments, neither the fact that the Law Officers have been consulted on a particular issue, nor the substance of any advice they have given on that issue, is disclosed outside government other than in exceptional circumstances.

33 Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [14].

34 Ibid.

lines of the argument.'[35]

The test for s 19(1) assessments and the lack of disclosure of the reasoning behind the assessment are problematic from an inter-institutional dialogic perspective. The first problem relates to policy formation. Convention rights are relevant at the policy formation stage. When forming policy, the executive either explicitly or implicitly makes assessments of the definition and scope of Convention rights. The executive's understanding of the Convention rights sets the parameters of the debate and thereby has the capacity to influence the legislature's and judiciary's analysis of the issue. However, there is no clear indication that Convention 'rights are being fully taken into account at the … stage of formulating proposals and instructing counsel to draft legislation',[36] even though 'this is perhaps the most important requirement of the *HRA*.'[37]

This not only potentially undermines the protection and promotion of the Convention rights; it also means the executive is not making as complete a contribution to the human rights debate as possible. If the Convention rights implications of policy are not consistently addressed within the executive, the executive will waste an important opportunity to educate parliament and the judiciary about *its* understanding of the meaning and scope of the open-textured Convention rights.

The second problem relates to the complacency of the Government's approach to the s 19(1) tests for compatibility. The balance of argument test emphasises judicial assessments of legislation. Pre-legislative audits that too readily defer to judicial understandings of the definition and scope of Convention rights fail to appreciate the unique, legitimate contribution of the executive to the inter-institutional dialogue about human rights.

The third problem is the ineffective contribution s 19(1) statements make to the inter-institutional dialogue about the refinement, interpretation and application of the Convention rights.[38] Section 19(1) assessments too readily assume compatibility. This approach to s 19(1) is unsatisfactory for a few reasons. First, over-generous use of s 19(1)(a) statements fail to alert parliament to proposed legislation that ought to be closely scrutinised. Secondly, over-generous statements of compatibility fail to inspire a full and frank debate between the executive and parliament about Convention rights. Thirdly, over-generous assessments of compatibility fail to generate a constructive dialogue between the executive and the judiciary.

The fourth problem is the lack of disclosure of the reasoning behind the executive's s 19(1) classification. It is the reasoning supporting the s 19(1) classification that is most important, as

35 *HRA Guidance* (2nd ed) [39], as cited by David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Summer *Public Law* 323, 338-9. See also Lord Anthony Lester, 'Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998' [2002] *European Human Rights Law Review* 432, 435.

36 David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Summer *Public Law* 323, 347-48. At the policy formulation and approval stage, *HRA Guidance* (2nd ed) requires 'a general assessment …, not necessarily as a free-standing document, to alert Ministers to substantive Convention issues': Lord Anthony Lester, 'Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998' [2002] *European Human Rights Law Review* 432, 435. The formal process of s 19(1) assessment occurs only once the proposed policy is transformed into a Bill.

37 Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 26.

38 John Wadham, 'The *Human Rights Act*: One year On' [2001] *European Human Rights Law Review* 620, 624.

the reasoning reveals the executive's views about the definition and scope of the Convention rights, its preferred resolution of conflicts between Convention rights and other non-protected values, any consequential limits the proposed legislation may impose on Convention rights, and the executive's justification for such limits. Parliament – when scrutinising proposed legislation and passing legislation – and the judiciary – when judicially reviewing challenged legislation – do *not* benefit from the perspectives of the executive.[39]

Overall, any pre-legislative scrutiny requirement in a future Victorian Charter of Human Rights should be drafted in such a way as to avoid these problems and a culture of transparency within the executive ought to be fostered.

See further pages 151 to 155 and 212 to 218 (Canada) and pages 291 to 306 (Britain) of *Human Rights and Institutional Dialogue*.

2) Limitations on rights:

The second dialogue mechanism relates to the myth that rights are absolute 'trumps' over majority preferences, aspirations or desires. In fact, most rights are *not* absolute. Under the *Charter* and *HRA*, human rights are balanced against and limited by other rights, values and communal needs. A plurality of values is accommodated, and the specific balance between conflicting values is assessed by a plurality of institutional perspectives.

There are three main ways to restrict rights. Many rights are *internally qualified*. For example, under art 5 of the *ECHR*, every person has the right to liberty and security of the person, but this may be displaced in specified circumstances, such as, lawful detention after conviction by a competent court or the detention of a minor for the lawful purpose of educational supervision.

Rights can also be *internally limited*. Under the *ECHR*, the rights contained in Articles 8 to 11 are guaranteed, subject to limitations that can be justified by reference to particular objectives, which are listed in each of the articles. Such limitations must be prescribed by law and necessary in a democratic society. Consider, for example, the freedom of religion. Art 9(2) states that the freedom of religion may be 'subject only to such limitations as are prescribed by law, and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

Finally, rights can be *externally limited*. The *Charter* is a good example of this. Section 1 of the *Charter* guarantees all the rights contained therein, subject to any reasonable limits that are prescribed by law and that can be demonstrably justified in a free and democratic society.[40]

I will briefly discuss the test for adjudging limits under the external limit of the *Charter*, and highlight the frequency with which each has been used by the judiciary. The test for adjudging the internal limits of the *ECHR*, in essence, addresses the same indicia. First, a *Charter* limit must be prescribed by law. This is not usually difficult, particularly when legislation is

[39] This is a double-edged sword. If the reasoning behind the statement is not disclosed, the executive retain the element of surprise in any subsequent litigation involving the legislation. Conversely, non-disclosure precludes the reasoning of the executive from influencing the views of parliament and the judiciary.

[40] The main difference, for current purposes, between the second and third form of limitation is that the latter does not specify the circumstances that justify an interference or limitation. Moreover, the main difference between a qualification and a justified limitation is that the former does not involve any violation of the human right, whereas the latter entails a justified violation of a human right.

involved.

Secondly, the limit must be reasonable. This means that the legislative objective must be sufficiently important to override the protected right. Statistics gathered from 1982-1997, a 15 year period, indicate that in 97 per cent of *Charter* cases the Supreme Court upheld the legislative objective as reasonable.[41] This means only 3% of legislation has had its objective impugned.

Thirdly, the limitation must be necessary in a free and democratic society. This is verified by a three-step proportionality test. The first component is a rationality test. The legislative objective must be rational, in that the legislative means must achieve the legislative objective. A substantial majority of limitations are found to be rational by the Supreme Court. Between 1982 and 1997, 86 per cent of legislation that violated the *Charter* possessed a rational connection to the legislative objective.[42]

The second component is a minimum impairment test. The means chosen by the legislature must impair as little as possible the rights. It is this component which most legislation falls foul of. Of the 50 (out of 87) infringements of *Charter* rights that have failed the s 1 limits test, 86 per cent (43 infringements) failed the minimum impairment test.[43]

The third component is the need for proportionality between the negative effects of the legislation, and the objective identified as being of sufficient importance. This test is somewhat superfluous, as whenever the impugned legislation met the minimal impairment test it was also considered to be proportionate, and whenever it failed the minimum impairment test it either failed the proportionality test or was not even considered.[44]

The fact that rights may be limited reflects the features of democracy and human rights discussed earlier. Allowing limits to be placed on most rights indicates that there is no definitive meaning of rights or democracy; we cannot say once and for all that a value we consider important enough to be called a 'right' ought to be absolute. Limits also accommodate diversity and difference of opinion. Rights do not necessarily trump other values, and we expect disagreement about which competing democratic values justifiably limit rights. Indeed, the *HRA* and the *Charter* contain mechanisms for dealing with such disagreement. Finally, ensuring rights are not absolute recognises the evolutionary nature of the concepts of democracy and human rights.

In terms of dialogue, all arms of government can make a legitimate contribution to the debate about the justifiability of limitations to human rights. The representative arms play a significant role, particularly given the fact that a very small proportion of legislation will ever be challenged in court. The executive and legislature will presumably try to accommodate human

41 Leon E Trakman, William Cole-Hamilton and Sean Gatien, '*R v Oakes* 1986 - 1997: Back to the Drawing Board' (1998) 36 *Osgoode Hall Law Journal* 83, 95.

42 Peter W Hogg and Alison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 98.

43 Peter W Hogg and Alison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 100.

44 Leon E Trakman, William Cole-Hamilton and Sean Gatien, '*R v Oakes* 1986 - 1997: Back to the Drawing Board' (1998) 36 *Osgoode Hall Law Journal* 83, 103. For criticism of this, see, 102-105.

rights in their policy and legislative objectives, and the legislative means chosen to pursue those objectives. Where it is considered necessary to limit human rights, the executive and legislature must assess the reasonableness of the legislative objectives and legislative means, and decide whether the limitation is necessary in a free and democratic society. Throughout this process, the executive and legislature bring their distinct perspectives to bear. They will be informed by: their unique role in mediating between competing interests, desires and values within society; their democratic responsibilities to their representatives; and their motivation to stay in power – all valid and proper influences on decision making.

If the legislation is challenged, the judiciary then contributes to the dialogue. The judiciary must assess the judgments of the representative institutions. From its own institutional perspective, the judiciary must decide whether the legislation limits a human right and, if so, whether the limitation is justified. Taking the external limit test as an example, the judiciary focuses firstly on whether the limits is prescribed by law, which is usually a non-issue. Secondly, the judiciary decides whether the legislative objective is important enough to override the protected right – that is, a reasonableness assessment. Thirdly, the judiciary assessed the proportionality of the legislative means compared with the legislative objective. The proportionality test usually comes down to minimum impairment assessment: does the legislative measure impair the right more than is necessary to accomplish the legislative objective?

Thus, more often than not, the judiciary is concerned about the proportionality of the legislative means, not the legislative objectives themselves. This is important from a democratic perspective, as the judiciary rarely precludes the representative arms of government from pursuing a policy or legislative objective. With minimum impairment at the heart of the judicial concern, it means that parliament can still achieve their legislative objective, but must use less-rights-restrictive legislation to achieve this.

The judicial analysis will proceed from its unique institutional perspective, which is informed by its unique non-majoritarian role, and its particular concern about principle, reason, fairness and justice. If the judiciary decides that the legislation constitutes an unjustified limitation, that is not the end of the story. The representative arms can respond, under the third mechanism, to which we now turn.

3) <u>Remedial powers and representative response mechanisms:</u>

The third dialogue mechanism relates to the judicial remedial powers and the representative response mechanisms. Many modern bills of rights limit the remedial powers of the judiciary and/or allow for executive and legislative reaction to judicial assessments of the scope and application of human rights.

Under the *Charter*, judges are empowered to invalidate legislation that they consider unjustifiably limits guaranteed *Charter* rights. This reflects the constitutional nature of the *Charter*. However, unlike in Australia and the US, this is not the end of the story. The representative arms of government have numerous response mechanisms. The *first* response is inaction, such that the legislation remains invalid. This means that the judicial invalidation remains in place presumably because the legislature on reflection agrees with the judiciary, or there is no political will to respond.

Secondly, the legislature may attempt to secure its legislative objective by a different legislative means. This will occur where the judiciary invalidated legislation because it failed the

proportionality test. The legislature may still attempt to achieve its legislative objectives, but by more proportionate legislative means, which usually requires the legislature to focus on minimally impairing the affected rights.

Thirdly, the legislature can re-enact the invalidated legislation *notwithstanding* the *Charter* under s 33. The legislature can override the operation of the *Charter* in relation to that legislation for a period of 5 years. The judicial decision remains as a point of principle during the period of the override and revives at the expiration of the 5 years. Use of the override provision is only *needed* when the judiciary takes issue with the legislative objectives pursued. Under the Charter, from 1982-97, this has happened in only 3% of Charter cases.[45] Of course, the override may also be used to secure a legislative objective by an impugned legislative means (i.e. in the situation where the legislative means has failed the proportionality test). Legislative use of the override indicates that the legislature disagrees with the judicial interpretation of the *Charter* or simply finds it unacceptable according to majoritarian sensibilities.

The safeguard against excessive or improper use of s 33 is the citizenry. Citizens should be reluctant to have their rights overridden by legislatures, such that use of the override should exact a high political price. That is not to say that the override should never be used, but its use should be subject to widespread debate and democratic accountability.

Despite the perception that the override clause is only a theoretical possibility in Canada, in reality the override has been used on numerous occasions and has not exacted such a high political price. The use of s 33 is more widespread than most commentators admit.[46] To be sure, the override has only been used twice as a direct response to a judicial ruling. The first such use was in Saskatchewan, where the provincial legislature used s 33 to re-enact back-to-work legislation that was invalidated by the Saskatchewan Court of Appeal for violating freedom of association under the s 2(d) of the *Charter*.[47] The second such use was in Quebec, where the provincial legislature used s 33 to re-enact unilingual public signs legislation invalidated by the Supreme Court for violating freedom of expression under the s 2(b) of the *Charter*.[48] However,

45 Leon E Trakman, William Cole-Hamilton and Sean Gatien, '*R v Oakes* 1986 - 1997: Back to the Drawing Board' (1998) 36 *Osgoode Hall Law Journal* 83, 95.

46 Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 255: 'Most Canadians believe that the notwithstanding clause … has been used only a few times in the past and that currently no legislation[] invoking s 33 is in force.'

47 For the Court of Appeal decision, see *RWDSU v Saskatchewan* [1985] 19 DLR (4th) 609 (Sask CA). The law affected was *Dairy Workers (Maintenance of Operations) Act*, SS 1983-84, c D-1.1 and the override legislation was *The SGEU Dispute Settlement Act*, SS 1984-85-86, c 111. The use of the override proved to be unnecessary as, on appeal, the Supreme Court ruled the original legislation to be constitutional: *RWDSU v Saskatchewan* [1987] 1 SCR 460. See Peter W Hogg and Alison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 110; Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 265, 269.

48 For the Supreme Court decision, see *Ford* [1988] 2 SCR 712. The law affected was *Charter of the French Language*, RSQ 1977, c C-11 and the override legislation was *An Act to amend the Charter of the French Language*, SQ 1988, c 54. Following an individual communication to the United Nations Human Rights Committee ("HRC"), in which the HRC was of the view that the legislation violated the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'), the provincial legislature amended the legislation to allow bilingual public signs on the proviso that French was present and predominant: see *An Act to amend the Charter of the French*

s 33 has been used on sixteen occasions in total – 13 occasions in Quebec, once in the Yukon, once in Saskatchewan, and once in Alberta. On another occasion the Albertan Government tabled a Bill that included a notwithstanding clause, but it was withdrawn before it was enacted.[49] Only two of the 17 legislative attempts to utilise an override clause never came into force: once in the Yukon and once in Alberta.[50] Four of the 17 notwithstanding provisions have been repealed or expired without re-enactment, covering three Quebec uses and the Saskatchewan use.[51] The ten remaining invocations of the override in Quebec have been renewed on numerous occasions.

Moreover, the use of s 33 is not as politically suicidal as most commentators portray. To be sure, there has been widespread political fallout from the use of s 33, with the unilingual public signs legislation in Quebec being the high-water mark. Quebec's re-enactment of the judicially invalidated legislation subject to a notwithstanding clause 'deepened the divide between anglophones and francophones in Quebec, and between francophones in Quebec and the rest of Canada.'[52] In Quebec, four English-speaking Ministers of Premier Bourassa's Government resigned. Prime Minister Mulroney declared that the Constitution was 'not worth the paper it was written on.'[53] The Premier of Manitoba withdrew the Meech Lake Constitutional Accord – within which Quebec was to be recognised as a 'distinct society' within Canada under the *Constitution* – from the Manitoba legislature as a direct result of this use of the override.[54]

However, there is counter-veiling evidence that the use of s 33 is not political suicide. Three provincial governments have been re-elected after using the override clause. The Bourassa

Language, SQ 1993, c 40. An override was not attached to the 1993 legislation. See Peter W Hogg and Alison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 85-6, 114-5; Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 264, 270-1.

49 Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 257-9, Tables 1-5 at 260-7.

50 Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 259. The Yukon government enacted legislation subject to a notwithstanding clause but the legislation never came into force, and the Alberta government withdrew from parliamentary consideration one of its two attempts to use the notwithstanding clause.

51 Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 259.

52 Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 270.

53 Canada, *Parliamentary Debates*, House of Commons, 6 April 1989, 152-3 (Prime Minister Mulroney), as cited by Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (revised and updated ed, Wall & Thompson, Toronto, 1994) 95; *The Globe and Mail* (Toronto), 8 April 1989, as cited by Peter Russell, 'Standing Up for Notwithstanding' (1991) 29 *Alberta Law Review* 293, 303.

54 See Peter Russell, 'Standing Up for Notwithstanding' (1991) 29 *Alberta Law Review* 293, 304; Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from F L Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Broadview Press Ltd, Ontario, 2000) 161-2; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed, Oxford University Press, Canada, 2001) 186. For a thorough discussion of the Meech Lake and Charlottetown Accords, see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (revised and updated ed, Wall & Thompson, Toronto, 1994) 92-126.

Government in Quebec was re-elected after using the override clause to re-instate the unilingual public signs legislation despite the controversy; the Devine Government in Saskatchewan was re-elected after it used the override clause to re-instate the back-to-work legislation invalidated by the Saskatchewan Court of Appeal; and the Klein Government in Alberta was re-elected after using the override clause to prohibit homosexual marriages.[55] This suggests that '[s]ection 33 is not politically fatal. '[56]

Under the *HRA*, the remedial powers of the judiciary have been limited. Rather than empowering the judiciary to invalidate laws that are incompatible with Convention rights, the judiciary can only make declarations of incompatibility.[57] A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision to which the declaration applies, nor is the declaration binding on the parties to the proceeding in which it is made. In other words, the judge must apply the incompatible law in the case at hand.

The legislature and executive have a number of responses to a declaration of incompatibility. *First*, the legislature may decide to do nothing, leaving the judicially assessed incompatible law in operation. There is no compulsion to respond under the *HRA*. However, there are two pressures operating here: (a) the right of individual petition to the European Court under the ECHR; and (b) the next election. Such inaction by the representative institutions indicates that the institutional view of the judiciary did not alter their view of the legislative objective, the legislative means used to achieve the objective, and the balance struck with respect to qualifications and limits to Convention rights.

Secondly, the legislature may decide to pass ordinary legislation in response to a s 4 declaration of incompatibility or s 3 interpretation. Parliament may take this course in response to a declaration of incompatibility for many reasons. Parliament may reassess the legislation in light of the non-majoritarian, expert view of the judiciary. This is a legitimate interaction between parliament and the judiciary, recognising that both institutional perspectives can influence the accepted limits of law-making and respect for human rights.[58] Parliament may also change its views in response to public pressure arising from the declaration. If the judiciary's reasoning is accepted by the represented, it is quite correct for their representatives to implement this change. Finally, the threat of resort to the European Court could be the motivation for change.

Moreover, Parliament may take this course in response to a s 3 interpretation for many reasons. Parliament may seek to clarify the judicial interpretation or address an unforeseen consequence arising from the interpretation. Alternatively, parliament may take heed of the judicial

55 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001) 191-2. See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (revised and updated ed, Wall & Thompson, Toronto, 1994) 89 (citation omitted): 'Not only did the [Saskatchewan] government suffer no adverse consequences, it was in fact solidly re-elected in a general election held nine months after the law was passed, arguably with a political assist from the override.' See Graham Fraser, 'What the Framers of the *Charter* Intended' [2003] October *Policy Options* 17, 17-18, where he claims that Quebec's five year reprieve on the language issue 'meant that when Quebec did introduce new legislation that met the requirements of the Charter, it was widely accepted': at 18.

56 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001) 192.

57 *Human Rights Act 1998* (UK) c 42, s 4.

58 Dominic McGoldrick, 'The United Kingdom's *Human Rights Act 1998* in Theory and Practice' (2001) 50 *International and Comparative Law Quarterly* 901, 924.

perspective, but wish to emphasise a competing Convention right or other non-protected value *it* considers was inadequately accounted for by the judiciary. Conversely, parliament may disagree with the judiciary's assessment of the legislative policy or its interpretation of the legislative means and seek to re-assert its own view. The latter response is valid under the *HRA* dialogically conceived, provided parliament listens openly and respectfully to the judicial viewpoint, critically re-assesses its own ideas against those of the differently motivated and situation institution, and respects the culture of justification imposed by the Convention rights and the *HRA*, in the sense that justifications must be offered for any qualifications or limitations on rights thereby continuing the debate. The inter-institutional dialogic model *does not* envisage *consensus*.

Thirdly, the relevant Minister is empowered to take remedial action, which allows the Minister to rectify an incompatibility by executive action;[59] that is, a Minister may alter primary legislation by secondary legislation (executive order) where a declaration of incompatibility has been issued. This course of action would presumably be taken in similar circumstances as the second response mechanism, but chosen for efficiency reasons.

Fourthly, the government may derogate from the *ECHR*, such that the right temporarily no longer applies in Britain. This is the most extreme response, and can be equated to using s 33 of the *Charter*. From an international perspective, derogation is necessary to alter Britain's international legal obligations, and may be necessary to ensure that domestic grievances do not succeed before the European Court of Human Rights. From a domestic perspective, derogation will never be *necessary* because judicially assessed incompatible legislation cannot be judicially invalidated. However, the representative arms may *choose* to derogate to secure compliance with the *HRA* (as opposed to the Convention rights guaranteed therein). Domestically, they may derogate to resolve an incompatibility based on the judicially assessed illegitimacy of a legislative objective. Moreover, where the judiciary considers the legislative *means* to be incompatible, derogation allows the representative arms to re-assert *their* understanding of the interaction of Convention rights and any conflicting non-protected values, as reflected in *their* chosen legislative means.[60]

Thus, the judicial remedies and response mechanisms under the *HRA* and the *Charter* are consistent with the features associated with human rights. First, the judiciary is *not* empowered to have the final say on human rights, which is proper given that there is no one true meaning of human rights. Secondly, the remedies and response mechanisms recognise that disagreement will feature between the arms of government, and provide structures for the temporary resolution of the disagreement. Thirdly, there is no judicial foreclosure on the limits of rights and democracy, highlighting that human rights are evolving and subject to continuous negotiation and conciliation.

In terms of dialogue, the arms of government are locked into a continuing dialogue that no arm can once and for all determine. The initial views of the executive and legislature do not trump because the judiciary can review their actions. Conversely, the judicial view does not necessarily trump, given the number of representative response mechanisms.

Finally, I want to emphasise the way the *Charter* and the *HRA* conceive of democracy and

59 *Human Rights Act 1998* (UK) c 42, s 10 and sch 2.

60 A disagreement over legislative means may be resolved by the other response mechanisms if the impugned legislative means are not vital to the representative institutions' legislative platform.

human rights. Democracy and human rights are designed to be ongoing dialogues, in which the representative arms of government have an important, legitimate and influential voice, but do *not* monopolise debate. Equally as important, the distinct non-majoritarian perspective of the judiciary is injected into deliberations about democracy and human rights, but without stifling the continuing dialogue about the legitimacy or illegitimacy of governmental actions. The judiciary does not have a final say on human rights, such that its voice is designed to be part of a dialogue rather than a monologue.

This dialogue should be an educative exchange between the arms of government, with each able to express its concerns and difficulties over particular human rights issues. Such educative exchanges should produce *better answers* to conflicts that arise over human rights. By' better answers' I mean more principled, rational, reasoned answers, based on a more complete understanding of the competing rights, values, interests, concerns and aspirations at stake.

Moreover, dialogic models have the distinct advantage of forcing the executive and the legislature to take more responsibility for the human rights consequences of their actions. Rather than being powerless recipients of judicial wisdom, the executive and legislature have an active and engaged role in the human rights project. This is extremely important for a number of reasons. First, it is extremely important because by far most legislation will never be the subject of human rights based litigation; we really rely on the executive and legislature to defend our human rights. Secondly, it is the vital first step to mainstreaming human rights: mainstreaming envisages public decision making which has human rights concerns at its core. And, of course, mainstreaming rights in our public institutions is an important step toward a broader cultural change.

Conclusion: The Charter or the HRA?

In terms of preference between the two dialogic models discussed, we need to focus on two problems with the current system of rights protection in Victoria – the under-enforcement of human rights in Victoria and Australia, and the perception that the judiciary is too activist or illegitimately law-making when it contributes to the protection of human rights.

The biggest problem with the *HRA* is its potential tendency to the under-enforcement of human rights due to the effects of legislative inertia.[61] Under the *Charter*, when the judiciary assesses legislation as unjustifiably violating *Charter* rights, the individual victim gets the benefit of legislative inertia; the law is invalidated and the representative arms must make a positive move to re-instate the law, by using s 1 if they wish to re-enact the same legislative objective using a different rights-limiting legislative means, or by using s 33 if they wish to re-enact an impugned legislative objective or the impugned legislative means.

Conversely, under the *HRA*, the representative arms enjoy the benefits of legislative inertia: if the judiciary issues a declaration of incompatibility, the judicially-assessed Convention-incompatible law remains valid, operative and effective, such that the representative arms need not do anything positive to maintain the status quo. However, the representative arms must pass remedial legislation if they consider it necessary, and legislative inertia may set in. This may be for many reasons, including the timing of an election, the unpopularity of a decision, or an already full legislative program. This is a weaker form of representative accountability for the human rights implications of governmental actions, and has a tendency to weaken the promotion and protection of human rights.

[61] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001) 63.

The remedial order procedure under the *HRA* only alleviates some causes of legislative inertia and is not a mandatory response to a declaration of incompatibility, so does not answer the criticism. Yet, given the retention of the right of individuals to petition the European Court of Human Rights and the obligation on Britain to implement its decisions, legislative inertia may not prove too problematic in Britain. However, legislative inertia remains a problem in Victoria and Australia, given the lack of enforceability of the views of the human rights treaty-monitoring bodies and the recent distancing of Australia from the international human rights regime.[62] This is not a bar to Victoria adopting the British model; rather, it is an issue to be aware of and improve upon if Victoria adopts it.

In conclusion, this submission recommends that Victoria adopt a modern human rights instrument that establishes a robust, mutually respectful, yet not unduly deferential, inter-institutional dialogue about human rights and democracy in preference to the current representative monopoly. The human rights guaranteed should be based on the *International Covenant on Civil and Political Rights*,[63] the international instrument to which Australia is a party. As between the two models of enforcement considered, let us return to the concerns that motivated this thesis – the under-enforcement of human rights in Victoria and the perception that the judiciary is too activist or illegitimately law-making when it contributes to the protection of human rights in Victoria. These issues are better addressed under the *Charter*. The *HRA* does not as effectively guard against the under-enforcement of rights and leaves the judiciary more open to allegations of improper activism and law-making. Accordingly, this submission recommends the *Charter* as the preferred model of adoption.[64]

For further discussion of:

- The dialogue theory and the operation of the mechanisms, see pages 94-121 of *Human Rights and Institutional Dialogue*
- The operation of the *Charter*, see pages 145 to 192 of *Human Rights and Institutional Dialogue*
- Strengthening the dialogue under the *Charter*, see pages 212 to 233 of *Human Rights and Institutional Dialogue*
- For case studies regarding the operation of the *Charter*, see pages 234 to 277 of *Human Rights and Institutional Dialogue*
- The operation of the *HRA*, see Chapter 5 of *Human Rights and Institutional Dialogue*

QUESTION 5: WHAT SHOULD HAPPEN IS A PERSON'S RIGHTS ARE BREACHED?

62 See David Kinley and Penny Martin, 'International Human Rights Law at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466. One answer to this problem in Australia would be to include an obligation on the legislature to respond within six months to any judicial declaration of incompatibility issued: see ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003, [4.36] – [4.38].

63 *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

64 The *ICCPR* is modelled more like the *HRA* than the *Charter*, in that there is no external limitations clause applying to the rights protected, but rather limits are expressed internally with respect to specific rights. In adopting the Canadian model, Australia should adopt an external limitations clause, with the internal limits on specific *ICCPR* rights acting as specific examples of the justifiable limitations. See ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [4.44] – [4.52], especially [4.52].

The *Statement of Intent* indicates that the government does not want to establish a separate cause of action under a Charter of Human Rights for Victoria. This mimics the ACT-HRA. For example, under the ACT-HRA, the rights are designed to be incorporated within existing causes of action by providing additional arguments based on compatible interpretations of the law. Accordingly, the judiciary within its ordinary decision-making process will form an opinion about the compatibility of Territory law. In interpreting law and exercising judicial discretions, the judiciary will incorporate human rights norms. Moreover, administrative decision-makers will have to take into account human rights as part of the duty to act lawfully, both in interpreting the law and exercising administrative discretions.

This is in contrast to ss 6 to 9 of the British *HRA*, which makes it unlawful for a public authority to exercise its powers under compatible legislation in a manner that is incompatible with rights. The definition of "public authority" includes a court or tribunal. Such unlawful action gives rise to three means of redress: a new cause for breach of statutory duty; a new ground of illegality under administrative law; and the unlawful act can be relied upon in any legal proceeding. Most importantly, under s 8 of the *HRA*, where a public authority acts unlawfully, a court may grant such relief or remedy, or make such order, within its power as it considers just and appropriate, which includes an award of damages in certain circumstances if the court is satisfied that the award is necessary to afford just satisfaction.[65] Similarly, section 24 of the *Charter* empowers the courts to provide just and appropriate remedies for violations of rights, and to exclude evidence obtained in violation of rights if to admit it would bring the administration of justice into disrepute.

The failure to create a separate cause of action and remedy in the ACT or in any future Victorian legislation may cause problems. Situations will inevitably arise where existing causes of action are inadequate to address violations of human rights and which require some form of remedy. In these situations, rights protection will be illusory. The NZ experience is instructive. Although the statutory *Bill of Rights Act 1990* (NZ), like the ACT-HRA, does not expressly provide for remedies, the judiciary developed two remedies for violations of rights – first, a judicial discretion to exclude evidence obtained in violation of rights and secondly, a right to compensation if rights are violated.[66] This may be the ultimate fate of the in Victoria. It is eminently more sensible for the parliament to provide for the inevitable rather than to allow the judiciary to craft solutions on the run.

QUESTION 6: WHAT WIDER CHANGES WOULD BE NEED IF VICTORIA BROUGHT ABOUT A CHARTER OF HUMAN RIGHTS?

There are numerous changes that a Charter of Human Rights would require. Due to time constraints, I will only address one: the creation of an independent Human Rights Commission. This could be modelled on that introduced under the ACT-HRA. Part 6 of the ACT-HRA establishes the office of Human Rights Commissioner, which is to be undertaken by the existing Discrimination Commissioner. The Commissioner's functions are four-fold. Firstly, the Commissioner is to review Territory law and the common law for compliance with the protected rights and report to the Attorney-General. This report will be presented to the Legislative Assembly.

65 The Consultative Committee recommended adopting the UK model in this regard, but the recommendation was not adopted: see ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [4.53] – [4.78].

66 ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [3.22] – [3.23].

Secondly, the Commission is to provide education about the *HRA* and human rights generally. Thirdly, the Commissioner may advise the Attorney-General on any matter relevant to the *HRA*. Finally, the Commissioner may intervene in court proceedings with leave.

The establishment of an independent Commissioner will enhance the operation of the ACT-HRA. In particular, its educative role – both within government and the broader community – will facilitate the mainstreaming of a human rights culture. The failure to create a similar office under the British *HRA* is a continuing source of tension in the UK. Victoria should follow the lead of the ACT, rather than Britain, in this respect.

QUESTION 9: IF VICTORIA INTRODUCED A CHARTER OF HUMAN RIGHTS, WHAT SHOULD HAPPEN NEXT?

Again, there are numerous 'next steps' that need to be undertaken. I will address only two: review of existing legislation in Victoria for compatibility with human rights, and training of the judiciary.

1) Review of Legislation:

Victoria should audit all legislation, policy and practices before any Charter of Human Rights comes into force and its approach could be modelled on the British experience. In Britain, all government departments audited their legislation, policies and practices for human rights compliance before the *HRA* came into force. They also undertook human rights awareness training within their departments.

The pre-*HRA* audit undertaken under the auspices of the Human Rights Unit of the Home Office ('Unit').[67] The Unit created a universal system for human rights auditing of legislation, policies and practices according to 'a "traffic light" system which grades the degree of risk according to the significance or sensitivity of an issue, its vulnerability to challenge and the likelihood of

[67] The Human Rights Unit ('Unit') was established to oversee the implementation of the *HRA*. Its main task was ensure that all government departments were prepared for the coming into force of the *HRA*, which involved awareness raising and education about the *HRA*, as well as monitoring and guidance with respect to a human rights audit of each department's legislation, policies and practices (see the various editions of *The HRA 1998 Guidance for Departments*, above). In December 2000, after implementation of the *HRA*, the Home Office transferred the ongoing responsibility for the *HRA* to the Cabinet Office, which then transferred responsibility to the Lord Chancellor's Department (June 2001), which has recently been replaced by the Department of Constitutional Affairs. The Home Office also established a Human Rights Taskforce, a body consisting of governmental and non-governmental representatives, to help governmental departments and public authorities implement the *HRA* and to promote human rights within the community. This involved the publication of materials for government departments and public authorities, the publication of educational material for the public, assisting with training for government departments and public authorities, consultations between government departments and the Taskforce in relation to the preparedness of the departments, and media liaison. The Taskforce, intended to be a temporary body, was disbanded in March 2001. See generally Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001 [4]-[12]; David Feldman, 'Whitehall, Westminster and Human Rights' (2001) 23(3) *Public Money and Management* 19, 20-21; John Wadham, 'The *Human Rights Act*: One Year On' [2001] *European Human Rights Law Review* 620, 622-3; Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 20-27; Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 16-7; Jeremy Croft, 'Whitehall and the Human Rights Act 1998' [2001] *European Human Rights Law Review* 392, 396-9.

challenge.'[68] A red light indicated a 'strong chance of challenge in an operationally significant or very sensitive area', which required priority action; a yellow light indicated a 'reasonable chance of challenge, which may be successful', which required action where possible; and a green light indicated 'little or no risk of challenge, or damage to an operationally significant area', such that no action was required.[69] The audit results served two main functions. First, the Cabinet Office used the results to identify priority areas to be dealt with before the *HRA* came into operation. Secondly, the results have influenced the work of specialist human rights legal teams within the executive post-*HRA*.[70]

Unfortunately, the audit process focussed heavily on judicial challenges to legislation, policies and practices. Rather than using the *HRA* as 'the springboard for further steps to be taken as part of a proactive human rights policy,' the government adopted 'a containment strategy' aimed at 'avoiding or reducing successful challenges' to policy and legislative initiatives.[71] A more proactive approach would increase the influence of the executive in the process of delimiting the open-textured Convention rights. The executive should honestly and vigorously assert its understandings of the Convention rights. Moreover, the containment strategy is too judicial-centric.

Thus, any pre-audit that occurs in Victoria should learn from the mistakes of the British experience, particularly by proactively asserting its understanding of the scope of the rights and justifiable limits thereto, and using the opportunity to mainstream human rights rather than contain human rights.

2) Training of the Judiciary:

Again, Victoria should undertake extensive training of the judiciary and quasi-judicial bodies (including administrative tribunals) before any Charter comes into force, and its approach could be modelled on the British experience. Extensive training was undertaken for the judiciary by the British Judicial Studies Board. I have undertaken research into the training programme and am happy to share this with the Committee upon request.

[68] Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 21. See also Jeremy Croft, 'Whitehall and the Human Rights Act 1998' [2001] *European Human Rights Law Review* 392, 396.

[69] Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 21. See also Jeremy Croft, 'Whitehall and the Human Rights Act 1998' [2001] *European Human Rights Law Review* 392, 396.

[70] Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 21; Jeremy Croft, 'Whitehall and the Human Rights Act 1998' [2001] *European Human Rights Law Review* 392, 396. Two litigation co-ordinating groups have been established within Government: the ECHR Criminal Issues Co-ordinating Group and the ECHR Civil Litigation Co-ordinating Group. Their functions are to co-ordinate the approach to Convention rights issues that arise in criminal and civil litigation (respectively) and to notify relevant parts of the Government to any significant human rights developments. Both groups also review the critical areas of concern identified in the pre-*HRA* 'traffic light' audit. The Criminal Group has issued 'lines to take' for prosecutors. Neither group is envisaged to be permanent, with funding allocated for 2 to 3 years. See further Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 32-33; Jeremy Croft, 'Whitehall and the Human Rights Act 1998' [2001] *European Human Rights Law Review* 392, 400-03.

[71] Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 27. See also Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 22-3.

FURTHER REFERENCES

I refer the Committee to further articles I have written that elucidate the above matters:

- Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.)**,** *Human Rights Protection: Boundaries and Challenges*, Oxford University Press, Oxford, 2003, 135-57
- Julie Debeljak, 'The *Human Rights Act 2004* (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights' (2004) 15 *Public Law Review* 169-176
- Julie Debeljak, 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection', (2003) 9 *Australian Journal for Human Rights* 183-235.
- Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights', (2002) 26 *Melbourne University Law Review* 285-324.
- Julie Debeljak, 'Access to Civil Justice: Can a Bill of Rights Deliver?' [2001] *Torts Law Review* 32-52.

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'Inquiry into the Charter of Human Rights and Responsibilities'

A submission as part of the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) for the Scrutiny of Acts and Regulations Committee

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This submission will address select issues from the Terms of Reference for the Scrutiny of Act and Regulation Committee ("SARC"), as set out in the Guidelines for Submission. This submission should be read in conjunction with the submission by the Castan Centre for Human Rights Law, Faculty of Law, Monash University.

This submission supports the retention of the *Charter for Human Rights and Responsibilities Act 2006* (Vic) ("*Charter*"), and explores various options to strengthen the *Charter* through very specific reforms.

TERM OF REFERENCE: SECTION 44(1) MATTERS, BEING ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Victoria should guarantee the full range of civil, political, economic, social and cultural rights. The initial step of protecting civil and political rights should now be followed by the protecting the inter-dependent, indivisible, inter-related and mutually reinforcing economic, social and cultural rights. It is thus **recommended** that economic, social and cultural rights are formally guaranteed under the *Charter*.

There are a number of reasons for this. First, to avoid a hypocritical situation where Victoria, as a constituent part of the federation of the Commonwealth of Australia, has guaranteed one set of rights at the international level and another at the domestic level, all rights protected at the international level must also be recognised in the domestic setting – that is, civil, political, economic, social and cultural rights.

Secondly, the weight of international human rights law and opinion supports the indivisibility, interdependence, inter-relationship and mutually reinforcing nature of all human rights – that is, civil, political, economic, social, cultural, developmental, environmental and other group rights. This was confirmed as a major outcome at the United Nations World Conference on Human Rights in Vienna.[1] Moreover, amongst international human rights experts, '[i]t is now undisputed that all human rights are indivisible,

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[1] See the *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993) amongst others.

interdependent, interrelated and of equal importance for human dignity.'[2] Any domestic human rights framework must comprehensively protect and promote all categories of human rights for it to be effective.[3]

Thirdly, the often-rehearsed arguments against the domestic incorporation of economic, social and cultural rights simply do not withstand scrutiny. The two main arguments are: (a) that Parliament rather than the courts should decide issues of social and fiscal policy; and (b) that economic, social and cultural rights raise difficult issues of resource allocation unsuited to judicial intervention.[4]

These arguments are basically about justiciability. Civil and political rights have historically been considered to be justiciable; whereas economic, social and cultural rights have been considered to be non-justiciable. These historical assumptions have been based on the absence or presence of certain qualities.[5] What qualities must a right, and its correlative duties, possess in order for the right to be considered justiciable? To be justiciable, a right is to be stated in the negative, be cost-free, be immediate, and be precise; by way of contrast, a non-justiciable right imposes positive obligations, is costly, is to be progressively realised, and is vague.[6] Traditionally, civil and political rights are considered to fall within the former category, whilst economic, social and cultural rights fall within the latter category.[7]

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2 See *Maastrict Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, 22-26 January 1997, [4] (see <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_ html>). More than thirty experts met in Maastricht from 22-26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands), with the Maastricht Guidelines being the result of the meeting. In the Introduction to the Guidelines, the experts state: 'These guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international level.'

3 Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000), especially ch 3, ch 4, 110, 116; K D Ewing, 'The Charter and Labour: The Limits of Constitutional Rights', in Gavin W Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press Ltd, Great Britain, 1999) 75; K D Ewing, 'Human Rights, Social Democracy and Constitutional Reform', in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights*, (Mansell Publishing Ltd, London, 1996) 40; Dianne Otto, 'Addressing Homelessness: Does Australia's Indirect Implementation of Human Rights Comply with its International Obligations?' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) 281; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, Toronto, 1997).

4 Indeed, the Victorian Government rehearsed both arguments in order to preclude consideration of economic, social and cultural rights: see Victoria Government, *Statement of Intent*, May 2005.

5 See generally D. Warner, "An Ethics of Human Rights", (1996) 24 *Denver Journal of International Law and Policy* 395. See further P. Hunt, "Reclaiming Economic, Social and Cultural Rights", (1993) *Waikato Law Review* 141.

6 See generally D. Warner, "An Ethics of Human Rights", (1996) 24 *Denver Journal of International Law and Policy* 395. See further P. Hunt, "Reclaiming Economic, Social and Cultural Rights", (1993) *Waikato Law Review* 141.

7 See generally D. Warner, "An Ethics of Human Rights", (1996) 24 *Denver Journal of International Law and Policy* 395. See further P. Hunt, "Reclaiming Economic, Social and Cultural Rights", (1993) *Waikato Law Review* 141.

These are artificial distinctions. All rights have positive and negative aspects, have cost-free and costly components, are certain of meaning with vagueness around the edges, and so on.[8] Let us consider some examples.

The right to life – a classic civil and political right – is a right in point. Assessing this right in line with the Maastricht principles,[9] first, States have the duty to *respect* the right to life, which is largely comprised of negative, relatively cost-free duties, such as, the duty not to take life. Secondly, States have the duty to *protect* the right to life. This is a duty to regulate society so as to diminish the risk that third parties will take each other's lives, which is a partly negative and partly positive duty, and partly cost-free and partly costly duty. Thirdly, States have a duty to *fulfil* the right to life, which is comprised of positive and costly duties, such as, the duty to ensure low infant mortality and to ensure adequate responses to epidemics.

The right to adequate housing – a classic economic and social right – also highlights the artificial nature of the distinctions. Again, assessing this right in line with the Maastricht principles,[10] first, States have a duty to *respect* the right to adequate housing, which is a largely negative, cost-free duty, such as, the duty not to forcibly evict people. Secondly, States have a duty to *protect* the right to adequate housing, which comprises of partly negative and partly positive duties, and partly cost-free and partly costly duties, such as, the duty to regulate evictions by third parties (such as, landlords and developers). Thirdly, States have a duty to *fulfil* the right to adequate housing, which is a positive and costly duty, such as, the duty to house the homeless and ensure a sufficient supply of affordable housing.

The argument that economic, social and cultural rights possess certain qualities that make them non-justiciable is thus suspect. All categories of rights have positive and negative aspects, have cost-free and costly components, and are certain of meaning with vagueness around the edges. If civil and political rights, which display this mixture of qualities, are recognised as readily justiciable, the same should apply to economic, social and cultural rights.

Indeed the experience of South Africa highlights that economic, social and cultural rights are readily justiciable. The South African Constitutional Court has and is enforcing economic, social and cultural rights. The Constitutional Court has confirmed that, at a minimum, socio-economic rights must be negatively protected from improper invasion. Moreover, it has confirmed that the positive obligations on the State are quite limited: being to take 'reasonable legislative and other measures, within its available resources, to achieve progressive realisation' of those rights. The Constitutional Court's decisions highlight that enforcement of economic, social and cultural rights is about the *rationality* and *reasonableness* of decision making; that is, the State is to act rationally and reasonably in the provision of social and economic rights. So, for example, the government need not go beyond its available resources in supplying adequate housing and shelter; rather, the court will ask whether the measures taken by the government to protect the right to adequate housing were

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8 See generally D. Warner, "An Ethics of Human Rights", (1996) 24 *Denver Journal of International Law and Policy* 395. See further P. Hunt, "Reclaiming Economic, Social and Cultural Rights", (1993) *Waikato Law Review* 141.

9 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, above n 2.

10 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, above n 2.

reasonable.[11] This type of judicial supervision is well known to the Australian legal system, being no more and no less than what we require of administrative decision makers – that is, a similar analysis for judicial review of administrative action is adopted.

Given the jurisprudential emphasis on the negative obligations, the recognition of progressive realisation of the positive obligations, and the focus on rationality and reasonableness, there is no reason to preclude formal and justiciable protection of economic, social and cultural rights in Victoria. The following summary of some of the jurisprudence generated under the South African Constitution demonstrates these points.

In *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997),[12] Soobramoney argued that a decision by a hospital to restrict dialysis to acute renal/kidney patients who did not also have heart disease violated his right to life and health. The Constitutional Court rejected this claim, given the intense demand on the hospitals resources. It held that a 'court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.' In particular, it found that the limited facilities had to be made available on a priority basis to patients who could still qualify for a kidney transplant (i.e. those that had no heart problems), not a person like the applicant who was in an irreversible and final stage of chronic renal failure.

In *Government of the Republic South Africa & Ors v Grootboom and Ors* (2000),[13] the plight of squatters was argued to be in violation of the right to housing and the right of children to shelter. The Constitutional Court held that the Government's housing program was inadequate to protect the rights in question. In general terms, the Constitutional Court held that there was no free-standing right to housing or shelter, and that economic rights had to be considered in light of their historic and social context – that is, in light of South Africa's resources and situation. The Constitutional Court also held that the Government need not go beyond its available resources in supplying adequate housing and shelter. Rather, the Constitutional Court will ask whether the measures taken by the Government to protect the rights were reasonable. This translated in budgetary terms to an obligation on the State to devote a reasonable part of the national housing budget to granting relief to those in desperate need, with the precise budgetary allocation being left up to the Government.

Finally, in *Minister of Health v Treatment Action Campaign* (2002),[14] HIV/AIDS treatment was in issue. In particular, the case concerned the provision of a drug to reduce the transmission of HIV from mother to child during birth. The World Health Organisation had recommended a drug to use in this situation, called nevirapine. The manufacturers of the drug offered it free of charge to governments for five years. The South African Government restricted access to this drug, arguing it had to consider and assess the outcomes of a pilot program testing the drug. The Government made the drug available in the public sector at only a small number of research and training sites.

The Constitutional Court admitted it was not institutionally equipped to undertake across-the-board factual and political inquiries about public spending. It did, however, recognise its

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11 See further *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC); *Government of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).

12 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC).

13 *Government of the Republic South Africa & Ors v Grootboom and Ors* 2000 (11) BCLR 1169 (CC).

14 *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).

constitutional duty to make the State take measures in order to meet its obligations – the obligation being that the Government must act reasonably to provide access to the socio-economic rights contained in the *Constitution*. In doing this, judicial decisions may have budgetary implications, but the Constitutional Court does not itself direct how budgets are to be arranged.

The Constitutional Court held that in assessing reasonableness, the degree and extent of the denial of the right must be accounted for. The Government program must also be balanced and flexible, taking into account short-, medium- and long-terms needs, which must not exclude a significant section of society. The test applied was whether the measures taken by the State to realize the rights are reasonable? In particular, was the policy to restrict the drug to the research and training sites reasonable in the circumstances? The court balanced the reasons for restricting access to the drug against the potential benefits of the drug. On balance, the Constitutional Court held that the concerns (efficacy of the drug, the risk of people developing a resistance to the drug, and the safety of the drug) were not well-founded or did not justify restricting access to the drug, as follows:

> [the] government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving [the drug] at the time of the birth… A potentially lifesaving drug was on offer and where testing and counselling faculties were available, it could have been administered within the available resources of the State without any known harm to mother or child.[15]

Beyond the South African experience, the increasing acceptance of the justiciability of economic, social and cultural rights has led to a remarkable generation of jurisprudence on these rights. Interestingly, this reinforces the fact the economic, social and cultural rights do indeed have justiciable qualities – the rights are becoming less vague and more certain, and thus more suitable for adjudication. Numerous countries have incorporated economic, social and cultural rights into their domestic jurisdictions and the courts of these countries are adding to the body of jurisprudence on economic, social and cultural rights.[16]

Moreover, the clarity of economic, social and cultural rights is being improved by the United Nations Committee on Economic, Social and Cultural Rights[17] currently through its concluding observations to the periodic reports of States' Parties[18] and through its General Comments. This will only improve, given the recent adoption by consensus of the United Nations of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008),[19] which allows individuals to submit complaints to the Committee about alleged violations of rights under *ICESCR*. Once the Optional Protocol comes into

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15 *Minister of Health v Treatment Action Campaign* (TAC) (2002) 5 SA 721 [80].

16 See generally Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (*CUP, 2008); Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, (Hart Publishing, Oxford, 2009, espec ch 4.

17 The Committee on Economic, Social and Cultural Rights is established via ECOSOC resolution in 1987 (note, initially States parties were monitored directly by the Economic and Social Council under *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, pt IV (entered into force 3 January 1976)).

18 *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, arts 16 and 17 (entered into force 3 January 1976).

19 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008) UN Doc No A/RES/63/117 (on 10 December 2008).

force, there will be even greater clarity given to the scope of, content of, and minimum obligations associated with, economic, social and cultural rights. This ever-increasing body of jurisprudence and knowledge will allow Victoria to navigate its responsibilities with a greater degree of certainty.

Further, one should not lose sight of the international obligations imposed under *ICESCR*. Article 2(1) of *ICESCR* requires a State party *to take steps*, to the *maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights, *by all appropriate means*, including particularly the adoption of legislative measures. Article 2(2) also guarantees that the rights are enjoyed without discrimination. The flexibility inherent in the obligations under *ICESCR*, and the many caveats against immediate realisation, leave a great deal of room for State Parties (and government's thereof) to manoeuvre. As the Committee on Economic, Social and Cultural Rights acknowledges in its third General Comment, progressive realisation is a flexible device which is needed to reflect the realities faced by a State when implementing its obligations.[20] It essentially 'imposes an obligation to move *as expeditiously and effectively as possible* towards'[21] the goal of eventual full realisation. Surely this is not too much to expect of a developed, wealthy, democratic polity, such as, Victoria?

Finally, I support the Castan Centre suggestion that economic, social and cultural rights may not need to be fully judicially enforceable as a first step. That is, as a first step, the judiciary may only be empowered to decide that in a certain situation economic, social and cultural rights are breached vis-a-vis a particular individual; with it then being up to the government to decide how to fix that situation.[22] This system is in place in the European system. Under art 46 of the *European Convention on Human Rights* (1951) ("*ECHR*"), States parties have agreed to "abide by" decisions of the European Court.[23] This has been interpreted to mean that the European Court identifies when a violation of rights has occurred, with the State party being obliged to respond to an adverse decision by fixing the human rights violation. In other words, he European Court judgments impose obligations of results: the State Party must achieve the result (fixing the human rights violation), but the State Party can choose the method for achieving the result. This means that the executive and parliament can choose how to remedy the violation, without having the precise nature of the remedy being dictated by the judiciary.

TERM OF REFERENCE: SECTION 44(1) MATTERS, BEING WHETHER FURTHER PROVISIONS SHOULD BE MADE REGARDING PUBLIC AUTHORITIES' COMPLIANCE WITH THE *CHARTER*

There are two major issues to be discussed under this Term of Reference. The first issue relates to the provision of remedies under s 39 of the *Charter*, and is thus linked to this Term of Reference, but also to the Term of Reference about the availability to Victorians of accessible, just and timely remedies for infringements of rights. The second issue relates to

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20 Committee on the Elimination of Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc No E/1991/23 (14 December 1990)

21 Committee on the Elimination of Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc No E/1991/23 (14 December 1990) [9]

22 Paul Hunt, 'Reclaiming Economic Social and Cultural Rights' (1993) *Waikato Law Review* 141, 157.

23 *ECHR*, opened for signature 4 November 1950, 213 UNTS 221, art 46 (entered into force 3 September 1953).

the definition of "public authority" and specifically to the exclusion of courts and tribunals from this definition.

Remedies under s 39 of the *Charter*

Although the *Charter* does make it unlawful for public authorities to act incompatibly with human rights and to fail to give proper consideration to human rights when acting under s 38(1), it does not create a freestanding cause of action or provide a freestanding remedy for individuals when public authorities act unlawfully; nor does it entitle any person to an award of damages because of a breach of the *Charter*. In other words, a victim of an act of unlawfulness committed by a public authority is not able to independently and solely claim for a breach of statutory duty, with the statute being the *Charter*. Rather, s 39 requires a victim to "piggy-back" *Charter*-unlawfulness onto a pre-existing claim to relief or remedy, including any pre-existing claim to damages.

It is **recommended** that this be changed. It is preferable to provide for a freestanding cause of action under the *Charter* and to remove the current s 39 device under the *Charter*. In short, the preferable situation is to adopt the British position under the *Human Rights Act 1998* (UK) ("*UK HRA*") position (see discussion below at p 8). This change is suggested for two reasons: first, the s 39 provision is unduly complex and convoluted; and secondly, a freestanding remedy is an appropriate and effective remedy when a public authority fails to meet its obligations under s 38.

The provisions of the *Charter* in this respect are quite convoluted and worth analysis. Section 39(1) states that if, otherwise than because of this *Charter*, a person may seek any relief or remedy in respect of an act or decision of a public authority, on the basis that it was unlawful, that person may seek that relief or remedy, on a ground of unlawfulness arising under the *Charter*.

The precise reach of s 39(1) has not been established by jurisprudence as of yet. From the wording of s 39(1), it appears that the applicant must only be able to "seek" a pre-existing, non-*Charter* relief or remedy; it does not appear that the applicant has to succeed on the non-*Charter* relief or remedy, in order to be able to secure the relief or remedy based on the *Charter* unlawfulness. This may be interpreted as meaning that an applicant must be able to survive a strike out application on their non-*Charter* ground, but need not succeed on the non-*Charter* ground, but this is yet to be clarified.

Section 39(2), via a savings provision, appears to then proffer two pre-existing remedies that may be apposite to s 38 unlawfulness: being an application for judicial review, or the seeking of a declaration of unlawfulness and associated remedies (for example, an injunction, a stay of proceedings, or the exclusion of evidence). The precise meaning of this section is yet to be fully clarified by the Victorian courts.

Section 39(3) clearly indicates that no independent right to damages will arise merely because of a breach of the *Charter*. Section s 39(4), however, does allow a person to seek damages if they have a pre-existing right to damages. All the difficulties associated with interpreting s 39(1) with respect to pre-existing relief or remedies will equally apply to s 39(4).

Section 39 is a major weakness in the *Charter*. First, it undermines the enforcement of human rights in Victoria. To force an applicant to "piggy-back" a *Charter* claim on a pre-existing relief or remedy adds unnecessary complexity to the vindication of human rights claims against public authorities, and may result in alleged victims of a human rights violation receiving no remedy in situations where a "piggy-back" pre-existing relief or remedy is not available.

Secondly, s 39 is highly technical and not well understood. Indeed, its precise operation is not yet known. It may be that the government and public authorities spend a lot more money on litigation in order to establish the meaning of s 39, than they would have if victims were given a freestanding cause of action or remedy and an independent right to damages (capped or otherwise).

Thirdly, it is vital that individuals be empowered to enforce their rights when violated and for an express remedy to be provided. Article 2(3) of the *International Covenant on Civil and Political Rights* (1966) ("*ICCPR*") provides that all victims of an alleged human rights violation are entitled to an effective remedy. Something short of conferring an unconstrained freestanding cause of action or remedy will place Victoria in breach of its (i.e. Australia's) international human rights obligations.

The British and, more recently, the ACT models offer a much better solution to remedies than s 39 of the *Charter*.[24] In Britain, ss 6 to 9 of the *UK HRA* make it unlawful for a public authority to exercise its powers under compatible legislation in a manner that is incompatible with rights. The definition of "public authority" includes a court or tribunal. Such unlawful action gives rise to three means of redress: (a) a new freestanding cause for breach of statutory duty, with the *UK HRA* itself being the statute breached; (b) a new ground of illegality under administrative law;[25] and (c) the unlawful act can be relied upon in any legal proceeding.

Most importantly, under s 8 of the *UK HRA*, where a public authority acts unlawfully, a court may grant such relief or remedy, or make such order, within its power as it considers just and appropriate, which includes an award of damages in certain circumstances if the court is satisfied that the award is necessary to afford just satisfaction.[26] The British experience of damages awards for human rights breaches is influenced by the *ECHR*. Under the *ECHR*, a victim of a violation of a human right is entitled to an effective remedy, which may include compensation. Compensation payments made by the European Court of Human Rights under the *ECHR* have always been modest,[27] and this has filtered down to compensation payments in the United Kingdom. Given that international and comparative jurisprudence inform any interpretation of the *Charter* under s 32(2), one could expect the Victorian judiciary to take

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24 Section 24 of the *Canadian Charter* empowers the courts to provide just and appropriate remedies for violations of rights, and to exclude evidence obtained in violation of rights if to admit it would bring the administration of justice into disrepute.

25 Indeed, in the UK, a free-standing ground of review based on proportionality is now recognised. See *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622, and *Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11.

26 The Consultative Committee recommended adopting the UK model in this regard, but the recommendation was not adopted: see ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [4.53] – [4.78].

27 It would be rare for a victim of a human rights violation to be awarded an amount in excess of GBP 20,000.

the lead from the European Court and the United Kingdom jurisprudence and avoid unduly high compensation payments, were a power to award compensation included in the *Charter*. This could be made clear by the Victorian Parliament by using the *ECHR* wording of "just satisfaction: or by capping damages awards.

The *ACT HRA* has recently been amended to extend its application to impose human rights obligations on public authorities and adopted a freestanding cause of action, mimicking the *UK HRA* provisions rather than s 39 of the *Charter*. This divergence of the *ACT HRA* from the *Charter* is particularly of note, given that in the same amending law, the interpretative provision of the *ACT HRA* was amended to mimic the *Charter* interpretation provision. Clearly, the ACT Parliament took what it considered to be the best provisions from each instrument.

The failure to create an unconstrained freestanding cause of action and remedy under the *Charter* will cause problems. Situations will inevitably arise where pre-existing causes of action are inadequate to address violations of human rights and which require some form of remedy. In these situations, rights protection will be illusory. The New Zealand experience is instructive. Although the statutory *Bill of Rights Act 1990* (NZ) does not expressly provide for remedies, the judiciary developed two remedies for violations of rights – first, a judicial discretion to exclude evidence obtained in violation of rights; and, secondly, a right to compensation if rights are violated.[28] This may be the ultimate fate of the *Charter* – if the Victorian Parliament does not legislate to provide for appropriate, effective and adequate remedies, the judiciary may be forced to develop remedies in its inherent jurisdiction. It is eminently more sensible for the Victorian Parliament to provide for the inevitable rather than to allow the judiciary to craft solutions on the run.

It should also be noted that Section 24 of the *Canadian Charter of Rights and Freedoms 1982* ('*Canadian Charter*')[29] empowers the courts to provide just and appropriate remedies for violations of rights, and to exclude evidence obtained in violation of rights if to admit it would bring the administration of justice into disrepute.

For further discussion on the human rights obligations of public authorities, particularly the complexity associated with *not* enacting a freestanding cause of action or remedy, see Appendix 5 (pp 12-20).[30]

Definition of "public authorities", particularly excluding courts and tribunals

Another issue for consideration is whether courts and tribunals should be included in the definition of "public authority" and thus subject to the ss 38 and 39 obligations under the *Charter*.

In the United Kingdom, courts and tribunals are core/wholly public authorities. This means that courts and tribunals have a positive obligation to interpret and develop the common law

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28 ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [3.22] – [3.23].

29 *Canadian Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 1 and 33.

30 Julie Debeljak, 'Human Rights Responsibilities of Public Authorities Under the Charter of Rights' (Presented at *The Law Institute of Victoria Charter of Rights Conference*, Melbourne, 18 May 2007).

in a manner that is compatible with human rights. The major impact of this to date in the United Kingdom has been with the development of a right to privacy.[31]

Under the *Victorian Charter*, in contrast, courts and tribunals were excluded from the definition of public authority. The Human Rights Consultation Committee report indicates that the exclusion of courts was to ensure that the courts are not obliged to develop the common law in a manner that is compatible with human rights. This is linked to the fact that Australia has a unified common law.[32] The Human Rights Consultation Committee's concern was that the High Court of Australia may strike down that part of the *Charter* if courts and tribunals were included in the definition of "public authority".

The position under the *UK HRA* is to be preferred to the current position under the *Charter*. First, given that courts and tribunals will have human rights obligations in relation to statutory law, it seems odd to not impose similar obligations on courts and tribunals in the development of the common law. It is not clear that to alter common law obligations pertaining to the relevance of human rights considerations by statute would fall foul of the principle of a unified common law – after all, State by State accident transport and workplace injury legislation, which codifies and alters the common law by statute, have *not* been found to be problematic. Why should similar statutory codification of the common law pertaining to human rights be treated any differently? Accordingly, it is much more preferable to include courts and tribunals in the definition of public authorities.

Moreover, the decision to exclude courts and tribunals from the obligations of public authorities in part necessitated the precise drafting of the "application" provision in s 6 of the *Charter*. Section 6(2)(b), which sets out which Parts of the *Charter* apply to courts and tribunals, has caused much confusion, particularly in relation to which rights apply to courts and tribunals. In *Kracke*, Justice Bell held that only rights apposite to the functions of courts and tribunals should apply to courts and tribunals, rather than the entire suite of human rights.[33] This is in contrast to the *UK HRA*, which does not contain an "application" provision. In Britain, there has not been a debate about what rights apply to courts and tribunals when undertaking their functions, and the full suite of human rights apply. The British position is preferable to the Victorian position. It is **recommended** that court an tribunals be included in the definition of "public authority" are that s 4(j) of the *Charter* be amended appropriately.

For further discussion on which public authorities should attract human rights obligations, see Appendix 5 (pp 2-12).[34]

TERM OF REFERENCE: THE EFFECT OF THE CHARTER ON THE ROLES AND FUNCTIONING OF COURTS AND TRIBUNALS

There are a number of issues to be addressed in relation to the role and functioning of the courts and tribunals under the *Charter*. Some consideration will be given to the need to retain

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31 *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

32 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, para 135.

33 *Kracke v Mental Health Review Board And Ors (General)* [2009] VCAT 646 [236] – [254].

34 Julie Debeljak, 'Human Rights Responsibilities of Public Authorities Under the Charter of Rights' (Presented at *The Law Institute of Victoria Charter of Rights Conference*, Melbourne, 18 May 2007) 2-12.

a role for the judiciary under the *Charter*, before turning to the specific operation of ss 32 and 38.

Retention of the Judicial Role

In order to highlight the importance of retaining a role for the judiciary under the *Charter*, a brief discussion of the history of the *Charter*, and its nature comparative to other models of human rights instruments, is necessary. The differences between the more "extreme" models of human rights protection help to understand why the Victoria chose the "middle" ground position of adopting a dialogue model.

The Dialogue Model under the *Charter*

The two "extreme" models of human rights protection are illustrated by Victoria prior to the *Charter*, and the United States. In Victoria, prior to the *Charter*, the representative arms of government – the legislature and executive – had an effective monopoly on the promotion and protection of human rights. This model promotes parliamentary sovereignty and provides no formal protection for human rights. It is often justified on democratic arguments – that is, the elected representatives are best placed to temper legislative agendas in relation to human rights considerations, rather than the unelected judiciary. This can be referred to as the "representative monologue" model.

At the other "extreme" is the *United States Constitution* ('*US Constitution*').[35] The United States adopted the traditional model of domestic human rights protection, which relies heavily on judicial review of legislative and executive actions on the basis of human rights standards. Under the *US Constitution*,[36] the judiciary is empowered to invalidate legislative and executive actions that violate the rights contained therein. If the legislature or executive disagree with the judicial vision of the scope of a right or its applicability to the impugned action, their choices for reaction are limited. The representative arms can attempt to limit human rights by changing the *US Constitution*, an onerous task that requires a Congressional proposal for amendment which must be ratified by the legislatures of three-quarters of the States of the Federation.[37] Alternatively, the representative arms can attempt to limit human rights by controlling the judiciary. This can be attempted through court-stacking and/or court-bashing. Court-stacking and/or court-bashing are inadvisable tactics, given the potential to undermine the independence of the judiciary, the independent administration of justice, and the rule of law – all fundamental features of modern democratic nation States committed to the protection and promotion of human rights.

Given the difficulty associated with representative responses to judicial invalidation of legislation, it is argued that the *US Constitution* essentially gives judges the final word on human rights and the limits of democracy. There is a perception that comprehensive protection of human rights: (a) transfers supremacy from the elected arms of government to

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35 *United States Constitution* (1787) ('*US Constitution*').

36 *United States Constitution* (1787) ('*US Constitution*').

37 *US Constitution* (1787), art V. An alternative method of constitutional amendment begins with a convention; however, this method is yet to be used. See further Lawrence M Friedman, *American Law: An Introduction* (2nd edition, W W Norton & Company Ltd, New York, 1998). The Australian and Canadian Constitutions similarly employ restrictive legislative procedures for amendment: see respectively *Constitution 1900* (Imp) 63&64 Vict, c 12, s 128; *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 38.

the unelected judiciary; (b) replaces the representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); (c) and results in illegitimate judicial sovereignty, rather than legitimate representative sovereignty. This can be referred to the "judicial monologue" model.

In Victoria, the difficulties associated with a "representative monopoly" and a "judicial monopoly" were recognised and responded to. Rather than adopting an instrument that supports a "representative monopoly" or a "judicial monopoly" over human rights, Victoria pursued the middle ground and adopted a model that promotes an "inter-institutional dialogue" about human rights. This more modern model of human rights instrument establishes an inter-institutional dialogue between the arms of government about the definition/scope and limits of democracy and human rights. Each of the three arms of government has a legitimate and beneficial role to play in interpreting and enforcing human rights. Neither the judiciary, nor the representative arms, have a monopoly over the rights project. This dialogue is in contrast to both the "representative monologue" and the "judicial monologue" models.

There are numerous "dialogue" models, including the *Canadian Charter* and the *UK HRA*. Victoria most closely modelled its *Charter* on the *UK HRA* – this is particularly in relation to the role of the judiciary.

A brief overview of the way in which the dialogue is established under the *Charter*, and the judicial role within the dialogue is apposite. There are three main mechanisms used to establish the dialogue. The *first* dialogue mechanism relates to the specification of the guaranteed rights: human rights specification is broad, vague and ambiguous under the *Charter* and the *UK HRA*. This creates an inter-institutional dialogue about the definition and scope of the rights. Refining the ambiguously specified rights should proceed with the broadest possible input, ensuring all interests, aspirations, values and concerns are part of the decision matrix. This is achieved by ensuring that *more than one* institutional perspective has influence over the refinement of the rights, and arranging a *diversity* within the contributing perspectives. Rather than having almost exclusively representative views (such as, Victoria prior to the *Charter*) or judicial views (such as, in the United States), the Victorian and British models ensure all arms of government contribute to, and influence the refinement of, the meaning of the rights. The executive does this in policy making and legislative drafting; the legislature does this in legislative scrutiny and law-making; and the judiciary does this when interpreting legislation and adjudicating disputes.

The *second* dialogue mechanism relates to the myth that rights are absolute 'trumps' over majority preferences, aspirations or desires. In fact, most rights are *not* absolute. Under the *Charter* and *UK HRA*, rights are balanced against and limited by other rights, values and communal needs. A *plurality* of values is accommodated, and the specific balance between conflicting values is assessed by a *plurality* of institutional perspectives. In terms of dialogue, all arms of government make a legitimate contribution to the debate about the justifiability of limitations to human rights. The representative arms play a significant role, particularly given the fact that a very small proportion of legislation will ever be challenged in court.[38] The executive and legislature will presumably try to accommodate human rights in their policy and legislative objectives, and the legislative means chosen to pursue those objectives. Where

[38] Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002) x.

it is considered necessary to limit human rights, the executive and legislature must assess the reasonableness of the rights-limiting legislative objectives and legislative means, and decide whether the limitation is necessary in a free and democratic society. Throughout this process, the executive and legislature bring their distinct perspectives to bear. They will be informed by their unique role in mediating between competing interests, desires and values within society; by their democratic responsibilities to their representatives; and by their motivation to stay in power – all valid and proper influences on decision making.

If the legislation is challenged, the judiciary then contributes to the dialogue. The judiciary must assess the judgments of the representative institutions. From its own institutional perspective, the judiciary must decide whether the legislation limits a human right and, if so, whether the limitation is justified. Taking the s 7(2) test under the *Charter* as an example, the judiciary, first, decides whether the legislative objective is important enough to override the protected right – that is, a reasonableness assessment. Secondly, the judiciary assesses the justifiability of the legislation: is there proportionality between the harm done by the law (the unjustified restriction to a protected right) and the benefits it is designed to achieve (the legislative objective of the rights-limiting law)? The proportionality assessment usually comes down to a question about minimum impairment:[39] does the legislative measure impair the right more than is necessary to accomplish the legislative objective?[40] Thus, more often than not, the judiciary is concerned about the proportionality of the legislative means, not the legislative objectives themselves. This is important from a democratic perspective, as the judiciary rarely precludes the representative arms of government from pursuing a policy or legislative objective. With minimum impairment at the heart of the judicial concern, it means that parliament can still achieve their legislative objective, but may be required to use less-rights-restrictive legislation to achieve this. The judicial analysis will proceed from its unique institutional perspective, which is informed by its unique non-majoritarian role, and its particular concern about principle, reason, fairness and justice. If the judiciary decides that the legislation constitutes an unjustified limitation, that is not the end of the story. The representative arms can respond, under the third mechanism, to which we now turn.[41]

The *third* dialogue mechanism relates to the judicial powers and the representative responses to judicial actions. Under the *Charter* and the *UK HRA*, the remedial powers of the judiciary have been limited. Rather than empowering the judiciary to invalidate laws that unjustifiably limit the guaranteed rights, the Victorian judiciary can only adopt a rights-compatible interpretation under s 32 where possible and consistent with statutory purpose, or issue an unenforceable declaration of incompatibility under s 36. A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision to which the declaration applies, nor is the declaration binding on the parties to the proceeding in which it is made. In other words, the judge must apply the incompatible law in the case at hand.

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39 Peter W Hogg and Alison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 100.

40 It must be noted that under the *Canadian Charter* and the *UK HRA/ECHR*, the limit must also be prescribed by law, which is usually a non-issue.

41 See further, Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422-469, 427-432.

The legislature and executive have a number of responses: the legislature and executive *may* respond to s 32 judicial interpretations and *must* respond to s 36 judicial declarations.[42] Let us explore the range of available responses. First, parliament may decide to do nothing, leaving the s 32 judicially-assessed interpretation in place or the s 36 judicially-assessed incompatible law in operation.[43] There is no compulsion to respond to a s 32 rights-compatible interpretation. If the executive and parliament are pleased with the new interpretation, they do nothing. In terms of s 36 declarations, although s 37 requires a written response to a declaration, it does not dictate the content of the response. The response can be to retain the judicially-assessed rights-incompatible legislation,[44] which indicates that the judiciary's perspective did not alter the representative viewpoint. The debate, however, is not over: citizens can respond to the representative behaviour at election time if so concerned, and the individual complainant can seek redress under the *ICCPR*.[45]

Secondly, parliament may decide to pass ordinary legislation in response to the judicial perspective.[46] It may legislate in response to s 36 declarations for many reasons. Parliament may reassess the legislation in light of the non-majoritarian, expert view of the judiciary. This is a legitimate interaction between parliament and the judiciary, recognising that one institution's perspectives can influence the other.[47] Parliament may also change its views because of public pressure arising from the declaration. If the represented accept the judiciary's reasoning, it is quite correct for their representatives to implement this change. Finally, the threat of resort to international processes under the *ICCPR* could motivate change, but this is unlikely because of the non-enforceability of international merits assessments within the Australian jurisdiction.[48]

Similarly, Parliament may pass ordinary legislation in response to s 32 interpretations for many reasons. Parliament may seek to clarify the judicial interpretation, address an unforeseen consequence arising from the interpretation, or emphasise a competing right or other non-protected value it considers was inadequately accounted for by the interpretation. Conversely, parliament may disagree with the judiciary's assessment of the legislative objective or means and legislate to re-instate its initial rights-incompatible legislation using express language and an incompatible statutory purpose in order to avoid any possibility of a

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42 *Charter 2006* (Vic), s 37.

43 For a discussion of examples of the first response mechanism under the *HRA*, see Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australian from Canada and the United Kingdom*, PhD Thesis, Monash University, 2004, ch 5.5.3(a).

44 Indeed, the very reason for excluding parliament from the definition of public authority was to allow incompatible legislation to stand.

45 The *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) ('*First Optional Protocol*') allows individual complaints to be made under the *ICCPR*. Australia ratified the *First Optional Protocol* in September 1991.

46 For a discussion of examples of the second response mechanism under the *HRA*, see Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australian from Canada and the United Kingdom*, PhD Thesis, Monash University, 2004, ch 5.5.3(b).

47 Dominic McGoldrick, 'The United Kingdom's *Human Rights Act 1998* in Theory and Practice' (2001) 50 *International and Comparative Law Quarterly* 901, 924.

48 *First Optional Protocol*, opened for signature 16 December 1966, 999 UNTS 302, art 5(4) (entered into force 23 March 1976). For a discussion of Australia's seeming disengagement with the international human rights treaty system, see David Kinley and Penny Martin, 'International Human Rights Law at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466; Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 297

future s 32 rights-compatible interpretation. Institutional dialogue models do *not* envisage consensus.[49] Parliament can disagree with the judiciary, provided parliament listens openly and respectfully to the judicial viewpoint, critically re-assesses its own ideas against those of the differently motivated and situated institution, and respects the culture of justification imposed by the *Charter* – that is, justifications must be offered for any limitations to rights imposed by legislation and, in order to avoid s 32 interpretation, parliament must be explicit about its intentions to limit rights with the concomitant electoral accountability that will follow.

Thirdly, under s 31, parliament may choose to override the relevant right in response to a judicial interpretation or declaration, thereby avoiding the rights issue. The s 32 judicial interpretative obligation and the s 36 declaration power will not apply to overridden legislation.[50] Given the extraordinary nature of an override, such declarations are to be made only in exceptional circumstances and are subject to a five yearly renewable sunset clause.[51] Overrides may also be used "pre-emptively" – that is, parliament need not wait for a judicial contribution before using s 31. Pre-emptive use, however, suppresses the judicial contribution, taking us from a dialogue to a representative monologue. It is unclear why an override provision was included in the *Charter*, and this issue is subject to exploration below.

Overall, in terms of dialogue, the arms of government are locked into a continuing dialogue that no arm can once and for all determine. The initial views of the executive and legislature do not trump because the judiciary can review their actions. Conversely, the judicial view does not necessarily trump, given the number of representative response mechanisms. And most importantly from a parliamentary sovereignty viewpoint, the judiciary is *not* empowered to have the final say on human rights; rather, the judicial voice is designed to be part of a dialogue rather than a monologue.

This dialogue should be an educative exchange between the arms of government, with each able to express its concerns and difficulties over particular human rights issues. Such educative exchanges should produce *better answers* to conflicts that arise over human rights. By 'better answers' I mean more principled, rational, reasoned answers, based on a more complete understanding of the competing rights, values, interests, concerns and aspirations at stake.

Dialogue models have the distinct advantage of forcing the executive and the legislature to take more responsibility for the human rights consequences of their actions. Rather than being powerless recipients of judicial wisdom, the executive and legislature have an *active* and *engaged* role in the human rights project. This is extremely important for a number of reasons. First, it is extremely important because by far most legislation will never be the subject of human rights based litigation;[52] we really rely on the executive and legislature to defend and uphold our human rights. Secondly, it is the vital first step to mainstreaming human rights. Mainstreaming envisages public decision making which has human rights

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49 Janet L Hiebert, 'A Relational Approach to Constitutional Interpretation: Shared Legislative Responsibilities and Judicial Responsibilities' (2001) 35 *Journal of Canadian Studies* 161, 170.

50 See legislative note to *Charter 2006* (Vic), s 31(6).

51 *Charter 2006* (Vic), ss 31(4), (7) and (8). The 'exceptional circumstances' include 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria': Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 21.

52 See above n 38.

concerns at its core. And, of course, mainstreaming rights in our public institutions is an important step toward a broader cultural change.

See further:

- Appendix 7: pp 304-16;[53]
- Appendix 6: pp 15-4;[54]
- Appendix 4: pp 26-31.[55]

Recommendations

Once the integrated nature of the dialogue model as enacted under the *Charter* is appreciated, it becomes apparent that each arm of government plays a vital role in the conversation about the balance between democracy and human rights in Victoria. To deny any one arm of their role under the *Charter* will undermine the model. Most particularly, to remove the judicial role under the *Charter* will return Victoria to a "representative monologue" model.

A representative monopoly over human rights is problematic. There is no systematic requirement on the representative arms of government to assess their actions against minimum human rights standards. Where the representative arms voluntarily make such an assessment, it proceeds from a certain (somewhat narrow) viewpoint – that of the representative arms, whose role is to negotiate compromises between competing interests and values, which promote the collective good, and who are mindful of majoritarian sentiment.

There is no constitutional, statutory or other requirement imposed on the representative arms to seek out and engage with institutionally diverse viewpoints, such as that of the differently placed and motivated judicial arm of government. In particular, there is no requirement that representative actions be evaluated against matters of principle in addition to competing interests and values; against requirements of human rights, justice, and fairness in addition to the collective good; against unpopular or minority interests in addition to majoritarian sentiment. There is no systematic, institutional check on the partiality of the representative arms, no broadening of their comprehension of the interests and issues affected by their actions through exposure to diverse standpoints, and no realisation of the limits of their knowledge and processes of decision-making.

These problems undermine the protection and promotion of human rights in Victoria. Representative monologue models remove the *requirement* to take human rights into account in law-making and governmental decision-making; and, when the representative arms *voluntarily choose* to account for human rights, the majoritarian-motivated perspectives of the representative arms are *not necessarily* challenged by other interests, aspirations or views.

Moreover, a representative monopoly over human rights tends to de-legitimise judicial contributions to the human rights debate. When judicial contributions are forthcoming – say,

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53 Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights', (2002) 26 *Melbourne University Law Review* 285-324.

54 Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.), *Human Rights Protection: Boundaries and Challenges* (Oxford University Press, Oxford, 2003) 135-57.

55 Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9-71.

through the development of the common law – they are more often viewed as judicially activist interferences with majority rule and/or illegitimate judicial exercises of law-making power, than beneficial and necessary contributions to an inter-institutional dialogue about human rights from a differently placed and motivated arm of government.

It is **recommended** that the judiciary retains its role under the *Charter* and that, specifically, ss 32 and 36 are not repealed (although amendment of s 32(1) is discussed below).

The Operation of s 32

As SARC will be aware, the operation of s (1) currently before the High Court of Australia. One of the major issues is the significance of the difference in wording between s 3(1) of the *UK HRA* and s 32(1) of the *Charter*. These provisions state, respectively:

> Section 3(1) *UKHRA*: So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights

> Section 32(1) *Charter*: So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights

The similarity between s 3(1) and s 32(1) is striking, with the only relevant difference being that s 32(1) adds the words 'consistently with their purpose'. The question is what impact these additional words have: were they intended to codify the British jurisprudence on s 3(1) of the *UK HRA*, most particularly *Ghaidan v Godin-Mendoza;*[56] or were they intended to enact a different sort of obligation altogether.

It is not currently certain that the wording used in s 32 of the *Charter*[57] achieve a codification of the British jurisprudence in *Ghaidan* and *re S*.[58] There were clear indications in the pre-legislative history to the *Charter* that the addition of the phrase 'consistently with their purpose' was to codify *Ghaidan* – both by referring to that jurisprudence by name[59] and lifting concepts from that jurisprudence in explaining the effect of the inserted phrase.[60]

Despite this pre-legislative history, the Court of Appeal in *R v Momcilovic* ('*Momcilovic*')[61] held that s 32(1) 'does not create a "special" rule of interpretation [in the *Ghaidan* sense], but rather forms part of the body of interpretative rules to be applied at the outset, in ascertaining

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56 *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

57 And, for that matter, s 30 of the *Human Rights Act 2004* (ACT) ('*ACT HRA*').

58 *In re S (Minors) (Care Order: Implementation of Care Plan); In re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10.

59 Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, 82-83.

60 Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, 83; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 23: 'The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.'

61 *R v Momcilovic* [2010] VSCA 50 ("*Momcilovic*").

the meaning of the provision in question.'[62] It then outlined a three-step methodology for assessing whether a provision infringes a *Victorian Charter* right, as follows ("*Momcilovic* Method"):

> Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the *Charter* in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).
>
> Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the *Charter*.
>
> Step 3: If so, apply s 7(2) of the *Charter* to determine whether the limit imposed on the right is justified.[63]

Tentatively,[64] the *Momcilovic* Court held that s 32(1) 'is a statutory directive, obliging courts ... to carry out their task of statutory interpretation in a particular way.'[65] Section 32(1) is part of the 'framework of interpretive rules',[66] which includes s 35(a) of the *ILA* and the common law rules of statutory interpretation, particularly the presumption against interference with rights (or, the principle of legality).[67] To meet the s 32(1) obligation, a court must explore 'all "possible" interpretations of the provision(s) in question, and adopt[] that interpretation which least infringes *Charter* rights',[68] with the concept of "possible" being bounded by the 'framework of interpretative rules'. For the *Momcilovic* Court, the significance of s 32(1) 'is that Parliament has embraced and affirmed [the presumption against interference with rights] in emphatic terms', codifying it such that the presumption 'is no longer merely a creature of the common law but is now an expression of the "collective will" of the legislature.'[69] The guaranteed rights are also codified in the *Charter*.[70]

As mentioned above, the Court of Appeal decision in *Momcilovic* is currently on appeal to the High Court of Australia. Accordingly, the legal interpretation to be given to s 32(1) of the *Charter* may not be known for some time – more particularly, the precise meaning to be given to the additional words of 'consistently with their purpose' may not be known for some time. It is not clear whether and how SARC can review the operation of s 32(1) without the decision of the High Court of Australia in *Momcilovic*.

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62 Ibid [35]. This is in contrast to Lord Walker's opinion that '[t]he words "consistently with their purpose" do not occur in s 3 of the *HRA* but they have been read in as a matter of interpretation': Robert Walker, 'A United Kingdom Perspective on Human Rights Judging' (Presented at *Courting Change: Our Evolving Court*, Supreme Court of Victoria 2007 Judges' Conference, Melbourne 9-10 August 2007) 4.

63 *Momcilovic* [2010] VSCA 50 [35].

64 The *Momcilovic* Court only provided its 'tentative views' because '[n]o argument was addressed to the Court on this question': Ibid [101]. Indeed, three of the four parties sought the adoption of the Preferred *UKHRA*-based methodology as propounded by Bell J in *Kracke* [2009] VCAT 646 [65], [67] – [235].

65 *Momcilovic* [2010] VSCA 50 [102].

66 Ibid [103]. It is merely 'part of the body of rules governing the interpretative task': [102].

67 For sound and persuasive arguments about why s 32(1) creates a stronger obligation than the common law presumptions, being arguments that are contrary to this conclusion of the *Momcilovic* Court, see Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, Australia, 2008) [3.11] – [3.17].

68 *Momcilovic* [2010] VSCA 50 [103].

69 Ibid [104].

70 Ibid.

Nevertheless, SARC should be aware of a number of issues that flow from this lack of legal certainty. First, it is by *no means clear* that the interpretation given to s 32(1) by the *Momcilovic* Court is correct, with the reasoning of the Court of Appeal being open to criticism. I refer SARC to Appendix 1,[71] which is an article I wrote critiquing the reasoning of the Court of Appeal decision.

Secondly, for a greater exploration of the meaning of s 3(1)of the *UK HRA* and its related jurisprudence, I refer you to Appendix 1,[72]Appendix 4 (pp 40-49)[73] and Appendix 2 (pp 51-60).[74] This exploration of s 3(1) of the *UK HRA* will highlight that the s 32(1) additional words 'consistently with their purpose' are merely, and were intended as, a codification of the British jurisprudence on s 3(1) of the *UK HRA*, most particularly *Ghaidan*. Moreover, and of particular relevance to my recommendation below, this more detailed discussion will illustrate why it is *not* necessary to include the phrase 'consistently with their purpose' in the rights-compatible statutory interpretation provision of s 32(1) in order to achieve a measure of balance between the parliamentary intentions contained in the *Charter* and the parliamentary intentions in any law being interpreted under the *Charter*. That is, s 3(1) of the UK HRA achieves a balance between the parliamentary intentions contained in the *UK HRA* and the parliamentary intentions in any law being interpreted under the *UK HRA without* the additional words 'consistently with their purpose.' Indeed, the jurisprudence has ensured this.

Thirdly, for greater exploration of the reasons why s 32(1) of the *Charter* is and ought to be considered a codification of *Ghaidan*, I refer you to Appendix 1 (pp 24-50),[75] Appendix 4 (pp 49-56)[76] and Appendix 2 (pp 57-60).[77] This discussion is important as a contrast to the reasoning of the Court of Appeal in *Momcilovic*. It also reinforces the need to be absolutely explicit about any parliamentary intentions behind any amendments to the wording of s 32(1) – that is, if s 32(1) is to be amended as per my recommendation below, Parliament must be explicit about its intention that s 32(1) is a codification of *Ghaidan*.

Fourthly, beyond the implications from the debate about whether s 32(1) of the *Charter* codifies *Ghaidan* or not, the methodology adopted in *Momcilovic* is problematic. The *Momcilovic* Method (see above) undermines the remedial reach of the rights-compatible statutory interpretation provision.[78]

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71 Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.

72 Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.

73 Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9-71.

74 Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009 (extracts).

75 Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.

76 Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9-71.

77 Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009 (extracts).

78 See especially, Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15, 21, 40-41, 44-46.

The "Preferred Method" to interpretation under a statutory human rights instrument should be modelled on the two most relevant comparative statutory rights instruments – the *UKHRA*[79] and the *NZBORA*.[80] The methodology adopted under both of these instruments is similar and, by and large, settled. This method gives the interpretation power a remedial reach and focuses on two classic "rights questions" and two "*Charter* questions",[81] and can be summarised as follows ("Preferred Method"):

> *The "Rights Questions"*
>
> First: Does the legislative provision limit/engage any of the protected rights in ss 8 to 27?
> Second: If the provision does limit/engage a right, is the limitation justifiable under the s 7(2) general limits power or under a specific limit within a right?
>
> *The "Charter Questions"*
>
> Third: If the provision imposes an unjustified limit on rights, interpreters must consider whether the provision can be "saved" through a s 32(1) interpretation; accordingly, the judge must alter the meaning of the provision in order to achieve rights-compatibility.
> Fourth: The judge must then decide whether the altered rights-compatible interpretation of the provision is "possible" and "consistent[] with [statutory] purpose".
>
> *The Conclusion…*
>
> Section 32(1): If the s 32(1) rights-compatible interpretation is "possible" and "consistent[] with [statutory] purpose", this is a complete remedy to the human rights issue.
> Section 36(2): If the s 32(1) rights-compatible interpretation is not "possible" and not "consistent[] with [statutory] purpose", the only option is a non-enforceable declaration of inconsistent interpretation under s 36(2).

Prior to the *Momcilovic* decision, three Supreme Court judges in separate decisions, sanctioned the Preferred Method. In *RJE*, Nettle JA followed the Preferred Method[82] and used s 32(1) to achieve a rights-compatible interpretation of s 11 of the *Serious Sex Offenders Monitoring Act 2005* (Vic), but did not consider it necessary to determine whether s 32(1) replicated *Ghaidan* to dispose of the case.[83] Similarly, in *Das*, Warren CJ in essence followed the Preferred Method [84] and used s 32(1) to achieve a rights-compatible interpretation of s 39

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79 *UKHRA* (UK) c 42. The methodology under the *UKHRA* was first outlined in *Donoghue* [2001] EWCA Civ 595 [75], and has been approved and followed as the preferred method in later cases, such as, *R v A* [2001] UKHL 25 [58]; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158[149]; *Ghaidan* [2004] UKHL 30 [24].

80 *Bill of Rights Act 1990* (NZ) ("*NZBORA*"). The current methodology under the *NZBORA* was outlined by the majority of judges in *R v Hansen* [2007] NZSC 7 ('*Hansen'*). This method is in contra-distinction to an earlier method proposed in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (NZCA) (known as "*Moonen No 1*").

81 Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9, 28 and 32.

82 See Nettle JA in *RJE* [2008] VSCA 265, [114] – [116].

83 Ibid [118] – [119]

84 *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [50] – [53] ('*Das'*). Warren CJ refers to Nettle JA's endorsement of the approach of Mason NPJ in *HKSAR v Lam Kwong Wai* [2006] HKCFA 84, and applies it: see *Das* [2009] VSC 381 [53]. Nettle JA indicates that the Hong Kong approach is the same as the *UKHRA* approach under *Poplar*, and expressly follows the *Poplar* approach: see *RJE* [2008] VSCA 265, [116]. This is why Warren CJ's approach is described as essentially following the *UKHRA* approach.

of the *Major Crime (Investigative Powers) Act 2004* (Vic), but did not need to determine the applicability of *Ghaidan* to dispose of the case.[85] In *Kracke*, Bell J adopted the Preferred Method[86] and held that s 32(1) codified s 3(1) as interpreted in *Ghaidan*.[87] This issue of methodology is more fully discussed in Appendix 1.[88]

SARC should give serious consideration to the need for a strong remedial reach in the rights-compatible interpretation provision of s 32(1) of the *Charter*. Given that the judiciary has no power to invalidate laws that unjustifiably limit the guaranteed rights, that s 39 does not confer a freestanding cause of action or remedy for public authorities failing to meet their human rights obligations, and that s 38(2) is an exception/defence to unlawfulness which is expanded under *Momcilovic* (see below), a strong remedial reach for s 32(1) is vital.

SARC should also reinforce the strong remedial reach of s 32(1) in any amendments to the wording of s 32(1) – that is, if s 32(1) is to be amended as per my recommendation below, Parliament must be explicit about its intention that s 32(1) have a strong remedial reach.

Recommendation

Given the confusion that the additional words of "consistently with their purpose" in s 32(1) of the *Charter* have generated, it is **recommend** that s 32(1) be amended. Section 32(1) should be amended to remove the words "consistently with their purpose", bringing s 32(1) of the *Charter* into line with s 3(1) of the *UK HRA*. To bring s 32(1) into line with s 3(1) addresses the two problems arising out of the Court of Appeal decision in *Momcilovic* – that is, adoption of the wording of s 3(1) of the *UK HRA* will sanction a reading of s 32(1) that is consistent with *Ghaidan* and *re S*, as was the apparent original intention of the Victorian Parliament in enacting the *Charter*, and will allow the judiciary to adopt the Preferred Methodology.

It is **recommended** further that the Parliament should also explicitly state in any Explanatory Memorandum and Second Reading Speech to the amendment that the interpretation to be given to amended s 32(1) is that of a codification of *Ghaidan* and *re S*, and that s 32(1) is intended to have a strong remedial reach.

As is apparent from *Momcilovic*, the insertion of the phrase "consistently with their purpose", and the failure to *explicitly* (as opposed to implicitly) state that the additional words were intended to codify *Ghaidan* in the Second Reading Speech and the Explanatory Memorandum, permitted the Court of Appeal to reject what was otherwise the apparent intention of the Victorian Parliament in enacting s 32(1). The recommended amendments and the use of extrinsic materials as suggested should put the issue beyond doubt.

Section 38(1) flow on effect

There is one consequential issue to the narrow reading of s 32(1) of the Court of Appeal in *Momcilovic* which bears mention. As mentioned above, s 38(1) outlines two situations where a public authority will be considered to act unlawfully under the *Charter*: first, it is unlawful

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85 *Das* [2009] VSC 381 [172] – [175].

86 *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646, [52] – [65] ('*Kracke*')

87 Ibid [65], [214].

88 Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.

for a public authority to act in a way that is incompatible with protected rights, and secondly, it is unlawful for a public authority, when making a decision, to fail to give proper consideration to a protected right. There are a number of exceptions to the application of s 38(1) unlawfulness in the *Charter*, with one being of particular relevance. Under s 38(2), there is an exception/defence to s 38(1) where the law dictates the unlawfulness; that is, there is an exception/defence to the s 38(1) obligations on a public authority where the public authority could not reasonably have acted differently, or made a different decision, because of a statutory provision, the law or a Commonwealth enactment. This applies, for example, where the public authority is simply giving effect to incompatible legislation.[89]

If a law comes within s 38(2), the interpretation provision in s 32(1) of the *Charter* becomes relevant. If a law is rights-incompatible, s 38(2) allows a public authority to rely on the incompatible law to justify a decision or a process that is incompatible with human rights. However, an individual in this situation is not necessarily without redress because he or she may have a counter-argument to s 38(2); that is, an individual may be able to seek a rights-compatible interpretation of the provision under s 32(1) which alters the statutory obligation. If the law providing the s 38(2) exception/defence can be given a rights-compatible interpretation under s 32(1), the potential violation of human rights will be avoided. The rights-compatible interpretation, in effect, becomes your remedy. The law is given a s 32(1) rights-compatible interpretation, the public authority then has obligations under s 38(1), and the s 38(2) exception/defence to unlawfulness no longer applies.

To the same extent that the Court of Appeal decision in *Momcilovic* reduces the application of s 32(1), the s 38(2) exception/defence for public authorities is expanded. The counter-argument to a s 38(2) claim is to interpret the alleged rights-*incompatible* law to be rights-*compatible* under s 32(1) is strengthened because a rights-compatible interpretation is less likely to be given. This counter-argument that an alleged victim might make is now weakened to the same extent that s 32(1) is weakened by the *Momcilovic* Court. This has now been confirmed by the Deputy-President of VCAT in *Dawson v Transport Accident Commission*.[90] This consequential effect of the Court of Appeal decision in *Momcilovic* gives further support to the **recommendation** to amend s 32(1) of the *Charter* to remove the words "consistently with their purpose", bringing s 32(1) of the *Charter* into line with s 3(1) of the *UK HRA*.

TERM OF REFERENCE: OPTIONS FOR REFORM OR IMPROVEMENT OF THE REGIME FOR PROTECTING AND UPHOLDING RIGHTS AND RESPONSIBILITIES – THE LIMITATIONS AND OVERRIDE PROVISIONS

The manner in which the *Charter* limits rights and provides for the override of rights raises particular problems. The problems will be identified and explored, followed by suggestions for reform and improvement of particular provisions.

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89 See the notes to *Victorian Charter 2006* (Vic), s 38. Note that s 32(3) of the *Victorian Charter* states that the interpretative obligation does not affect the validity of secondary legislation 'that is incompatible with a human rights and is empowered to be so by the Act under which it is made.' Thus, secondary legislation that is incompatible with rights and is not empowered to be so by the parent legislation will be invalid, as ultra vires the enabling legislation.

90 *Dawson v TAC* [2010] VCAT (Reference No. G796/2009).

Justifiable Limitations to Rights

There are two aspects to the limitations provisions which need to be addressed: first, the presence of both internal and external limitations provisions; and secondly, the failure to recognise absolute rights within the context of the general limitations provisions.

Internal and External Limitations

The *Charter* contains an external general limitations provision in s 7(2). Section 7(2) provides that the guaranteed rights 'may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account' various factors. The *Charter* also contains internal limitations for certain rights; for example, s 15(3) states:

> Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality.

There are two issues to consider here. The first is the *selective* nature of including internal limitation provisions, and the second is whether *both* internal and external limitations provisions are needed.

In relation to the first issue, the *Charter* only "borrows" one internal limitation provision from the *ICCPR* – that for freedom of expression under art 19. It does not "borrow" the internal limitation wording for other rights that are capable of justifiable limitation; in particular for freedom of thought, conscience and religion (art 18), peaceful assembly (art 21), and freedom of association (art 22). By way of comparison, the *ECHR* provides internal limits for the right to privacy (art 8), freedom of thought, conscience and religion (art 9), freedom of expression (art 10), and freedom of assembly and association (art 11). It is not at all clear why the *Charter* only provides an internal limit under s 15(3).

In relation to the second issue, of whether internal or external limitations provisions are preferable, there is no theoretical difference between them. Both internal and external limitations achieve the same outcome – that a right may be limited if strict test of reasonableness and demonstrable justifiability are met. Moreover, the tests for both internal and external limitations consider very similar (if not identical) elements. Both internal and external limitations tests both require: first, prescription by law; secondly, the achievement of a legitimate legislative objective (as listed within the article itself in internal limits or not restricted under general limitations provisions); and thirdly, necessity or justifiability in a democratic society, which tends to require a combination of reasonableness (that is, demonstration of a pressing social need) and proportionality (being made up of rationality, minimum impairment and proportionality).[91]

A difference between the internal and external limitations provisions is that the internal limitations provisions specifically list the legislative objectives that may be pursued when justifiably limiting a right – for example, under s 15(3) of the *Charter* the legislative objectives that can justifiably be pursued through a limitation are protection of the rights and

[91] Debeljak, Balancing Rights, above n 99, 425.

reputation of other persons, and the protection of national security, public order, public health or public morality. The external limitations provisions do not do this; the parliament is free to pursue whatever legislative objectives it likes with respect to limiting rights, provided that those legislative objectives are reasonable (i.e. pressing and substantial; that is, 'of sufficient importance to warrant overriding a constitutionally protected right or freedom').[92]

There is no major advantage or strength to the internal listing of legislative objectives. The specific listing of legislative objectives in internal provisions is of little practical assistance or substantive impact because the legislative objectives of most rights-limiting laws can readily be classified within the legislative objectives that tend to be listed as legitimate in internal limitation provisions.[93] In other words, because of the open-textured and vague nature of the specified legitimate legislative objectives listed in internal limitations clauses, these clauses do not tend to restrict the objectives that can be pursued in rights-limiting legislation. For example, one is hard pressed to think of a law that limits freedom of expression which could not be characterised as having a legislative objective that protects the rights and reputation of other persons, and/or protects national security, public order, public health or public morality. Consequently, there is no major advantage in having the legitimate legislative objectives specifically listed in internal clauses, rather than leaving the legitimate legislative objectives open as per external limitation provisions.

Moreover, a strength of the external limitations provision is that a consistent approach to assessing the justifiability of limitations is developed, which has many positive effects, including contributing to certainty and consistency of the law, helping to de-mystify human rights and justifiable limits thereto, and encouraging mainstreaming of human rights within government because of the simplicity of assessing justifiable limits on human rights.

Given that the adoption of internal limitations provisions has been selective and without apparent rationale, and the lack of any distinct advantage in their use, the use of an external limitations provision is preferable to the use of internal limitations provisions. It is **recommended** that s 7(2) be retained and that the internal limitation in s 15(3) be repealed.

Absolute Rights and Section 7(2)

It is appropriate to provide the capacity to balance rights against other rights, and other valuable but non-protected principles, interests and communal needs, through a general external limitations provision of the type contained in s 7(2) of the *Charter*. However, the external limitations provision in s 7(2) applies to all of the guaranteed rights in the *Charter*, and fails to recognise that some of the rights guaranteed are so-called "absolute rights" under international law. To apply s 7(2) to all of the guaranteed rights violates international human rights law to the extent that it applies absolute rights.

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92 *R v Oakes* [1986] 1 SCR 103, 138.

93 For example, art 22(2) of the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) states that:

> [n]o restrictions may be placed on the exercise of [the right to freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Moreover, art 9(2) of the *ECHR*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) states that:

> [f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Under international human rights law, absolute rights cannot be derogated from (or overridden) and no circumstance justifies a qualification or limitation of such rights.[94] Absolute rights in the *ICCPR*[95] include: the prohibition on genocide (art 6(3)); the prohibition on torture or cruel, inhuman and degrading treatment or punishment (art 7); the prohibition on slavery and servitude (arts 8(1) and (2)); the prohibition on prolonged arbitrary detention (elements of art 9(1)); the prohibition on imprisonment for a failure to fulfil a contractual obligation (art 11); the prohibition on the retrospective operation of criminal laws (art 15); the right of everyone to recognition everywhere as a person before the law (art 16); and the right to freedom from systematic racial discrimination (elements of arts 2(1) and 26).[96] To apply a general external limitation provision to all protected rights violates international human rights law to the extent that it applies to so-called "absolute rights". For example, to the extent that s 7(2) of the *Charter* applies to absolute rights, it does not conform to international human rights law.[97]

Moreover, any argument suggesting that absolute rights are sufficiently protected under an external general limitations provision, because a limitation placed on an absolute right will rarely pass the limitations test (that is, that a limitation on an absolute right will rarely be reasonable and demonstrably justified), does not withstand scrutiny (see especially Appendix 2, p 435).[98]

The solution to this problem is to retain the generally-worded external limitations provision, but to specify which protected rights it does *not* apply to. It is **recommended** that s 7(2) be

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94 When dealing with absolute rights, the treaty monitoring bodies have some room to manoeuvre vis-à-vis purported restrictions on absolute rights when considering the scope of the right. That is, when considering the scope of a right (that is, the definitional question as opposed to the justifiability of limitations question), whether a right is given a broad or narrow meaning will impact on whether a law, policy or practice violates the right. In the context of absolute rights, a treaty monitoring body may use the definitional question to give narrow protection to a right and thereby allow greater room for governmental behaviour that, in effect, restricts a right. However, the fact that absolute rights may be given a narrow rather than a broad definition does not alter the fact that absolute rights (whether defined narrowly or broadly) allow of no limitation. Indeed, the very fact that the treaty monitoring bodies structure their analysis as a definitional question rather than a limitation question reinforces that absolute rights admit of no qualification or limitation.

95 The *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976) is a relevant comparator because, *inter alia*, the rights guaranteed in the *Charter* are modelled on the rights guaranteed in the *ICCPR*.

96 See American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States (*1987) vol 2, 161; Oscar Schachter, *International Law in Theory and Practice* (1991) 85, extracted in Henry Steiner and Philip Alston, *International Human Rights in Context* (2nd edition, Clarendon Press, Oxford, 2000) 230-231; Sarah Joseph, Jenny Schultz, and Melissa Castan, The *International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edition, Oxford University Press, 2004) [1.66], [25.75]. The Human Rights Committee describes the prohibitions against the taking of hostages, abductions and unacknowledged detention as non-derogable. 'The absolute nature of these prohibitions, even in times of emergency, is justified by status as norms of general international law': Human Rights Committee, *General Comment No 29: States of Emergency* (Article 4), UN Doc No CCPR/C/21/Rev.1/Add.11 (31 August 2001) [13] ('General Comment No 29').

97 To the extent that other domestic human rights instruments have general limitations powers that do not account for absolute rights, they too do not conform to international human rights law. See eg, *Canadian Charter of Rights and Freedoms 1982*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 1 ('*Canadian Charter'*); *NZ Bill of Rights* 1990 *(NZ)*, s 5.

98 Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009 (extracts).

amended to exclude the following sections from its operation: ss 8, 10, 11(1), 11(2), 21(2), 21(8), and 27. This outcome should be achieved by legislative amendment to the *Charter*.

This solution may also be achieved through judicial interpretation of the *Charter* – given that international jurisprudence is a legitimate influence on the s 32(1) interpretation obligation under s 32(2), and that the *Charter* itself should be interpreted in light of the s 32 rights-compatible interpretation obligation, the general limitations power in s 7(2) could be read down by the judiciary so as not to apply to ss 8, 10, 11(1), 11(2), 21(2), 21(8), and 27. However, parliamentary legislative reform under the four-year review seems like a more appropriate vehicle for this change than jurisprudential reform.

I refer to Appendix 3.[99] The issue of whether a small number of rights ought to be excluded from the external limitations provision is directly addressed (Appendix 3, pp 433-435). By way of background, the different mechanisms for limiting rights (Appendix 3, pp 424-427), and the main reasons linked to institutional design for justifying limitation to rights, namely the preservation of parliamentary sovereignty and the creation of an institutional dialogue about rights and their justifiable limits (Appendix 3, pp 427-432), are also explored.

Override the Provision

Superfluous

It is unclear why an override provision was included in the *Charter*. Override provisions are necessary in certain "dialogue" models of human rights instrument, such as the *Canadian Charter*, in order to preserve parliamentary sovereignty - that is, because the judiciary is empowered to invalidate legislation that unjustifiably limits guaranteed rights, the parliament requires an override power in order to preserve its sovereignty. This is *not* the situation under the *Charter*. It is not necessary to include an override provision in the *Charter* because of the circumscription of judicial powers.

Under the *Charter*, as under the *UK HRA*, judges are *not* empowered to invalidate legislation; rather, judges are only empowered to interpret legislation to be rights-compatible where possible and consistent with statutory purpose (s 32), or to issue a non-enforceable declaration of inconsistent interpretation (s 36). Under the *Charter*, use of the override provision will *never be necessary* because judicially-assessed s 36 incompatible legislation cannot be judicially invalidated, and unwanted or undesirable s 32 judicial rights-compatible interpretations of legislation can be altered by the parliament by way of ordinary legislation. The parliament *may choose* to use the override power to avoid the controversy of ignoring a judicial declaration which impugns legislative objectives or legislative means to achieve legislative objectives; however, *surely* use of the override itself would cause equal, if not more, controversy than the Parliament simply ignoring the declaration.

Inadequate Safeguards

One might nevertheless accept the inclusion of an override power – even if it was superfluous – if it did not create other negative consequences. This *cannot* be said of the override

[99] Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422-469.

provision in s 31 of the *Charter*. A major problem with s 31 is the supposed safeguards regulating its use. Overrides are exceptional tools; overrides allow a government and parliament to temporarily suspend guaranteed rights that they otherwise recognise as a vital part of a modern democratic polity. In international law, the override equivalent – the power to derogate – is similarly recognised as a necessity, albeit an unfortunate necessity.

In recognition of this exceptionality, the power to derogate is carefully circumscribed in international and regional human rights law. First, in the human rights context, some rights are non-derogable, including the right to life, freedom from torture, and slavery. Second, most treaties allow for derogation, but place conditions/limits upon its exercise. The power to derogate is usually (a) limited in time – the derogating measures must be temporary; (b) limited by circumstances – there must be a public emergency threatening the life of the nation; and (c) limited in effect – the derogating measure must be no more than the exigencies of the situation require and not violate international law standards (say, of non-discrimination).

In contrast, the *Charter* does *not* contain sufficient safeguards. To be sure, the does *Charter* provides that overrides are temporary, by imposing a 5-year sunset clause – which, mind you, is continuously renewable in any event. However, it fails in three important respects.

First, the override provision can operate in relation to *all* rights. There is no category of non-derogable rights. This lack of recognition of non-derogable rights contravenes international human rights obligations.

Secondly, the conditions placed upon its exercise do *not* reach the high standard set by international human rights law. The circumstances justifying an override under the *Charter* are labelled "exceptional circumstances". However, in fact, the supposed "exceptional circumstances" are no more than the sorts of circumstances that justify "unexceptional limitations", rather that the "exceptional circumstances" necessary to justify a derogation in international and regional human rights law. Let me explain.

Under the *Charter*, "exceptional circumstances" include 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.'[100] These fall *far short* of there being a public emergency that threatens the life of the nation, as per the international and regional human rights obligations. Indeed, the circumstances identified under the *Charter* are not "exceptional" at all. Factors such as public safety, security and welfare are the grist for the mill for your "unexceptional limitation" on rights. If you consider the types of legislative objectives that justify "unexceptional limitations" under the *ICCPR* and the *ECHR*, public safety, security and welfare rate highly.

So why does this matter – why does it matter that an "exceptional override" provision is utilising factors that are usually used in the "unexceptional limitations" context?

One answer is oversight. When the executive and parliament place a limit on a right because of public safety, security or welfare, such a decision can be challenged in court. The executive and parliament must be ready to argue why the limit is reasonable and justified in a free and democratic society, against the specific list of balancing factors under s 7(2).[101] The

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[100] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21

[101] Section 7(2) of the *Victorian Charter* outlines factors that must be balanced in assessing a limit, as follows: (a) the nature of the right; (b) the importance of the purpose of the right; (c) the nature and

executive and parliament must be accountable for limiting rights and provide convincing justifications for such action. The judiciary then has the opportunity to contribute its opinion as to whether the limit is justified. If the judiciary consider that the limit is not justified, it can then exercise its s 32 power of interpretation where possible and consistent with statutory purpose, or issue a s 36 declaration of incompatibility.

However, if parliament uses the "exceptional override" to achieve what ought to be achieved via an "unexceptional limitation", the judiciary is excluded from the picture. An override in effect means that the s 32 interpretation power and the s 36 declaration power do not apply to the overridden legislation for five years. There is no judicial oversight for overridden legislation as compared to rights-limiting legislation.

Another answer is the way the *Charter* undermines human rights. By setting the standard for overrides and "exceptional circumstances" too low, it places human rights in a precarious position. It becomes too easy to justify an absolute departure from human rights and thus undermines the force of human rights protection.

Thirdly, another problem with the override provision is the complete failure to regulate the effects of the derogating or overriding measure. Section 31 of the *Charter* does *not* limit the effect of override provisions at all. There is no measure of proportionality between the exigencies of the situation and the override measure, and nothing preventing the Victorian Parliament utilising the override power in a way that unjustifiably violates other international law norms, such as, discrimination. To this extent, s 32 falls short of equivalent international and regional human rights norms.

Each of these arguments is more fully developed in Appendix 3, especially at pp 436-453.[102] Appendix 3 also examines the override in the context of the Victorian Government's stated desire to retain parliamentary sovereignty and establish an institutional dialogue on rights (pp 453-58). It further assesses the superior comparative methods for providing for exceptional circumstances, be they via domestic override or derogation provisions under the British, Canadian and South African human rights instruments (pp 458-68)).

Recommendation

In conclusion, an override provision does serve a vital purpose under the Canadian model – that of preserving parliamentary sovereignty. An override provision is not necessary under the "dialogue" model adopted by the *Charter*. Moreover, the override provision contained in the *Charter* is inadequate in terms of recognising non-derogable rights, and in terms of conditioning the use of the override/derogation power, especially in relation to the circumstances justifying an override/derogation and regulating the effects of override/derogation. Accordingly, it is **recommended** that s 31 of the *Charter* should be repealed.

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extent of the limitation; (d) the relationship between the limitation and its purposes; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve – a minimum impairment test.

102 Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422-469.

If repeal of the override provision is not a politically viable option, it is **recommended** that s 31 should be amended to more closely reflect a proper derogation provision – that is, it should be amended to be modelled on the derogation provisions under art 4 of the *ICCPR*, as is the case under s 37 of the *South African Bill of Rights*.[103] Article 4 of the *ICCPR* states:

> In time of public emergency which threatens the life of the nation and the existence of which is publicly proclaimed, States may take measures of derogation from obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided measures are not inconsistent with other obligations under international law and do not involve discrimination on basis of race, colour, sex, language, religion or social origin.

Section 37 of the *South African Bill of Rights*[104] states, *inter alia*:

> (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.
>
> ...
>
> (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that (a) the derogation is strictly required by the emergency; and (d) the legislation is (i) consistent with the Republic's obligations under international law applicable to states of emergency; (ii) conforms to subsection (5); and (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.
>
> (5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise (a) indemnifying the state, or any person, in respect of any unlawful act; (b) any derogation from this section; or (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

See further Appendix 3, p 440, and pp 458-61.[105]

Economic, Social and Cultural Rights

Any amendment to s 31 of the *Charter* modelled on art 4 of the *ICCPR* and s 37 of the *South African Bill of Rights* will have to account for the fact that *ICESCR* does not contain an explicit power of derogation. It appears that derogation from economic, social and cultural rights is not allowed under international human rights law. This absence of a power to derogate is explicable because derogation is unlikely to be necessary given that a State

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103 *Constitution of the Republic of South Africa 1996* (RSA), s 37.

104 *Constitution of the Republic of South Africa 1996* (RSA), s 37.

105 Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422-469.

Parties' obligations under art 2(1) of the *ICESCR* are limited to progressive realisation to the extent of its available resources, as follows:

> each State party ... undertakes *to take steps*, individually and through international assistance and co-operation, … to the *maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognised in the present Covenant, *by all appropriate means*, including particularly the adoption of legislative measures

It is **recommended** that any amendment to s 31 regarding override/derogation not extend to any economic, social and cultural rights that are recognised in the *Charter*.

APPENDICES

- Appendix 1: Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.
- Appendix 2: Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009 (extracts).
- Appendix 3: Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422-469.
- Appendix 4: Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9-71.
- Appendix 5: Julie Debeljak, 'Human Rights Responsibilities of Public Authorities Under the Charter of Rights' (Presented at *The Law Institute of Victoria Charter of Rights Conference*, Melbourne, 18 May 2007).
- Appendix 6: Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.), *Human Rights Protection: Boundaries and Challenges* (Oxford University Press, Oxford, 2003) 135-57.
- Appendix 7: Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights', (2002) 26 *Melbourne University Law Review* 285-324.

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SUBMISSION TO THE QUEENSLAND HUMAN RIGHTS INQUIRY

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INTRODUCTION

I have written extensively on human rights models, particularly the Victorian *Charter*, the United Kingdom *Human Rights Act* and the Canadian *Charter*. This submission attempts to briefly answer the questions put in the Terms of Reference to the Queensland Human Rights Inquiry.

More in-depth analysis is contained in my academic writing, which is referred to throughout and which is listed in an Appendix to this Submission.

QUESTION 1(A): THE EFFECTIVENESS OF CURRENT LAWS AND MECHANISMS FOR PROTECTING HUMAN RIGHTS IN QUEENSLAND AND POSSIBLE IMPROVEMENTS TO THESE MECHANISMS

Change is needed in Queensland to better protect human rights. The constitutional arrangement in Queensland (and many other Australian jurisdictions) gives the representative arms of government an effective monopoly over the protection and promotion of human rights. The judiciary has a limited role in protecting and promoting rights.

Four main factors create this monopoly:

1) The paucity of constitutionally protected human rights guarantees:

   The Queensland Constitution does not comprehensively guarantee human rights. Even if the Queensland parliament were to incorporate human rights guarantees into its constitution, such provisions would have to be subject to a restrictive legislative procedure (i.e. a 'manner and form' provision) to be effective.

   Similarly, the *Commonwealth Constitution* does not comprehensively guarantee human rights. Although it contains three human rights – the right to trial by jury on indictment (s 80), freedom of religion (s 116), and the right to be free from discrimination on the basis of interstate residence (s 117) – and three implied freedoms – the implied separation of the judicial arm from the executive and legislative arms of government, the implied freedom of political communication, and voting rights – this falls *far short* of a comprehensive list of civil, political, economic, social and cultural rights. A cursory

comparison of these rights with the *International Covenant of Civil and Political Rights* (1966) ('*ICCPR*')[1] demonstrates this. Moreover, these rights have most often been interpreted narrowly by the courts.

The result is that the representative arms of government have very wide freedom when creating and enforcing laws. That is, the narrower rights protections and the narrower the restrictions on governmental activity, the broader the power of the government and parliament to impact on human rights.

[See further Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Human Rights Issues in Australia* (Thomson Reuters, 2013) 37, 38-41.]

2) <u>The partial and fragile nature of statutory human rights protection</u>:

Queensland laws do and can provide statutory protection of human rights. Statutory regimes, in part, implement the international human rights obligations that successive Australian governments have voluntarily entered into. For example, the anti-discrimination laws of the Commonwealth and the States partially implement the ICCPR, the *Convention on the Elimination of All Forms of Racial Discrimination* ('CERD'), and the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW').[2]

These statutory regimes are more comprehensive than the protections offered under the *Commonwealth Constitution*. However, the disadvantages of mere statutory protection far outweigh this advantage. The disadvantages include:

a) the scope of the rights protected by statute is much narrower than that protected by international human rights law;
b) there are exemptions from the statutory regimes, allowing exempted persons to act free from human rights obligations;
c) the interpretation of human rights statutes by courts and tribunals has generally been restrictive;
d) the human rights commissions established under the statutes are only as effective as the representative arms of government allow them to be; and
e) the protections are only statutory– parliament can repeal or alter these protections via the ordinary legislative process.

[See further Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Human Rights Issues in Australia* (Thomson Reuters, 2013) 37, 41-44.]

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[1] The *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[2] *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); the *Convention on the Elimination of All Forms of Racial Discrimination*, open for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*'); the *Convention on the Elimination of All Forms of Discrimination Against Women* ('*CEDAW*'), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

3) The ineffectiveness of Parliamentary Sovereignty and Responsible Government:

The constitutional and legal foundations for Queensland and all Australian jurisdictions are grounded in 19th century assumptions about the capacity of parliamentary sovereignty and responsible government to act as the bulwark against government interference with individual rights. The constitutional drafters considered both the British and American methods of rights protection, and settled on the Westminster model with its reliance upon the rule of law, the doctrine of parliamentary sovereignty, and responsible government.

From a rights perspective, there are major difficulties with relying on parliamentary sovereignty and responsible government for the promotion and protection of rights, and excluding the judiciary from the institutional design regarding rights protection. The first difficulty is whether parliamentary sovereignty and responsible government were ever able to function as safeguards for human rights. The second difficulty is that neither political conceptions operates in the same manner today as it did in yesteryear.

In relation to parliamentary sovereignty, as I have noted elsewhere: 'the concept of parliamentary sovereignty is concerned about the *source* of the law (that being parliament) rather than the *quality* of the law (that being laws that respect human rights). Thus, in theory, the nexus between parliamentary sovereignty and human rights protection is tenuous.'[3] Moreover, modern political structures, processes and practices have undermined parliamentary sovereignty, resulting in an executive dominance of parliament. Although parliament sovereignty was originally a reaction to monarchical rule, today we have returned to rule by executive – thus sidelining the supposed benefits for human rights of parliamentary sovereignty.

In relation to responsible government, the collective and individual responsibility of the executive to parliament was supposed to be a safeguard against rights abuses. However, responsible government has no greater a commitment to rights than parliament. Both theories rely on voters bringing their representatives to heel on matters of rights, but majorities are not guaranteed to act in the best interests of others, particularly minorities, the vulnerable and the unpopular. Moreover, collective and individual responsibility of the executive to parliament have waned as tools for government accountability, let alone rights accountability. As I have noted elsewhere, 'Parliamentary sovereignty and responsible government do not adequately protect human rights today, and it is doubtful if they ever could. This effective executive dominance of parliament suggests that (more precisely) the executive monopolises human rights protection in Australia. Such concentration of power in the executive is an ongoing challenge to the functioning of representative democracy, and the more concentrated monopoly amplifies the threat to the effective protection of human rights.'[4]

[See further, Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Human Rights Issues in Australia* (Thomson Reuters, 2013) 37, 44-48.]

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[3] Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Human Rights Issues in Australia* (Thomson Reuters, 2013) 37, 45-46.

[4] Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Human Rights Issues in Australia* (Thomson Reuters, 2013) 37, 47-48.

4) The domestic impact (or lack thereof) of our international human rights obligations:

The representative arms of government enjoy a monopoly over the choice of Australia's international human rights obligations, and their implementation in the domestic legal regime. Moreover, these powers rest in the representative arms of the Commonwealth, not the representative arms Queensland. In terms of choice, the Commonwealth Executive decides which international human rights treaties Australia should ratify (s 61 of the *Commonwealth Constitution*). In terms of domestic implementation, the Commonwealth Parliament controls the relevance of Australia's international human rights obligations within the domestic legal system. The ratification of an international human rights treaty by the executive gives rise to international obligations *only*. A treaty does *not* form part of the domestic law of Australia until it is incorporated into domestic law by the Commonwealth Parliament.

The judiciary alleviates the dualist nature of our legal system in a variety of ways:

a) there are rules of statutory interpretation that favour interpretations of domestic laws that are consistent with our international human rights obligations;
b) our international human rights obligations influence the development of the common law;
c) international human rights obligations impact on the executive insofar as the ratification of an international treaty alone, without incorporation, gives rise to a legitimate expectation that an administrative decision-maker will act in accordance with the treaty, *unless* there is an executive or legislative indication to the contrary (*Teoh* decision).

Basically, Australia's international human rights obligations offer very little protection within the domestic system, whether one is considering the federal or Queensland jurisdictions. In particular, the rules of statutory interpretation are weak, especially because clear legislative intent can negate them. Moreover, reliance on the common law is insufficient, especially given that judges can only protect human rights via the common law when cases come before them, which means that protection will be incomplete. The common law can also be overturned by statute. Furthermore, the decision of *Teoh* offers only procedural (not substantive) protection, and its effectiveness and status is in doubt – the Commonwealth legislature is poised to override it by legislation and a majority of judges on the High Court have recently questioned its correctness ().

[See further, Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Human Rights Issues in Australia* (Thomson Reuters, 2013) 37, 48-51.]

It is important to note that the representative monopoly over the protection and promotion of human rights results in problematic consequences. First, human rights in Australia are under-enforced. The Commonwealth has ratified the major international human rights treaties,[5]

[5] The *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'); the *Convention on the Elimination of All Forms of Racial Discrimination*, open for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*'); the

however, there are insufficient mechanisms to enforce these basic human rights within the domestic system, including in the Queensland jurisdiction. Secondly, and consequently, aggrieved persons and groups are denied an effective non-majoritarian forum within which their human rights claims can be assessed.[6] This, in turn, has led to increasing recourse to the judiciary, placing pressures on the judiciary which ultimately test the independence of the judiciary and the rule of law. In particular, when individuals turn to the judiciary as a means of final recourse to resolve human rights disputes, the judiciary is often accused of illegitimate judicial law-making or judicial activism. [See further Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Human Rights Issues in Australia* (Thomson Reuters, 2013) 37, 52-56.]

In my opinion, human rights protection will be best improved by introducing a statutory rights instrument, with rights-protective roles for all arms of government – the executive, parliament and the judiciary.

QUESTION 1(B): THE OPERATION AND EFFECTIVENESS OF HUMAN RIGHTS LEGISLATION IN VICTORIA, THE AUSTRALIAN CAPITAL TERRITORY AND BY ORDINARY STATUTE INTERNATIONALLY

I have written extensively on the operation of the Victorian *Charter*, and this has included analysis of the United Kingdom *Human Rights Act*, the Canadian *Charter*, and the New Zealand *Bill of Rights*. Every publication listed in the Appendix is relevant to answering this question. I invite the Committee to consider these publications.

Based on this research and my expertise in the area, I would like to make the following contribution. Much of the discussion refers to the operation of the Victorian *Charter*, and suggested improvement to and amendments of the Victorian *Charter*, with recommendations relating to the choices for Queensland.

The Human Rights

Protection of civil and political rights is a first step toward comprehensive human rights protection. It is the first step that most jurisdictions take. However, there is a strong case for protecting all categories of rights – that is, economic, social, cultural, civil and political rights.

One of the main concerns against protecting economic, social and cultural rights relates to justiciability – that is, having judges decide cases in relation to vague rights, that impose positive obligations, that are resource intensive, and involve complex issues with concentric

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Convention on the Elimination of All Forms of Discrimination Against Women ('*CEDAW*'), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*'); and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*'); and *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD'*).

[6] The domestic fora have limited rights jurisdictions only and are vulnerable to change; the international fora are non-binding and increasingly ignored.

impacts. The international jurisprudence on economic, social and cultural rights, and comparative jurisprudence, particularly from the South African *Bill of Rights*, weakens the arguments against the enforceability of economic, social and cultural rights. Indeed, the Committee on Economic, Social and Cultural Rights, and the Constitutional Court of South Africa have led the way in demonstrating how economic, social and cultural rights: (a) can impose clearly identifiable obligation; (b) which are part positive and part negative in nature; (c) that do not necessarily interfere with resourcing; and (d) that can be enforced along the lines of judicial review of administrative decision-making. The jurisprudence in this area reinforces that economic, social and cultural rights are legally enforceable, and the benefits thereof.

I recommend that any Queensland human rights instrument protect civil, political, economic, social and cultural rights, those rights being indivisible, inter-dependant, inter-related and mutually reinforcing.

[See further

- Julie Debeljak, 'How Best to Protect and Promote Human Rights in Victoria', submitted to the *Human Rights Consultative Committee of the Victorian Government*, August 2005, pp 4-5.
- Julie Debeljak, 'Inquiry into the *Charter of Human Rights and Responsibilities*', submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, pp 1-6.]

The Limitations Provision

Any protected rights must be capable of being limited. Rights are not absolute, and must be able to be balanced against each other. The rights instrument also needs to be flexible enough to respond to unforeseen events and future exigencies. There are two considerations for the Queensland Commission in relation to limitations provisions, both arising from s 7(2) of the Victorian *Charter*.

External vs internal limitations provision

Section 7(2) of the Victorian *Charter* uses a general limitations provision. A general limitations provision based on s 7(2) of the Victorian *Charter* is an appropriate tool to provide the capacity to balance rights against other rights, and other valuable but non-protected principles, interests and communal needs.

However, the external limitations provision in s 7(2) applies to *all* of the *Charter* rights, and fails to recognise that some of the rights guaranteed are so-called "absolute rights" under international law. To apply s 7(2) to all of the rights violates international human rights law to the extent that it applies absolute rights. See further Julie Debeljak, 'Inquiry into the *Charter of Human Rights and Responsibilities*', submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, pp 25-26.

Were Queensland to adopt a human rights instrument and seek to allow for reasonable and justifiable limitations, I recommend that:

- **a generally-worded external limitations provision be used;**
- **that the wording of s 7(2) of the Victorian *Charter* be adopted;**
- **but that the Queensland equivalent of s 7(2) states that it does *not* apply to the following absolute rights:**
    - **the prohibition on genocide;**
    - **the prohibition on torture or cruel, inhuman and degrading treatment or punishment;**
    - **the prohibition on slavery and servitude;**
    - **the prohibition on prolonged arbitrary detention;**
    - **the prohibition on imprisonment for a failure to fulfil a contractual obligation;**
    - **the prohibition on the retrospective operation of criminal laws;**
    - **the right of everyone to recognition everywhere as a person before the law; and**
    - **the right to freedom from systematic racial discrimination.**

Role of s 7(2) in rights-compatibility

Under the Victorian *Charter*, a question has arisen as to the role of s 7(2). Some judges have held that s 7(2) has no role to play in relation to statutory interpretation under s 32(1); whilst some judges have held that it is only relevant to the exercise of judicial discretion under the s 36(2) power to issue a declaration of inconsistent interpretation. In my opinion, both interpretations of the role and interaction of s 7(2) are incorrect. The reasoning behind my opinion is quite complex, and is summarised in:

- Julie Debeljak, 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, 1-13.

An in-depth analysis of the jurisprudence that resulted in these opinions is provided in:

- Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340-388
- Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.

Were Queensland to adopt a similar model to Victoria, I recommend that any equivalent to s 7(2) of the Victorian *Charter* in Queensland legislation accommodate the following:

- **To clearly draft the rights legislation to indicate that the concept of 'rights compatibility' includes s 7(2) analysis – that is, legislation will be compatible with rights where the legislation limits rights but that limit is reasonable and demonstrably justifiable;**
- **To clearly draft the rights legislation to indicate that s 7(2) has a role to play when undertaking rights-compatible statutory interpretation, and considering a declaration of incompatibility;**

- **To clarify the interaction between the limitations provision, the obligation to interpret rights compatibly, and the power to issue declarations of incompatibility – in particular, to adopt what I refer to as the UK/NZ methodology, as follows:**

  The "Rights Questions"
  First: Does the legislative provision limit/engage any of the protected rights?

  Second: If the provision does limit/engage a right, is the limitation justifiable under the general limitations power? [i.e. s 7(2), Victorian *Charter*.]

  The "Charter Questions"
  Third: If the provision imposes an unjustified limit on rights, interpreters must consider whether the provision can be "saved" through a rights-compatible interpretation; accordingly, the judge must alter the meaning of the provision in order to achieve rights-compatibility. [i.e. s 32(1), Victorian *Charter*.]

  Fourth: The judge must then decide whether the altered rights-compatible interpretation of the provision is "possible" and "consistent[] with [statutory] purpose". [i.e. s 32(1), Victorian *Charter*.]

  The Conclusion…
  Remedy: If the rights-compatible interpretation is "possible" and "consistent[] with [statutory] purpose", this is a complete remedy to the human rights issue. [i.e. s 32(1), Victorian *Charter*.]

  Declaration: If the rights-compatible interpretation is not "possible" and not "consistent[] with [statutory] purpose", the only option is a non-enforceable declaration of inconsistent interpretation. [i.e. s 36(2), Victorian *Charter*.]

The NZ/UK method is important for the role of s 7(2), as I have explained earlier:

> First, s 7(2) limitation analysis is built into assessing whether a rights compatible interpretation is possible and consistent with statutory purpose. Section 7(2) proportionality analysis informs whether an ordinary interpretation is indeed compatible with rights because the limitation is reasonable and demonstrably justified; or whether the ordinary interpretation is not compatible with rights because the limit is unreasonable and/or demonstrably unjustified, such that an alternative interpretation under s 32(1) should be sought if possible and consistent with statutory intention. Section 7(2) justification is part of the overall process leading to a rights-compatible or a rights-incompatible interpretation.[7]

Please note that specific amendments to the wording of the Victorian *Charter* to accommodate these concerns have been suggested in Julie Debeljak 'Eight-year Review of

[7] Julie Debeljak 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, pp 4.

the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, pp 16-18. **The legislative drafters in Queensland should take note of these suggested amendments if they are modelling an instrument on the Victorian *Charter*.**

Judicial Role in Interpretation and Declaration

Remedial Interpretation

The underlying concern of all statutory human rights instruments is the preservation of parliamentary sovereignty. This is achieved by *not* giving judges the power to invalidate legislation based on rights-incompatibility. Rather, the power of the judiciary is usually limited to an obligation to secure rights-compatible interpretations; and, where this is not possible and consistent with the purpose of statute being interpreted, to issue an unenforceable declaration of rights-incompatibility.

The Victorian *Charter* does this through:

- Section 32(1), which requires all statutory provisions to be interpreted in a way that is compatible with rights, so far as it is possible to do so, consistently with statutory purpose; and
- Section 36(2), which provides that where legislation cannot be interpreted rights-compatibly, the Supreme Court and Court of Appeal may issue an *unenforceable* 'declaration of inconsistent interpretation.[8]

I have written extensively about the differences between the institutional approaches to rights in comparative jurisdictions. In most Australian jurisdictions the approach focuses on parliamentary sovereignty, with the approach to rights in the United States of America focussing on judicial supremacy. Modern statutory human rights instruments fall between the two, and tend to encourage an inter-institutional dialogue about human rights and their justifiable limits between the executive, legislature and judiciary. My preference between the instruments that create an inter-institutional dialogue is the Canadian *Charter*. However, the terms of reference of the Inquiry are limited to statutory models, not constitutional models, so I will focus on the Victorian *Charter*.

The major difference between constitutional and statutory instruments is the remedy. Under constitutional instruments, the remedy is the invalidation of the rights-incompatible law. The law no longer exists and cannot be used in violation of rights. Under statutory instruments, rights-compatible interpretation becomes the remedy. If a law unreasonably and/or unjustifiably limits a right, a complete remedy is to give the law an interpretation that avoids the unreasonable and/or unjustifiable limitation. In other words, a rights-*compatible* interpretation is a complete remedy to an otherwise rights-*incompatible* law. These statutory interpretative techniques are also available and used under constitutional rights instruments.

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[8] Section 36(2) declarations do not affect the validity, operation or enforcement of the legislation, or create in any person any legal right or give rise to any civil cause of action (s 36(5)). A declaration will not affect the outcome of the case in which it is issued, with the judge compelled to apply the rights-*in*compatible law; nor will a declaration impact on any future applications of the rights-*in*compatible law because it remains in force and is applied to all future cases.

In my opinion, s 32(1) of the Victorian *Charter* was intended to be a remedial interpretation provision. The NZ/UK method gives the rights-compatible interpretation provisions a remedial reach. Numerous Victorian and High Court judges have characterised s 32(1) as remedial; but some Victorian and High Court judges have, essentially, denied the remedial reach of s 32(1).

Again, the reasoning behind my opinion, and the differing judicial opinions, are quite complex, and are summarised in:

- Julie Debeljak, 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, 1-15.

An in-depth analysis of the jurisprudence is provided in:

- Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340-388
- Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.

In brief, as I noted in my 8-Year *Charter* Review submission:

> The importance of a remedial reach for s 32(1) cannot be underestimated. The *Charter* is not a constitutional instrument, such that laws that are unreasonably and unjustifiably limit rights cannot be invalidated. The only "remedy" under the *Charter* for laws that unreasonably and/or unjustifiably limit rights are contained in Part III – in particular, the only remedy is a rights-consistent interpretation, so far as it is possible to do so, consistently with statutory purpose.
>
> If s 32(1) is not given remedial force, as reflected in the adoption of the UK/NZ Method, then the *Charter* in truth contains no remedy for laws that unreasonably and unjustifiably limit rights. In other words, the *Charter* does no more than codify the common law position of the principle of legality (which is little protection against express words of parliament or their necessary intendment), and clarifies the list of rights that come within that principle. This simply was *not* the intention of the *Charter*-enacting Parliament.
>
> Despite the variously stated misgivings of some judges about remedial interpretation, it must be noted that both statutory and constitutional rights instruments employ interpretation techniques for remedial purposes.[9]

Were Queensland to adopt a similar model to Victoria, I recommend that any equivalent provision providing for rights-compatible interpretation must:

- **Be clearly drafted to indicate that rights-compatible interpretation is remedial, in that rights-compatible interpretation is intended to remedy legislation that would otherwise be rights incompatible, so far as it is possible to do so within the realms of interpretation;**

[9] Julie Debeljak 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, p 14.

- **Clearly indicate the appropriate interaction between the limitations provision, the obligation to interpret rights compatibly, and the power to issue declarations of incompatibility – in particular, to adopt what I refer to as the UK/NZ methodology, as follows:**

  The "Rights Questions"
  First: Does the legislative provision limit/engage any of the protected rights?

  Second: If the provision does limit/engage a right, is the limitation justifiable under the general limitations power? [i.e. s 7(2), Victorian *Charter*.]

  The "Charter Questions"
  Third: If the provision imposes an unjustified limit on rights, interpreters must consider whether the provision can be "saved" through a rights-compatible interpretation; accordingly, the judge must alter the meaning of the provision in order to achieve rights-compatibility. [i.e. s 32(1), Victorian *Charter*.]

  Fourth: The judge must then decide whether the altered rights-compatible interpretation of the provision is "possible" and "consistent[] with [statutory] purpose". [i.e. s 32(1), Victorian *Charter*.]

  The Conclusion…
  Remedy: If the rights-compatible interpretation is "possible" and "consistent[] with [statutory] purpose", this is a complete remedy to the human rights issue. [i.e. s 32(1), Victorian *Charter*.]

  Declaration: If the rights-compatible interpretation is not "possible" and not "consistent[] with [statutory] purpose", the only option is a non-enforceable declaration of inconsistent interpretation. [i.e. s 36(2), Victorian *Charter*.]

The NZ/UK method is important for the role of s 32(1), as I have explained earlier:

> Secondly, under the UK/NZ Method, s 32(1) has a remedial role. Let us consider some scenarios. If a statutory provision does limit a right, but that limitation is reasonable and demonstrably justified, there is no breach of rights – the statutory provision can be given an interpretation that is 'compatible with rights'. If a statutory provision does limit a right, and that limitation is not reasonable and demonstrably justified, there is a breach of rights. In this case, a s 32(1) rights-*compatible* interpretation is a complete remedy to what otherwise would have been a rights-*incompatible* interpretation of the statutory provision. To be sure, the judiciary's s 32(1) right-compatible re-interpretation must be possible and consistent with statutory purpose (i.e. a role of interpretation not legislation), but nevertheless the rights-compatible interpretation provides a complete remedy.[10]

[10] Julie Debeljak 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, p 4.

Please note that specific amendments to the wording of the Victorian *Charter* to accommodate these concerns have been suggested in Julie Debeljak 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, pp 16-18. **The legislative drafters in Queensland should take note of these suggested amendments if they are modelling an instrument on the Victorian *Charter*.**

Strength of Remedial Interpretation

Another issue that has arisen under comparative human rights instruments is the 'strength' of remedial interpretation. 'Strength' is short-hand for how far judges are willing to push the concept of interpretation to achieve rights-compatibility. There is a range of answers to the question: how far can the concept of rights-compatible interpretation be pushed to be still consider legitimate judicial interpretation and not an illegitimate acct of judicial legislation.

In the United Kingdom, the choice appears to be between the *Ghaidan* approach or the *Wilkinson* approach. The *Hansen* approach under the *NZBORA* seems to fall somewhere between the two. I have summarised the British jurisprudence in Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15, 18-21, as follows:

> For the purposes of discussion, the British jurisprudence is of three categories. The earlier case of *R v A*[11] is considered the 'high water mark'[12] for s 3(1),[13] when a non-discretionary general prohibition on the admission of prior sexual history evidence in a rape trial was re-interpreted under s 3(1) to allow discretionary exceptions.[14] One commentator considered that Lord Steyn's judgment signalled 'that the

[11] *R v A (No 2)* [2001] UKHL 25 ('*R v A*').

[12] John Wadham, 'The *Human Rights Act*: One Year On' [2001] *European Human Rights Law Review* 620, 638.

[13] In *R v A*, Lord Steyn established some general principles in relation to s 3(1) interpretation. His Lordship confirmed that s 3 required a 'contextual and purposive interpretation' and that 'it will be sometimes necessary to adopt an interpretation which linguistically may appear strained': at *R v A* [2001] UKHL 25 [44]. His Lordship held that s 3 empowers judges to *read down* express legislative provisions or *read in* words so as to achieve compatibility, provided the essence of the legislative intention was still viable (at [44]). Judges could go so far as the 'subordination of the niceties of the language of the section': at [45]. His Lordship justified this interpretative approach by reference to the parliamentary intention in enacting the *UKHRA*: Parliament clearly intended that a declaration be 'a measure of last resort', with 'a *clear* limitation on Convention rights [to be] stated *in terms*': at [44] (emphasis in original). Nevertheless, Lord Nicholls quelled any doubts about the breadth of Lord Steyn's comments in *re S* when Lord Nicholls expressly stated that 'Lord Steyn's observations in *R v A* … are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise': *In re S (Minors) (Care Order: Implementation of Care Plan); In re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10 [40] ("*re S*").

[14] This case addressed the admissibility of evidence in a rape trial. Section 41 of the *Youth Justice and Criminal Evidence Act* 1999 (UK) c 23 prohibited the leading of prior sexual history evidence, without the leave of the court. Accordingly, there was a general prohibition with some narrowly defined exceptions, notably the court could grant leave to lead evidence where the sexual behaviour was contemporaneous to the alleged rape (s 41(3)(b)) or the sexual behaviour is similar to past sexual behaviour (s 41(3)(c)). The House of Lords held that the provision unjustifiably limited the defendant's right to a fair trial under art 6 of the *European Convention on Human Rights* ("*ECHR*") (*Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950,

interpretative obligation is so powerful that [the judiciary] need scarcely ever resort to s 4 declarations' of incompatibility,[15] suggesting that 'interpretation is more in the nature of a "delete-all-and-replace" amendment.'[16]

The middle ground is represented by *Ghaidan*.[17] In *Ghaidan*, the heterosexual definition of "spouse" under the *Rents Act*[18] was found to violate the art 8 right to home when read with the art 14 right to non-discrimination.[19] The House of Lords "saved" the rights-incompatible provision via s 3(1) by re-interpreting the words "living with the statutory tenant as his or her wife or husband" to mean "living with the statutory tenant as *if they were* his wife or husband".[20] Although *Ghaidan*[21] is considered a retreat from *R v A*,[22] its approach to s 3(1) is still considered "radical" because of Lord Nicholls *obiter* comments about the rights-*compatible* purposes of s 3(1) potentially being capable of overriding rights-*incompatible* purposes of an impugned law:

> [T]he interpretative obligation decreed by s 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear… Section 3 *may* require the court to depart from … the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3

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213 UNTS 222, arts 6 and 8 (entered into force 3 September 1953), commonly known as the *European Convention on Human Rights* ('*ECHR*')) – although the legislative objective was beyond reproach, the legislative means were excessive. The provision was saved through s 32 "possible" interpretation, with the House of Lords interpreting the provision as being 'subject to the implied provision that evidence or questioning which is required to ensure a fair trial … should not be treated as inadmissible': at [45]. In particular, s 41(3)(b) was interpreted so as to admit evidence of contemporaneous sexual behaviour, only if it was truly contemporaneous to the alleged rape; and s 41(3)(c) was interpreted so as to admit evidence of similar past sexual behaviour, only if it was so relevant to the issue of consent, that to exclude it would endanger the fairness of the trial.

15 Section 4(2) of the *UKHRA* is the equivalent to s 36(2) of the *Charter*.

16 Danny Nicol, 'Are Convention Rights a No-Go Zone for Parliament?' [2002] Autumn *Public Law* 438, 442 and 443 respectively. Keir Starmer describes Lord Steyn's decision in *R v A* as the 'boldest exposition': Keir Starmer, 'Two Years of the *Human Rights Act*' [2003] *European Human Rights Law Review* 14, 16. See also Lord Irvine, 'The Impact of the *HRA*', 320. For a not so radical take on *R v A*, see Aileen Kavanagh, 'Unlocking the *Human Rights Act:* The "Radical" Approach to Section 3(1) Revisited' (2005) 3 *European Human Rights Law Review* 259.

17 *Ghaidan v Godin-Mendoza* [2004] UKHL 30 ('*Ghaidan*').

18 *Rents Act 1977* (UK) sch 1, para 2(2).

19 *ECHR*, opened for signature 4 November 1950, 213 UNTS 222, arts 8 and 14 (entered into force 3 September 1953).

20 *Ghaidan* [2004] UKHL 30, [35] – [36] (Lord Nicholls]; [51] (Lord Steyn); [129] (Lord Rodger); [144], [145] (Baroness Hale). Lord Millett dissented. His Lordship agreed that there was a violation of the rights [55], and agreed with the general approach to s 3(1) interpretation [69], but did not agreed that the particular s 3(1) interpretation that was necessary to save the provision was 'possible' on the facts: see espec [57], [78]. [81], [82], [96], [99], [101].

21 And the cases leading up to *Ghaidan*, for example, *R v Lambert* [2001] UKHL 37 ('*Lambert*'); *re S* [2002] UKHL 10; *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 ('*Anderson*'); *Bellinger v Bellinger* [2003] UKHL 21.

22 Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33, 45-46.

> requires the court to depart from the intention of the enacting Parliament. The answer … depends upon the intention reasonably to be attributed to the Parliament in enacting section 3.[23]

It is questionable whether the *obiter* comments are in truth that "radical". Lord Nicholls is *not* saying that the will of Parliament as expressed in the *UK HRA* will *always prevail* over the will of parliament as expressed in challenged legislation. Indeed, it is not at all clear that Lord Nicholls instructs courts to go against the will of parliament, especially given that His Lordship proceeds to articulate a set of guidelines about what s 3 does and does not allow. Section 3 *does* enable 'language to be interpreted restrictively or expansively'; is 'apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant'; can allow a court to 'modify the meaning, and hence the effect, of … legislation' to 'an extent bounded by what is "possible"'.[24] However, s 3 *does not* allow the courts to 'adopt a meaning inconsistent with a fundamental feature of legislation'; any s 3 re-interpretation 'must be compatible with the underlying thrust of the legislation being construed' and must '"go with the grain of the legislation."'[25]

Focusing on departures from parliamentary intention, *Ghaidan*, and for that matter *Sheldrake*,[26] do not state that judges *must* depart from the legislative intention of parliament. These cases indicate that judges *may* depart from legislative intention, *but not* where to do so would undermine the fundamental features of legislation, would be incompatible with the underlying thrust of legislation, or would go against the grain of legislation. The judiciary gets close to the line of improper judicial interpretation (read judicial legislation) only where a s 3(1) re-interpretation is compatible with the fundamental features, the underlying thrust and the grain, but is incompatible with the legislative intent. But it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation would clash with parliamentary intention; that is, it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation were *compatible* with an interpretation, but the interpretation was *incompatible* with the parliamentary intention.[27] In effect, these obiter comments place boundaries around the judicial interpretation power, and indicate that s 3(1) does not sanction the exercise of non-judicial power – being acts of judicial legislation – by the judiciary.[28]

Moreover, as numerous Law Lords have indicated,[29] more instructive than the *obiter* comments of judges is analysis of the *ratio* of the cases. The *ratio* of *Ghaidan* was grounded in a s 3(1) re-

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23 *Ghaidan* [2004] UKHL 30 [30] (Lord Nicholls). Prior to this statement, in contemplating the reach of s 3, Lord Nicholls admits that '… section 3 itself is not free from ambiguity' (at [27]) because of the word "possible."' However, his Lordship noted that ss 3 and 4 read together make one matter clear: 'Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant' (at [27]). Given the ambiguity in s 3 itself, Lord Nicholls pondered by what standard or criterion "possibility" is to be adjudged, concluding that '[a] comprehensive answer to this question is proving elusive' (at [27]).

24 Ibid [32].

25 Ibid [33]. Lord Rodger agreed with these propositions ([121], [124]), as did Lord Millett ([67]). Lord Nicholls concluded on the facts: 'In some cases difficult problems may arise. No difficulty arises in the present case. There is no doubt that s 3 can be applied to section 2(2) of *Rents Act* so it is read and given effect 'to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant.'

26 *Sheldrake v DPP* [2005] 1 AC 264 [28] ('*Sheldrake'*).

27 See further Aileen Kavanagh, 'Unlocking the *Human Rights Act:* The "Radical" Approach to Section 3(1) Revisited' (2005) 3 *European Human Rights Law Review* 259.

28 See further, Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 51-57.

29 Indeed, as Lord Bingham states in *Sheldrake* [2005] 1 AC 264, after giving a similar exposition on s 3 to that of Lord Nicholls (at [28]): 'All of these expressions, as I respectfully think, yield valuable insights,

interpretation that was expressly demonstrated to be consistent with the purposes of the statutory provision in question.[30] Further, it is questionable whether the re-interpretation of the legislation in *Ghaidan* was that "radical". In the pre-*UKHRA* equivalent case of *Fitzpatrick*,[31] Ward LJ 'was able to interpret the words "living together as his or her husband" to include same-sex couples'.[32] As Aileen Kavanagh notes, this demonstrates that the *Ghaidan* re-interpretation 'was possible using traditional methods of statutory interpretation even before the *UKHRA* came into force.'[33] Unfortunately, these points of moderation are rarely acknowledged in the debate.

The "narrowest"[34] interpretation of s 3(1) was proposed by Lord Hoffman in *Wilkinson*.[35] Lord Hoffman describes s 3(1) as 'deem[ing] the Convention to form a significant part of the background against which all statutes ... had to be interpreted',[36] drawing an analogy with the principle of legality. His Lordship introduces an element of reasonableness, describing interpretation under s 3(1) as 'the ascertainment of what, taking into account the presumption created by s 3, Parliament would *reasonably* be understood to have meant by using the actual language of the statute.'[37] Although the

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but none of them should be allowed to supplant the simple test enacted in the Act: "so far as it is possible to do so…' Similar sentiment was earlier expressed by Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 ('*Donoghue*'), when he acknowledged that '[t]he most difficult task which courts face is distinguishing between legislation and interpretation', with the 'practical experience of seeking to apply section 3 … provid[ing] the best guide' (at [76]). The lesson from these statements is not to angst too much in the abstract about the meaning of s 32(1) of the *Charter*, and to simply understand it through its applications in particular cases.

30 See *Ghaidan* [2004] UKHL 30 [35], where Lord Nicholls explicitly bases his s 3(1) re-interpretation on the social policy underlying the impugned statutory provision:

> [T]he social policy underlying the 1988 extension of security of tenure under paragraph 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship. In this circumstance I see no reason to doubt that application of s 3(1) to paragraph 2 has the effect that paragraph 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant. Reading paragraph 2in this way would have the result that cohabiting heterosexual couples and cohabiting [homosexual] couples would be treated alike for the purposes of succession as a statutory tenant. This would eliminate the discriminatory effect of paragraph 2 and would do so consistently with the social policy underlying paragraph 2.

31 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 ('*Fitzpatrick*').

32 Aileen Kavanagh, 'Choosing Between Sections 3 and 4 of the *Human Rights Act 1998*: Judicial Reasoning after *Ghaidan v Mendoza*' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning Under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2007) 114, 142, fn 131.

33 Ibid. See further, Debeljak, 'Submission to the National Consultation', above n 28, 51-57.

34 The "narrowness" of *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30 ('*Wilkinson*') is disputed by Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press, 2009) 94-95 ("*Constitutional Review*"):

> Lord Hoffman's articulation of a narrower and more text-bound rationale for disposing of *Ghaidan* does not necessarily entail that he endorses "a rather less bold conception of the role of s 3(1))" as a general matter. The most important premise in *Ghaidan* which led the majority to the "inescapable" conclusion that the language of the statute was not, in itself, determinative of the interpretative obligation under s 3(1), was that it allowed the court to depart from unambiguous statutory meaning. This premise is shared by Lord Hoffman in *Wilkinson*. As Lord Nicholls pointed out in *Ghaidan*, once this foundational point is accepted, it follows that some departure from, and modification of, statutory terms must be possible under s 3(1). Moreover, Lord Hoffman acknowledged that a s 3(1) interpretation can legitimately depart from the legislative purpose behind the statutory provision under scrutiny...
>
> So it is far from clear that *Wilkinson* adopts a weaker or narrower conception of s 3(1) as a general matter.

35 *Wilkinson* [2005] UKHL 30.

36 Ibid [17].

37 Ibid [2005] UKHL 30 [17] (emphasis added).

> reasoning of Lord Hoffman was accepted by the other Law Lords in that case,[38] *Wilkinson* has failed to materialise as the leading case on s 3(1); rather, *Ghaidan* remains the case relied upon.[39]

In my opinion, s 32(1) of the Victorian *Charter* was an attempt to codify the principles in *Ghaidan*. This is based on report of the Victorian Human Rights Consultation Committee.[40] The Victorian Committee recommended the insertion of "consistently with their purpose" to the UK *Human Rights Act* s 3(1) formula,[41] explaining that the additional words would provide the courts:

> with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question. This is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured. In the United Kingdom House of Lords decision in *Ghaidan v Godin-Mendoza*, Lord Nicholls of Birkenhead said: 'the meaning imported by application of s 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must ... "go with the grain of the legislation."'
>
> Or as Lord Rodger of Earlsferry stated: 'It does not allow the Courts to change the substance of the provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen.'[42]

If Queensland is considering adopting a model similar to Victoria, the United Kingdom and New Zealand, serious consideration must be given to the desired 'strength' of remedial rights interpretation. In my opinion, the *Ghaidan* approach is preferred for the following reasons.

Given that judges are not empowered to invalidate laws that unreasonably and/or unjustifiably limit the protected rights, rights-interpretation must provide a remedy.

One must also consider the obligations to be placed on public authorities, which I discuss more fully below. The concept of rights-compatibility is usually also used in the context of the obligations to be placed on public authorities – for example, under s 38(1) 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.' Section 38(2) then

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38 Ibid [2005] UKHL 30 [1] (Lord Nicholls); [32] (Lord Hope); [34] (Lord Scott); [43] (Lord Brown).

39 See, for example, Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh, and Stephanie Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 208) [5-64] – [5-127]; Kavanagh, *Constitutional Review*, above n 34, 28: 'In what is now the leading case on s 3(1), *Ghaidan*, ...'

40 Human Rights Consultation Committee ("Victorian Committee"), Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005 ("*Victorian Report*").

41 Note, slightly different language is used to express this concept in the body of the report and the draft Charter attached to the report (Ibid 82) and the Draft Charter of Human Rights and Responsibilities, s 32 (Ibid, appendix, 191). These differences in language are of no consequence to this analysis, being grammatical changes due to the way in which the applicable law was described; that is, the phrase "all statutory provisions" was ultimately enacted rather than the suggested "Victorian law".

42 Ibid 82-83.

outlines an exception to this obligation: 'Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.' The note to s 38(2) gives an example: 'Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.' The strength of remedial rights interpretation is relevant here, as I mentioned in the Four-Year Review of the *Charter*:

> If a law comes within s 38(2), the interpretation provision in s 32(1) of the *Charter* becomes relevant. If a law is rights-incompatible, s 38(2) allows a public authority to rely on the incompatible law to justify a decision or a process that is incompatible with human rights. However, an individual in this situation is not necessarily without redress because he or she may have a counter-argument to s 38(2); that is, an individual may be able to seek a rights-compatible interpretation of the provision under s 32(1) which alters the statutory obligation. If the law providing the s 38(2) exception/defence can be given a rights-compatible interpretation under s 32(1), the potential violation of human rights will be avoided. The rights-compatible interpretation, in effect, becomes your remedy. The law is given a s 32(1) rights-compatible interpretation, the public authority then has obligations under s 38(1), and the s 38(2) exception/defence to unlawfulness no longer applies.[43]

Thus, in the context of the rights obligations of public authorities, a strong remedial reach for rights-compatible interpretation provides stronger protection for individuals against acts of unlawfulness of public authorities.

Moreover, strong remedial rights-compatible interpretation is part of the 'dialogue' scheme underlying the statutory human rights instruments, and does not undermine parliamentary sovereignty – parliament can respond to unwanted or undesirable rights-*compatible* judicial interpretations by statutory provisions that clearly and explicitly adopt rights-*incompatible* provisions.[44]

Were Queensland to adopt a similar model to Victoria, I recommend that any equivalent provision providing for rights-compatible interpretation must:

- **Be drafted to clearly establish that the rights-compatible interpretation provision must be given a strong remedial reach similar to *Ghaidan* in order to properly protect and promote rights in Queensland;**
- **This strong remedial approach should be evidenced by explicit statutory language in the human rights instrument itself, and bolstered by explicit language in the parliamentary extrinsic materials, including the Explanatory Memorandum and Second Reading Speech.**

Please note that specific amendments to the wording of the Victorian *Charter* to accommodate these concerns have been suggested in Julie Debeljak 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, pp 16-18. **The legislative drafters in**

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[43] Julie Debeljak, 'Inquiry into the *Charter of Human Rights and Responsibilities*', submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, p 22.

[44] Julie Debeljak, 'Inquiry into the *Charter of Human Rights and Responsibilities*', submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, pp 11-17.

Queensland should take note of these suggested amendments if they are modelling an instrument on the Victorian *Charter*.

The Override

Many human rights instruments contain an override provision. Of note, the Canadian *Charter* contains s 33, which allows the parliament to override the operation of the constitutional rights for renewable five-year periods. Under the Canadian *Charter*, which is a constitutional instrument that allows judges to invalidate laws that unreasonably and/or unjustifiably limit rights, an override is needed where the executive and parliament want to re-assert their will with respect to legislation – that is, it allows the executive and parliament to react to judicial invalidation by re-enacting the law subject to the override. The override can also be used pre-emptively. The override is necessary in constitutional instruments to ensure the judiciary does not have the final word (i.e. preserves parliamentary sovereignty), and to encourage an inter-institutional dialogue about rights between the arms of government.

Statutory instruments operate differently. Judges cannot invalidate legislation. The judges are only empowered to provide a rights-compatible interpretation where it is possible to do so and consistent with the purpose of the statute being interpreted. Where rights-compatible interpretation along these lines is not available, judges can only issue an unenforceable declaration of incompatibility. The law stands, and is applied to the case at hand and all future cases.

The limited judicial powers ensures that the judiciary does not have the final word (i.e. preserves parliamentary sovereignty), and encourages the dialogue between the arms of government. The override provision is *not* needed to preserve parliamentary sovereignty or create a dialogue. The executive and parliament have a suite of other responses to rights-incompatible interpretations and declarations of incompatibility. For example, the executive and parliament may neutralise an unwanted rights-*compatible* interpretation by legislatively reinstating a rights-*incompatible* provision. Explicit rights-*incompatible* language will prevent the judiciary using interpretative methods to sanction rights-compatible interpretations; and this can be coupled with clear parliamentary intention to legislate in a rights-*incompatible* manner. Moreover, the executive and parliament may amend a law to make it rights-*compatible* in response to a judicial declaration of incompatibility; equally, they may not be persuaded and maintain the rights-*incompatible* law.

Were Queensland to adopt a statutory human rights instrument based on the dialogue model, I recommend that it does *not* include an override provision.

However, were Queensland minded to adopt an override provision, I recommend that it:

- **not be modelled on s 31 of the Victorian *Charter*; and**
- **rather, be modelled on a derogation provision, such as art 4 of the *ICCPR*.**

The override contained in s 31 of the Victorian *Charter* is inadequate in terms of recognising non-derogable rights, and in terms of conditioning the use of the override power, especially in relation to the circumstances justifying an override and regulating the effects of override. Any override is better off being modelled on a derogation provision, such as art 4 of the ICCPR. See further:

- Julie Debeljak, 'Inquiry into the *Charter of Human Rights and Responsibilities*', submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, pp 26-29.
- Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422-469.

Pre-Legislative Rights-Scrutiny

Statements of Incompatibility – the Executive

The obligation on the relevant Minister to present a statement of compatibility for all new legislation proposed to parliament is a vital obligation. It serves numerous purposes. It aids in the transparency of and accountability for the rights implications of proposed legislation. It is also a vital step in creating a dialogue about rights between the executive, parliament and the judiciary.

Section 28 of the Victorian *Charter* is the most recent iteration of the obligation to issues statements of compatibility with all Bills amidst the comparative statutory rights instruments. In addition to imposing the obligations to state whether the Bill is compatible or incompatible with the protected rights, it also requires the relevant Minister to state 'how it is compatible' and explain 'nature and extent of [any] incompatibility'.

This is an important reform over previous versions of the obligation, with the requirement to reveal the reasoning behind any assessment of compatibility or incompatibility being key to the efficacy of such statements. This reveals the range of rights considered by the executive, the executive's view of the scope of the rights and whether the proposed legislation violates those rights, and the executive's view of the reasonableness and justifiability of the legislative objectives and legislative means that limit the rights. This facilitates and reinforces the transparency, accountability and dialogue purposes behind such statements.

In practice, however, a consistent gap in statements of compatibility that have been presented in Victoria is a failure to explain '*how*' the Bill was compatible or incompatible. The Scrutiny of Acts and Regulations Committee have, time and again, commented on this problem.[45] Moreover, Parliamentarians have often lamented that limited evidence is provided for the legislative programs presented, particularly when legislation violates rights.[46] For a recent review of statements of compatibility, see Julie Debeljak, 'Human Rights Dialogue under the Victorian *Charter*: The Potential and the Pitfalls' (Presented at the *National Law Reform Conference*, Australian National University, 14-15 April 2016).

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[45] See e.g., SARC, *Alert Digest*, No 2 of 2009, 10-11.

[46] See e.g., Victoria, *Parliamentary Debates*, Legislative Council, 19 August 2014, 2513 (Ms Pennicuik); Victoria, *Parliamentary Debates*, Legislative Council, 4 December 2008, 5492 (Mr Barber); Victoria, *Parliamentary Debate*, Legislative Council, 29 July 2010, 3413 and 3427 (Ms Pennicuik).

Section 28 of the Victorian *Charter* would be strengthened by requiring the explanations of 'how' a Bill is compatible or incompatible be drafted by reference to s 7(2) and provide evidence for the assessments.

Were Queensland to adopt a dialogue model of rights instrument, I recommend that:

- **The wording of s 28 of the Victorian *Charter* be adopted;**
- **Subject to amending the wording of s 28(3) as follows (the words in italic indicating the words to be inserted into the existing s 28(3)):**

> **'A statement of compatibility must state— (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible *by reference to s 7(2) providing evidence for the assessment*; and (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility *by reference to s 7(2) providing evidence for the assessment.'***

Parliamentary Rights-Scrutiny

Under dialogue models of rights protection, specialised or general parliamentary scrutiny committees are given a rights remit. An example of this is s 30 of the Victorian *Charter*, which states: 'The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.'

Similar to the obligations of scrutiny committees in other comparative jurisdiction, the Scrutiny of Acts and Regulations Committee ('SARC') must scrutinise all Bills and accompanying statements of compatibility against the Victorian *Charter*. SARC reports to parliament, and parliament then debates the legislation and decides whether to enact the law, given the rights considerations. Again, this pre-legislative rights-scrutiny obligation makes rights-compatibility an explicit consideration in policy-making and law-making, and creates greater transparency around and accountability for government decisions that impact on rights. It also contributes to the dialogue between the three arms of government. The SARC reports, parliamentary debates, and the enacted legislation indicate parliament's understanding of the rights, whether the legislation limits those rights, and whether the limits are justified under s 7(2) to the executive and the judiciary.

For an initial assessment of the work of SARC, and its contribution to the inter-institutional dialogue under the Victorian *Charter*, see Julie Debeljak, 'Human Rights Dialogue under the Victorian *Charter*: The Potential and the Pitfalls' (Presented at the *National Law Reform Conference*, Australian National University, 14-15 April 2016).

From this initial assessment, there are a number of ways that the obligations cast on SARC and the processes followed by SARC could be strengthened. These should influence the operation of any parliamentary committee established in Queensland.

First, the timing of SARC's contribution could begin earlier. The reasons for this relate to how policy and legislation is developed, so this recommendation is relevant to other jurisdictions, including Queensland. Before proposed legislation is tabled in parliament, it is in the sole domain of the executive. Before it is tabled, the executive develops the policy priorities and legislative design in private. Although rights considerations are now accounted for during this phase, particularly because a statement of compatibility is eventually required,

this is all done in secret and there is no guarantee of outside influence. This is problematic because once Cabinet has given 'in-principle' agreement to the policy outcomes and the legislative design, it is very difficult to secure amendments. This difficulty factor increases further once the draft legislation, explanatory memorandum and statement of compatibility are released, and even further once presented to SARC and the Parliament.

If the window for real rights-influence ends at Cabinet, dialogue is nothing more than an executive monologue. To avoid this, there needs to be an expansion of voices influencing the pre-Cabinet phase of policy and legislative development. One solution would be to, in confidence, consult SARC and relevant human rights Commission on draft policy and legislative proposals pre-Cabinet approval.

This becomes even more important in a unicameral parliament. My recent research shows that the lower house of parliament has had very little influence on rights outcomes, particularly with legislation that unreasonably and/or unjustifiably limits rights. Such legislation may create some debate and some acknowledgement of the violation of rights, but there has been no genuine push to ameliorate the rights-incompatibility in the lower house and no successful rights-friendly amendments on the floor of the House. Real debate and real efforts to ameliorate the rights-incompatibility have occurred only in the upper house, and have only led by the Greens, not the major parties. This is in part explained by the executive dominance of the lower house; and in part explained by the major parties having no incentive to enact laws that are rights-compatible, nor to properly justify limitations to rights that are unreasonable or unjustified – particularly where the minority, the vulnerable or the unpopular are concerned. See further Julie Debeljak, 'Human Rights Dialogue under the Victorian *Charter*: The Potential and the Pitfalls' (Presented at the *National Law Reform Conference*, Australian National University, 14-15 April 2016).

Secondly, the timing of SARC's public report needs to be considered. Again, most committees operate under similar time constraints, such that this recommendation is relevant to other jurisdictions, including Queensland. SARC has two-weeks to report on *all* bills introduced. SARC reports are often not available *before* Bills pass either the lower or both houses. This mutes SARC's contribution to the dialogue. In relation to urgent bills, Parliamentarians have suggested that SARC be convened *ad hoc* whenever 'urgent bills' are presented to Parliament.[47] A broader solution than this is needed, however. In addition to changes around urgent bills, rights instruments should be amended so that no Bill can become a valid Act until SARC/the parliamentary committee has reported on it to Parliament, and Parliament has 'properly considered' the report.

Thirdly, scrutiny committees in general tend to focus on technical drafting issues, and avoid analysis of policy pursuits and outcomes. This has impacted on SARC's reports, and is likely to impact on the reports of any rights committee introduced into Queensland. Although the tenor of SARC's opinion can be gleaned from its analysis and whether it has sought clarification from the responsible Minister, SARC's recommendations are mild – usually simply 'referring questions to Parliament' rather than reporting that a bill *is* or *may be*

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[47] Victoria, *Parliamentary Debates*, Legislative Council, 16 August 2012, 3535 (Mr Pakula) and 3541 (Ms Pennicuik). The 8-year *Charter* review also raised the issue of SARC need 'sufficient time to scrutinise Bills that raise significant human rights issues': see Recommendation 37(a): Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Melbourne, 2015) 185

incompatible. This may be consistent with the practise of scrutiny committees, but SARC's current practice 'has had little influence over the content of legislation once the bill has been presented to Parliament.'[48] Were SARC consulted on draft legislation pre-Cabinet approval and in private, SARC could be more frank in its public rights assessment, allowing for and justifying public reports to Parliament with (stronger) conclusions.

Were Queensland to adopt a dialogue model of rights protection, I recommend that:

- **It establishes a Parliamentary Rights Committee whose task it is to assess the rights-compatibility of proposed legislation. Ideally this is a free-standing committee.**
- **The legislative provision creating and empowering the Parliamentary Rights Committee be based on s 30 of the Victorian *Charter* and amended as follows:**
  - **Section 30 should become s 30(1): 'The Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.'**
  - **Section 30(2) should provide that no Bill can become a valid Act until the Committee has reported on it to Parliament;**
  - **Section 30(3) should provide that no Bill can become a valid Act until the Parliament has 'properly considered' the Committee's report; and**
  - **Section 30(4) stating that 'a failure to comply with sub-sections 30(1), (2) and (3) in relation to any Bill that becomes an Act is not a valid Act, has no operation and cannot be enforced.'**
- **That a practice be established that during the legislative development phase, the relevant department, in confidence, consult the Parliamentary Rights Committee on draft policy and legislative proposals pre-Cabinet approval.**

<u>Dialogue Model</u>

As the above discussion indicates, the dialogue model in relation to legislation is preferred.

I have written extensively on the dialogue model, and the following items particularly hone in on the institutional design, operation and benefits of dialogue:

- Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340-388
- Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Human Rights Issues in Australia* (Thomson Reuters, 2013) 37-70
- Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.
- Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial

[48] Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Melbourne, 2015) 177, citing the Chair of SARC, Carlo Carli MP.

Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9-71.

- Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights', (2002) 26 *Melbourne University Law Review* 285-324.
- Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.)**,** *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) 135-57
- Julie Debeljak, 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, pp 1- 49.
- Julie Debeljak, 'Inquiry into the *Charter of Human Rights and Responsibilities*', submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, pp 1-30.
- Julie Debeljak, 'How Best to Protect and Promote Human Rights in Victoria', submitted to the *Human Rights Consultative Committee of the Victorian Government*, August 2005, pp 1-27.

To round out the discussion, I will briefly outline the way in which dialogue about legislation is created under statutory human rights instruments, such as the UK *Human Rights Act*, the ACT *Human Rights Act*, and the New Zealand *Bill of Rights Act*. My discussion will refer to the provisions under the Victorian *Charter*, but the comparative instruments contain equivalents.

As already mentioned, the pre-legislative rights-scrutiny roles of the executive and the parliament generate dialogue. The executive must take rights into consideration in policy formulation and legislative drafting, and this is formally recognised by the s 28 obligation to issue a statement of compatibility for all proposed legislation (as discussed above). Parliament also has enhanced rights-obligations in its constitutional roles of legislative scrutineer and law-maker. SARC has a rights-scrutiny role under s 30 (as discussed above), and parliament must then consider SARC's report, debate the proposed legislation, and decide whether to enact the law, given the rights considerations.

Through s 28 statements, SARC reports, parliamentary debates, and enacted legislation, the executive and parliament educate each other and the judiciary about each arm of government's understanding of the rights, whether legislation limits those rights, and whether limits are justified under s 7(2) – in other words, they engage in an educative dialogue based on each arm's unique perspective and underlying motivations. This educative exchange is designed to improve rights outcomes.

The judiciary becomes involved when interpreting legislation. Section 32(1) of the *Charter* requires all statutory provisions to be interpreted in a way that is compatible with rights, so far as it is possible to do so, consistently with statutory purpose. Where legislation cannot be interpreted rights-compatibly, the judiciary is *not* empowered to invalidate the law; rather, the Supreme Court or Court of Appeal may issue an *unenforceable* 'declaration of inconsistent

interpretation' under s 36(2).[49] Section 36(2) declarations are a caution to the executive and parliament that legislation is inconsistent with the judiciary's understanding of rights. Under s 37, the responsible Minister has six-months to prepare a written response to a s 36(2) declaration and table it in parliament.

The judicial opinion continues the dialogue loop, with the executive and parliament having a range of responses to the judicial opinion. If the judiciary has given an otherwise rights-*incompatible* legislative provision a rights-*compatible* interpretation under s 32(1), the representative arms may neutralise this by legislatively reinstating a rights-*incompatible* provision.[50] Where the judiciary has issued a s 36(2) declaration, the representative arms have two options: the executive and parliament may be persuaded by the judicial reasoning underlying the declaration and amend the law to make it rights-*compatible*; equally, the executive and the parliament may not be persuaded and maintain the rights-*incompatible* law. The dialogue process continues, with executive and parliamentary responses being open to further challenge before the judiciary.

Public Authorities

As noted above, statutory human rights instruments tend to impose obligations on public authorities. Under the Victorian *Charter*, s 38(1) states that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.' Section 38(2) then outlines an exception to this obligation: 'Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.'

Although the *Charter* does make it unlawful for public authorities to act incompatibly with human rights and to fail to give proper consideration to human rights when acting under s 38(1), it does *not* create a freestanding cause of action or provide a freestanding remedy for individuals when public authorities act unlawfully (s 39(1) and (2)); *nor* does it entitle any person to an award of damages because of a breach of the *Charter* (s 39(3) and (4)). In other words, a victim of an act of unlawfulness committed by a public authority is not able to independently and solely claim for a breach of statutory duty, with the statute being the *Charter*. Rather, s 39 requires a victim to "piggy-back" *Charter*-unlawfulness onto a pre-existing claim to relief or remedy, including any pre-existing claim to damages.

To highlight the complexity of the remedial provisions where a public authority fails to act lawfully, I reproduce s 39:

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[49] Section 36(2) declarations do not affect the validity, operation or enforcement of the legislation, or create in any person any legal right or give rise to any civil cause of action (s 36(5)). A declaration will not affect the outcome of the case in which it is issued, with the judge compelled to apply the rights-*in*compatible law; nor will a declaration impact on any future applications of the rights-*in*compatible law because it remains in force and is applied to all future cases.

[50] See *RJE v Secretary to the Department of Justice, AG, and VHREOC* [2008] VSCA 265 and the legislative response thereto: *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic).

(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

(2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right—

(a) to seek judicial review under the *Administrative Law Act 1978* or under Order 56 of Chapter I of the Rules of the Supreme Court; and

(b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

(3) A person is not entitled to be awarded any damages because of a breach of this Charter.

(4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

Were Queensland considering imposing rights obligations on public authorities, I would *not* recommend those obligations be modelled on s 39 of the Victorian *Charter*.

This is because: first, the s 39 provision is unduly complex, technical and convoluted; secondly, it's meaning and scope is yet to clarified by the courts, so the extent of the obligations and the precise nature and extent of the available remedies is not known; thirdly, the combination of the complexity and failure of the courts to clarify s 39, and the fact that by definition a litigant has another cause of action to pursue, has had a chilling effect on litigation under s 39; and fourthly, a free-standing remedy is an appropriate and effective remedy when a public authority fails to meet its obligations under s 38. See further Julie Debeljak, 'Inquiry into the *Charter of Human Rights and Responsibilities*', submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, 7-9.

Were Queensland considering imposing rights obligations on public authorities, I would recommend modelling these obligations on the UK *Human Rights Act* or the ACT *Human Rights Act*.

I have described the operation of the UK and ACT provisions elsewhere:

> The British and, more recently, the ACT models offer a much better solution to remedies than s 39 of the *Charter*.[51] In Britain, ss 6 to 9 of the *UK HRA* make it unlawful for a public authority to exercise its powers under compatible legislation in a manner that is incompatible with rights. The definition of "public authority" includes a court or tribunal. Such unlawful action gives rise to three means of redress: (a) a new freestanding cause for breach of statutory duty, with the *UK HRA* itself being the

[51] Section 24 of the *Canadian Charter* empowers the courts to provide just and appropriate remedies for violations of rights, and to exclude evidence obtained in violation of rights if to admit it would bring the administration of justice into disrepute.

statute breached; (b) a new ground of illegality under administrative law;[52] and (c) the unlawful act can be relied upon in any legal proceeding.

Most importantly, under s 8 of the *UK HRA*, where a public authority acts unlawfully, a court may grant such relief or remedy, or make such order, within its power as it considers just and appropriate, which includes an award of damages in certain circumstances if the court is satisfied that the award is necessary to afford just satisfaction.[53] The British experience of damages awards for human rights breaches is influenced by the *ECHR*. Under the *ECHR*, a victim of a violation of a human right is entitled to an effective remedy, which may include compensation. Compensation payments made by the European Court of Human Rights under the *ECHR* have always been modest,[54] and this has filtered down to compensation payments in the United Kingdom. Given that international and comparative jurisprudence inform any interpretation of the *Charter* under s 32(2), one could expect the Victorian judiciary to take the lead from the European Court and the United Kingdom jurisprudence and avoid unduly high compensation payments, were a power to award compensation included in the *Charter*. This could be made clear by the Victorian Parliament by using the *ECHR* wording of "just satisfaction: or by capping damages awards.

The *ACT HRA* has recently been amended to extend its application to impose human rights obligations on public authorities and adopted a freestanding cause of action, mimicking the *UK HRA* provisions rather than s 39 of the *Charter*.[55]

In conclusion, I recommend that:

- **rights obligations are imposed on public authorities;**
- **that remedies for not meeting those obligations be conferred on victims, including a free-standing cause of action for breach of a statutory duty; and**
- **that the provisions be modelled on the UK *Human Rights Act* and the ACT *Human Rights Act* (not the Victorian *Charter*).**

QUESTION 1(C): THE COSTS AND BENEFITS OF ADOPTING A HR ACT (INCLUDING FINANCIAL, LEGAL, SOCIAL AND OTHERWISE)

There are better placed people to comment on this question. My only comment is that the converse ought to be considered: that is, 'what is the cost of *not* adopting a Human Rights Act?'

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52 Indeed, in the UK, a free-standing ground of review based on proportionality is now recognised. See *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622, and *Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11.

53 The Consultative Committee recommended adopting the UK model in this regard, but the recommendation was not adopted: see ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [4.53] – [4.78].

54 It would be rare for a victim of a human rights violation to be awarded an amount in excess of GBP 20,000.

55 Julie Debeljak, 'Inquiry into the *Charter of Human Rights and Responsibilities*', submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, pp 8-9.

QUESTION 1(D): PREVIOUS AND CURRENT REVIEWS AND INQUIRIES (IN AUSTRALIA AND INTERNATIONALLY) ON THE ISSUE OF HUMAN RIGHTS LEGISLATION

My answer to question 1(B) canvasses this question. Please refer to that answer.

QUESTION 2(B) AND (C): HOW THE LEGISLATION WOULD APPLY TO: THE MAKING OF LAWS, COURTS AND TRIBUNALS, PUBLIC AUTHORITIES AND OTHER ENTITIES; AND THE IMPLICATIONS OF LAWS AND DECISIONS NOT BEING CONSISTENT WITH THE LEGISLATION?

Much of my discussion under Question 1 answers this question. To put it beyond doubt, I will summarise my view of how a human rights instrument should apply, and what the implications should be where laws and decisions are not consistent with human rights.

The model

I have written extensively on statutory human rights instruments. The main considerations when contemplating the precise model come down to identifying the underlying principles to be protected and promoted, the rights to be protected, and the mechanisms for 'enforcing' the rights.

Underlying principles

The current trend is to enact statutory human rights instruments, and the terms of reference of the Human Rights Inquiry limit consideration to models other than constitutional models.

The two underlying purposes of statutory human rights instruments are to preserve parliamentary sovereignty, and to establish and promote an inter-institutional dialogue about human rights across the arms of government. The two are linked when it comes to limiting the powers of the judiciary to rights-compatible interpretation and unenforceable declarations of incompatibility; whilst various additional obligations on the executive and parliament, such as statements of compatibility, parliamentary rights-scrutiny committees, and the requirement for ministers to respond to judicial declarations, round out the dialogue cycle.

I recommend that Queensland adopt a statutory human rights instrument, which preserves parliamentary sovereignty and establishes a rights dialogue amongst the arms of government. The Queensland model should take account of improvements on and suggested amendments to the Victorian *Charter* that I have canvassed in my answers to Question 1.

The Rights

As discussed above, ideally economic, social and cultural rights are protected in addition to civil and political rights. These rights, however, should not be absolute, and in the main they should be subject to reasonable limitations that are demonstrably justified in a free and democratic society.

I recommend that:

- **Civil, political, economic, social and cultural rights be protected; and**
- **That a general limitations clause based on s 7(2) of the Victorian *Charter* be enacted, subject to the recommendations contained in my answer to Question 1(B) above.**

Rights 'Enforcement' Mechanisms

Most statutory rights instruments utilise two mechanisms to uphold and enforce the guaranteed rights. The first mechanism relates to legislation. The second mechanism is the obligation placed on "public authorities" to act in a way that is compatible with human rights, and to give proper consideration to human rights when making decisions. Both of these mechanisms have been discussed in Question 1 above, mainly in the context of the Victorian *Charter*.

I recommend that the Queensland human rights instrument adopt the same mechanisms adopted in the UK *Human Rights Act,* the ACT *Human Rights Act* and the Victorian *Charter* – in relation to both the creation and interpretation of legislation, and in relation to the obligations placed on public authorities. Were the Queensland legislation to be modelled on the Victorian *Charter,* I recommend that the improvements to and amendments of various *Charter* provisions suggested in Question 1 be adopted in the Queensland instrument.

Education and Culture change

The first step in improving the protection and promotion of rights is the enactment of a human rights instrument. The second step is to embed a human rights culture throughout the arms of government and society more generally. A major element of human rights culture change involves human rights education.

My recent research unveiled a need for better human rights education and cultural change in the Parliament, and in the judiciary and legal profession on the other.

Parliament

My recent research has been considering the rights dialogue in practice under the Victorian Charter. The only currently publicly available work is Julie Debeljak, 'Human Rights Dialogue under the Victorian *Charter*: The Potential and the Pitfalls' (Presented at the *National Law Reform Conference*, Australian National University, 14-15 April 2016).

This research has uncovered a real and serious lack of engagement with *Charter* rights. This must be addressed through developing and nurturing a rights-culture in parliament, ensuring there is a political cost for *not* protecting rights and *not* convincingly justifying limitations on rights. Non-legal methods of cultural change include influence by parliamentary 'rights-leaders', better rights education of parliamentarians, and pressure from constituents. Legal methods for inducing cultural change have been outlined in my answer to Question 1, and include imposing an obligation on Parliament to 'give proper consideration' to statements of compatibility and SARC reports, with a failure to give proper consideration precluding a Bill becoming an Act.

The Judiciary and the Legal Profession

I have recently written an article about the Victorian *Charter* jurisprudence relating to prisoner's rights – in particular, it concentrated on the conditions of detention of prisoners, and the treatment of prisoners.[56] The article considered cases concerning the: (a) s 47(1) rights under the *Corrections Act 1986* (Vic); (b) the place of detention of certain classes of prisoner; and (c) conditions of detention and the impact on sentencing. See further Julie Debeljak, 'The Rights of Prisoners under the Victorian *Charter*: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38 *University of New South Wales Law Journal* 1332-85.

One of the main conclusions of this article is the lack of understanding of the rights arguments, the limitation arguments, and arguments surrounding the *Charter* enforcement mechanisms by both judges and legal professionals. There is also a distinct lack of utilisation of comparative jurisprudence.

It highlights the need for better human rights education and training for the judiciary and legal profession, and the need to create and embed a rights culture.

I recommend that alongside implementing a human rights instrument in Queensland, a program to embed a rights-culture and provide human rights education and training be developed for the executive, the parliament, the judiciary and the legal profession.

In relation to cultural change, I recommend the Committee read the cultural change research done by Anita Mackay, and published in Section V of Bronwyn Naylor, Julie Debeljak, and Anita Mackey, 'A Strategic Framework for Implementing Human Rights in Closed Environments: A Human Rights Regulatory Framework and its Implementation', (2015) 41 *Monash University Law Review* 218, 260-68.

QUESTION 2(A) AND (D):

I have no expert commentary to make in relation to questions 2(a) and (d).

I thank the Committee for the opportunity to make this submission the Human Rights Inquiry.

Dr Julie Debeljak
Associate Professor, Faculty of Law
Deputy Director, Castan Centre for Human Rights Law
Monash University

April 2016

[56] It did not question the legitimacy of the detention (i.e. the right to liberty); rather, the question is the rights-compatibility of the conditions of detention and the treatment of detainees whose detention is assumed to be lawful.

Dr Julie Debeljak
Qld Human Rights Inquiry

APPENDIX

The following articles and book chapters are relevant to the current Human Rights Inquiry. Except for the starred (*) book chapter, the full-text of all of the articles can be found at: http://ssrn.com/author=865908. I will attach the starred book chapter to my submission.

- Julie Debeljak, 'The Rights of Prisoners under the Victorian *Charter*: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38 *University of New South Wales Law Journal* 1332-85.
- Julie Debeljak, 'A Strategic Framework for Implementing Human Rights in Closed Environments: A Human Rights Regulatory Framework and its Implementation', (2015) 41 *Monash University Law Review* 218-70 (with Bronwyn Naylor and Anita Mackay).
- Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340-388
- * Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Human Rights Issues in Australia* (Thomson Reuters, 2013) 37-70
- Julie Debeljak, 'Indigenous Peoples' Human Rights and the Victorian C*harter*: a Framework for Reorienting Recordkeeping and Archival Practice' (2012) 12 *Archival Science* 213-234, with Melissa Castan (Published online, December 2011, DOI 10.1007/s10502-011-9164-z))
- Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.
- Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422-469.
- Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9-71.
- Julie Debeljak, 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection', (2003) 9 *Australian Journal for Human Rights* 183-235.
- Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights', (2002) 26 *Melbourne University Law Review* 285-324.
- Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.)**,** *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) 135-57

The following submissions pertaining to the *Victorian Charter* are relevant to the current Human Rights Inquiry. These submissions may not be readily publicly available, so I will attach these to my submission.

- Julie Debeljak, 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, pp 1- 49.
- Julie Debeljak, 'Inquiry into the *Charter of Human Rights and Responsibilities*', submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, pp 1-30.
- Julie Debeljak, 'How Best to Protect and Promote Human Rights in Victoria', submitted to the *Human Rights Consultative Committee of the Victorian Government*, August 2005, pp 1-27.

The following conference paper, which will soon be published, is also relevant to the Human Rights Inquiry. This is not publicly available, so I will attach it to my submission.

- Julie Debeljak, 'Human Rights Dialogue under the Victorian *Charter*: The Potential and the Pitfalls' (Presented at the *National Law Reform Conference*, Australian National University, 14-15 April 2016).

3 Does Australia Need a Bill of Rights?

Julie Debeljak[1]

INTRODUCTION

[3.10] Australia does not have a comprehensive system of human rights protection. Upon federation in 1901, a formal instrument protecting human rights was considered unnecessary, and attempts to introduce such an instrument across the ensuing century have been unsuccessful. The most recent attempt to investigate the formalisation of human rights protection – the 2008-09 National Human Rights Consultation – evoked a community response overwhelmingly in favour of a human rights instrument,[2] with the Human Rights Consultation Committee ("Consultation Committee") recommending, amongst other things, the adoption of a statutory human rights instrument based on a "dialogue model".[3] Despite this, the Rudd Government refused to enact a formal human rights instrument, in favour of adopting of a National Human Rights Framework (explored in Chapter 2 of this book).[4]

The absence of a formal federal human rights instrument does not mean that human rights have no legal protection in Australia. The various chapters in this book outline the piecemeal protection of individual and collective rights, and their areas of strength and weakness. The Consultation Committee was critical of this "patchwork" approach to human rights:

1 Julie would like to thank Melissa Castan for her guidance and support in bringing this chapter to fruition, and Adam Fletcher for his research assistance.

2 The Human Rights Consultation Committee received 35,014 written submissions, which is "by far the largest response to a national consultation in Australia": *National Human Rights Consultation Report* (September 2009) 5 ("*National Consultation Report*"). Of those that expressed a view about whether Australia needs a "Human Rights Act", 87 per cent were in favour: at 6.

3 Human Rights Consultation Committee, *National Consultation Report* (September 2009) Recommendations 17 to 31, especially 18 and 19.

4 The Commonwealth Attorney-General's Department outlines the framework at http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx.

"[t]he patchwork is fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable."[5]

This chapter will, first, review the current "patchwork" of human rights protections in Australia, highlighting the weaknesses that exist. Secondly, the chapter will explore comparative models of comprehensive human rights protection. Discussion will focus on those arms of government who have influence under each model, and address the concern to preserve parliamentary sovereignty. Thirdly, the chapter will briefly review the legislative model adopted in Victoria (which is similar to the Australian Capital Territory model).

This chapter adopts the position that the representative arms of government – the executive and parliament – currently have a monopoly on deciding the breadth of our human rights protections in Australia. One critical question is whether this monopoly should be expanded to include the views of others, particularly the judiciary. This chapter suggests that a greater role for the judiciary would counterbalance majoritarian-driven decision-making, placing greater focus on the rights and dignity of the individual.

CURRENT PROTECTION OF HUMAN RIGHTS IN THE FEDERAL SYSTEM

[3.20] Currently in Australia, the executive and parliament have a monopoly on deciding the breadth of our human rights protections. This is due to the paucity of constitutionally guaranteed human rights, the partial and fragile nature of statutory human rights protection, the limited capacity of the judiciary to base decisions on human rights principles, the failure of conventional doctrines to protect human rights, the inadequacy of recent pre-legislative human rights scrutiny obligations, and the limited domestic impact of our international human rights obligations. Consequently, the executive and parliament are subject to very few human rights constraints when enacting and executing laws and implementing policy. Moreover, the current system fails to comprehensively protect human rights.

This section will briefly consider the domestic and international human rights protections that we currently enjoy. The remaining chapters in this book provide detail on some specific areas or topics of human rights.

Protection of rights in the Constitution

Express constitutional rights

[3.30] The Constitution[6] contains a handful of expressly guaranteed rights and freedoms. We have the right to just terms if the Commonwealth

5 Human Rights Consultation Committee, *National Consultation Report*, 127.

6 *Commonwealth of Australia Constitution Act 1900* (IMP) 63&64 Vict, c 12, s 9 ("Constitution").

compulsorily acquires property (s 51(xxxi)); the right to trial by jury on indictment (s 80); freedom of trade, commerce, and intercourse amongst the States (s 92); freedom of religion (s 116); and the right to be free from discrimination on the basis of interstate residence (s 117). Only ss 80, 116 and 117 can be categorised as human rights proper. These rights have most often been interpreted narrowly by the courts,[7] giving greater freedom to the representative arms of government in their creation and enforcement of Commonwealth law, without any strong rights-based constraints.[8]

Implied constitutional rights

[3.40] The Constitution has also been interpreted to contain implied freedoms and limits restricting the powers of the parliament and executive. These have been reviewed in more detail in Chapter 4, but must be referred to briefly here.

The separation of judicial power from executive and legislative power is implied from the structure of the Constitution.[9] The separation of judicial power has two limbs. First, it dictates that judicial power can only be exercised by courts established under Ch III of the Constitution (that is, federal courts).[10] Secondly, it dictates that non-judicial power cannot be conferred on a judge of a ConstitutionCh III court, unless such power is conferred on the judge as a persona designate, subject to incompatibility principles.[11] The rationale for the strict separation of judicial power is that the judiciary is a bulwark against the legislature and the executive, and that the independence of the judiciary from the political arms of government is

7 See Leslie Zines, *The High Court and the Constitution* (5th ed, Federation Press, Sydney, 2008) 567-95; Nick O'Neill and Robin Handley, *Retreat from Injustice: Human Rights in Australian Law* (2nd ed, Federation Press, Sydney, 2004) 93-4; Wendy Lacey, "Restoring the Rule of Law through a National Bill of Rights", *Precedent* 84 (January / February 2008) 28-31; James Allan, "Implied Rights and Federalism: Inventing Intentions While Ignoring Them", (2009) 34 *University of Western Australia Law Review* 228-37.

8 Not surprisingly, the two economic rights in the Constitution, ss 51(xxxi) and 92, have been interpreted more expansively than the human rights: see, for example, Leslie Zines, *The High Court and the Constitution* (5th ed, Federation Press, Sydney, 2008) 569-70; Hilary Charlesworth, "The Australian Reluctance about Rights", in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, Canberra, 1994) 21, 24 (The Australian Reluctance about Rights).

9 That is, the separate establishment of the parliament under Ch I, the executive under Ch II, and the judiciary under Ch III, was the basis for implying a complete separation of the judicial power – as conferred under Ch III to the judiciary – from the other powers.

10 *New South Wales v Commonwealth* (1915) 20 CLR 54 (*Wheat Case*); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

11 See, for example, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (High Court of Australia (the High Court)) (*Boilermakers' Case*); *A-G (Cth) v R; Ex parte Australian Boilermakers' Society* (1957) AC 288 (Privy Council); *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal Affairs* (1996) 189 CLR; *South Australia v Totani* (2010) 242 CLR 1 and *Wainohu v NSW* (2011) 243 CLR 181. See

a guarantee of liberty and serves to buttress public confidence in the administration of justice by the courts.[12]

The Constitution has also been found to contain an implied freedom of political communication,[13] and possibly the concomitant implied freedom of political movement.[14] The implied freedom of political communication is founded on the notions of representative and responsible government, based in the text and structure of the Constitution – particularly ss 7, 24, 64, 128.[15] The freedom allows communication about governmental and political matters relating to all levels of the Australian polity and relevant overseas polities.[16] The freedom is not absolute, being limited to communication that is necessary for the effective operation of *the* system of representative and responsible government that underpins the Constitution. Accordingly, limits can be imposed on the freedom.[17] Similarly, protection of the right to vote has emerged in recent years.[18]

There is some debate over the role of the High Court of Australia in interpreting the express rights and the practice of implying rights into the Constitution.[19] Whether one favours the judicial expansion or reduction of

generally Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (3rd ed, Lawbook Co, 2010) 189-219; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (5th ed, Abridged, The Federation Press, 2010) chs 13, 14 and 15.

12 See *Boilermakers' Case* (1956) 94 CLR 254 and *Grollo v Palmer* (1995) 184 CLR 348, respectively. On human rights outcomes from separation of judicial powers, see George Winterton, "The Separation of Judicial Power as an Implied Bill of Rights", in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines*, (Federation Press, Sydney, 1994) 185, 190, citing *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501. On attempted ouster of judicial review, see *Plaintiff M61/2010E v Cth; Plaintiff M69 of 2010 v Cth* (2010) 243 CLR 319.

13 The development of the implied freedom of political communication culminated in the unanimous decision of the High Court in *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520. See Adrienne Stone, "Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication" (2001) 25 *Melbourne University Law Review* 374; Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (3rd ed, Lawbook Co, 2010) 434-67.

14 *Kruger v Commonwealth* (1997) 190 CLR 1.

15 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

16 See McHugh J in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 232; *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 527-31.

17 See *Coleman v Power* (2004) 220 CLR 1, and *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

18 See *Roach v Australian Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* [2010] HCA 46.

19 See Leslie Zines, *The High Court and the Constitution* (5th ed, Federation Press, Sydney, 2008) 582-88; Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (University of New South Wales Press, Sydney, 2002) 40; Jeff Goldsworthy, "Australia: Devotion to Legalism", in Jeffrey Goldsworthy (ed), *Interpreting Constitutions, A Comparative Study* (Oxford University Press, 2006) 106-60; Patrick Emerton, "Political

the express and implied rights in the Constitution, the fact remains that the Constitution does *not* provide comprehensive protection of human rights.[20] Given that the Constitution is the main and enduring safeguard against unfettered executive and parliamentary power, this means that the executive and parliament are free to grant or constrain our human rights. This reinforces the monopoly that parliament and the executive have over the protection of human rights in Australia.

The system of statutory protection

[3.50] The Commonwealth, States and Territories provide some statutory protection of human rights. The human rights statutory regimes, in part, implement the international human rights obligations successive Australian governments have voluntarily entered into.

As discussed in later chapters, Australia has ratified seven of the nine major international human rights treaties:

- *International Covenant on Civil and Political Rights* (1966) ("ICCPR");
- *International Covenant on Economic, Social and Cultural Rights* (1966) ("ICESCR");
- *International Convention on the Elimination of All Forms of Racial Discrimination* (1966) ("CERD");
- *Convention on the Elimination of all Forms of Discrimination Against Women* (1979) ("CEDAW");
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* ("CAT");
- *Convention on the Rights of the Child 1989* ("CRC"); and
- *Convention on the Rights of Persons with Disabilities 2006* ("CRPD").[21]

Freedoms and Entitlements in the *Australian Constitution* – an Example of the Referential Intentions Yielding Unintended Legal Consequences" (2010) 38 *Federal Law Review* 169; Jeffrey Goldsworthy, "Constitutional Implications Revisited" (2011) 30 *University of Queensland Law Journal* 9.

20 George Williams, *A Bill of Rights for Australia* (University of New South Wales Press, Sydney, 2007) 8-17; Human Rights Consultation Committee, *National Consultation Report*, ch 5.

21 The *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) (ICESCR); the *International Convention on the Elimination of All Forms of Racial Discrimination*, open for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) (CERD); the *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (CEDAW); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT); the *Convention*

The domestic legislation enacted by the Commonwealth, which partially implements international conventions or is protective of human rights therein, includes:

- *Racial Discrimination Act 1975* (Cth) ("RDA");
- *Sex Discrimination Act 1984* (Cth) ("SDA");
- *Disability Discrimination Act 1992* (Cth) ("DDA");
- *Human Rights and Equal Opportunity Commission Act 1986* (Cth);[22]
- *Privacy Act 1988* (Cth);
- *Age Discrimination Act 2004* (Cth);
- part of the *Migration Act 1958* (Cth) (for example, non-refoulement protections);
- part of the *Criminal Code 1995* (Cth) (for example, the prohibition on torture prohibition);
- *Fair Work Act 2009* (Cth) (for example, implementation of economic and social rights, such as labour rights); and
- *Paid Parental Leave Act 2010* (Cth).

Although the suite of rights protected under statute is broader than the constitutional protections, the statutory regimes are inadequate (as many chapters in this book outline).[23] First, there are limits on substance and process under the statutory regimes, which minimises and/or limits human rights protection. For example, the scope of the rights currently protected by statute is much narrower than that protected by international human rights law (many of which are outlined in other chapters).[24] The Commonwealth has not introduced domestic legislation implementing in full each of the international human rights treaties it has ratified. Moreover, there are exemptions from the statutory regimes, allowing exempted

on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC) and the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD).

22 Under the *Disability Discrimination and other Human Rights Legislation Amendment Act 2009* (Cth), the "Human Rights and Equal Opportunity Commission" was renamed the "Australian Human Rights Commission" and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) became the "*Australian Human Rights Commission Act*".

23 See for example, Hilary Charlesworth and Sara Charlesworth, "The Sex Discrimination Act and International Law" (2004) 47 *University of New South Wales Law Journal* 21, 21-2.

24 For example, the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth) "fall short of providing for equality and protection from discrimination on *any* ground as required by Art 26 of the [ICCPR]": Elizabeth Evatt, *National Implementation: The Cutting Edge of International Human Rights Law (Law and Policy Paper 12)* (Centre for International and Public Law, Australian National University, Canberra, 1999) 20-1. See also the ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act* (2003) [2.52] – [2.53] ("*ACT Consultation Report*"); Human Rights Consultation Committee, *National Consultation Report*, [5.10].

persons to act free from human rights obligations.[25] Further, the interpretation of human rights legislation by courts has generally been restrictive. According to Beth Gaze, "[s]ome judges take a very conservative approach to interpreting anti-discrimination law, [with cases being] decided on the basis of quite narrow distinctions".[26] Furthermore, with the Commonwealth and States having concurrent power over human rights, there is a lack of uniformity of standards and protections across the Australian jurisdictions.[27] Given that human rights are universal, this is problematic. Finally, the human rights commissions established under statute to promote human rights are only as effective as the executive and parliament allow them to be. Examples include: the indirect methods of enforcement given to commissions under human rights legislation;[28] the transfer of adjudicative functions to the federal courts;[29] budgetary

25 Exemptions include exemptions based on genuine occupational qualifications, admission criteria and the servicing of members of voluntary organisations, residential care of children, sporting activities and pursuits, unreasonable adjustments for disabled access, and exemptions with respect to the employment of staff in religious educational institutions. See Elizabeth Evatt, *National Implementation: The Cutting Edge of International Human Rights Law (Law and Policy Paper 12)* (Centre for International and Public Law, Australian National University, Canberra, 1999) 20; Hilary Charlesworth and Sara Charlesworth, "The Sex Discrimination Act and International Law" (2004) 47 *University of New South Wales Law Journal* 21, 23-4; Carolyn Evans and Leilani Ujvari, "Non-discrimination Laws and Religious Schools in Australia", 30 *Adelaide Law Review* 1 (2009) 31-56. For guidance on the granting of exemptions under the federal anti-discrimination laws see http://www.humanrights.gov.au/legal/exemptions/index.html.

26 Beth Gaze, "Context and Interpretation in Anti-Discrimination Law" [2002] 26 *Melbourne University Law Review* 325, 341.

27 Peter Bailey and Anne-Marie Devereux, "The Operation of Antidiscrimination Laws in Australia", in David Kinley (ed), *Human Rights in Australian Law* (Federation Press, Sydney, 1998) 292, 296-300. For a critique of State anti-discrimination laws, see Beth Gaze, "Context and Interpretation in Anti-Discrimination Law" [2002] 26 *Melbourne University Law Review* 325. The Commonwealth is currently considering the interaction of State and federal anti-discrimination laws as part of its project to consolidate the four federal Acts into one, at http://www.equalitylaw.org.au/elrp/submissions.

28 The "indirect methods" of enforcement include the investigation and conciliation of a complaint. At the Commonwealth level, the Australian Human Rights Commission ("AHRC") does not have the power to make final, binding decisions because of the separation of judicial power doctrine: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. This is not the case for the State commissions. See generally ACT Bill of Rights Consultative Committee, *ACT Consultation Report*, [2.35]. For criticisms of the conciliation process, see Peter Bailey and Anne-Marie Devereux, "The Operation of Antidiscrimination Laws in Australia", in David Kinley (ed), *Human Rights in Australian Law* (Federation Press, Sydney, 1998) 302-6.

29 See Beth Gaze, "Access to Justice for Discrimination Complainants: Courts and Legal Representation" (2009) 32(3) *University of New South Wales Law Journal* 699, 702-3.

reductions in resources and staffing to the Australian Human Rights Commission;[30] and the refusal to appoint commissioners based on independent advice.[31]

Secondly, these human rights protections are contained in ordinary statutes (rather than constitutions), which can be easily amended by later express legislation or implied repeal. This highlights the fragile nature of statutory human rights protections.

It remains to be seen whether the consolidation of the federal anti-discrimination laws under the National Human Rights Framework remedies some of these limitations in the federal sphere, and improves the interaction between federal and State anti-discrimination laws. The challenges ahead are highlighted in Chapter 2 by Phil Lynch and in Chapter 7 by Beth Gaze.

In short, the limitations of the statutory human rights regime, and its statutory basis, reflect the dominance of the executive and parliament in conferring human rights guarantees – the executive and parliament choose the scope and effectiveness of statutory human rights protections. This highlights the unconstrained nature of their power over human rights.

Parliamentary sovereignty and responsible government are ineffective

[3.60] Australia's constitutional and legal foundations are grounded in 19th century assumptions about the capacity of democratic processes to act as the bulwark against government interference with individual rights.[32] The constitutional drafters considered both the British and American methods of rights protection, and settled on the Westminster model with its reliance upon the rule of law, the Diceyan doctrine of parliamentary sovereignty, and responsible government.[33]

30 The AHRC is funded by the executive, but it is free to criticise the executive. The level of funding impacts on the quantity and quality of its work. For example, in 2008, then President Von Doussa reported that a withdrawal of ongoing funding for the Complaints Handling Section forced him to cut the funding of every Unit in the Commission by 14.5 per cent despite an increasing complaints workload: see HREOC Annual Report 2007-08, xii.

31 An example is the disagreement over the appointment of the Commissioner to the Victorian Equality Opportunity and Human Rights Commission between the Victorian Attorney-General and the Board of the Commission in 2012: see Farah Faruque, "Rights Group Board Resigns", *The Age* (27 June 2012) 1 and 7.

32 See Chapter 4 by Melissa Castan.

33 The British tradition of protecting human rights via parliamentary sovereignty and responsible government was preferred to the American tradition of judicially enforceable rights. There are three other relevant conventional wisdoms. The first was that the common law adequately protects rights: Nick O'Neill and Robin Handley, *Retreat from Injustice: Human Rights in Australian Law* (2nd ed, Federation Press, Sydney, 2004) 27. The second was that a bill of rights within the Constitution would not make a great deal of

From a rights perspective, there are major difficulties with the two conventional wisdoms of parliamentary sovereignty and responsible government that justified the *exclusion* of a comprehensive constitutional bill of rights. The first difficulty is whether parliamentary sovereignty and responsible government were ever able to function as safeguards for human rights; and the second is whether these notions operate today as the constitutional framers envisaged they would.

The notion of parliamentary sovereignty is one of two pillars of British constitutional law espoused by Dicey. It developed from the power struggle between the Parliament and the Monarchy in England in the 17th century. Parliamentary sovereignty was considered a necessary protection against the absolute and arbitrary power of the Monarchy,[34] and proposes that parliament is the supreme authority within government.[35] The capacity of parliamentary sovereignty to act as a bulwark for human rights, however, is less certain.

One rationale underlying parliamentary sovereignty is that parliament is representative of the people and will legislate in accordance with the wishes of the majority of the people. If the government were to propose any violation of human rights, so the argument goes, the parliament would vote against this in accordance with the wishes of the majority. This argument optimistically presumes that the people are not in favour of exercises of authority that detract from human rights. Although parliament *may* act as a brake on executive power in this manner, it is *not required* to. Parliamentary sovereignty allows populist majoritarian thinking to influence decisions, so that it is too easy to circumscribe the human rights of minority groups, the marginalised or the unpopular.[36] In short, the concept of parliamentary sovereignty is concerned about the *source* of the

sense because the relatively few powers given to the Commonwealth were unlikely to raise human rights concerns: Enid Campbell, "Civil Rights and the Australian Constitutional Tradition", in Carl Beck (ed), *Law and Justice: Essays in Honor of Robert S Rankin* (Duke University Press, Durham, NC, 1970) 295, 303-4. The third was that the reluctance about rights was partly motivated by a fear that laws designed to prevent immigration on grounds of race would be invalidated: Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (Butterworths, Australia, 2000) [11.5]. See also Haig Patapan, "Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia" (1997) 21 *Melbourne University Law Review* 497, 505-8. The structural arrangements for a supervisory, federalist, democratically-elected Senate adopted one aspect of the American system.

34 The power struggle culminated in the *Bill of Rights* (1 Will & Mar, sess 2, c 2 (1688)), in which the "divine right" of the Monarchy to rule as it wished succumbed to parliamentary sovereignty.

35 In a positive sense, this means that parliament can legally pass any law whatsoever; in a negative sense, this means that there is no person or body whose legislative power competes with parliament, or is superior to it.

36 Lord Bingham, "The Way We Live Now: Human Rights in the New Millennium", in Lord Bingham, *The Business of Judging* (Oxford University Press, Oxford, 2000) 155, 156. Indeed, parliamentary sovereignty would not prevent the parliament passing undemocratic laws, such as abolishing free, fair and periodic elections.

law (that being parliament) rather than the *quality* of the law (that being laws that respect human rights). Thus, in theory, the nexus between parliamentary sovereignty and human rights protection is tenuous.

In addition, modern political structures have substantially subordinated the concept of parliamentary sovereignty to the reality of executive sovereignty. The executive is formed from the political party with the most seats in the most populous house of parliament. With numbers on its side, the executive is usually able to secure parliamentary approval for its legislative programme. This is because of the expansion of political parties and the operation of strict party discipline, under which members of parliament almost never vote against party lines.[37] The executive now controls parliament (at least the lower house),[38] such that vast power has been transferred from parliament to the executive. In practice, we have returned to the days of executive dominance, despite the theoretical notion of parliamentary sovereignty. Consequently, any claim that parliamentary sovereignty can protect the human rights of the people can no longer be sustained.[39]

Responsible government as a safeguard of human rights is also problematic. Responsible government is the notion that collectively and individually, the executive government is responsible to parliament,[40] and parliament in

37 See Peter Hanks, "Moving Towards the Legalisation of Politics" (1988) 6 *Law in Context* 80, 88-9; Sir Gerard Brennan, "The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective", in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights* (Oxford University Press, Oxford, 1999), 454, 456.

38 At the Commonwealth level, the Senate, has the capacity to influence the actions of the government of the day because the proportional representation voting system means that the government rarely has a majority in the Senate. However, this does not undermine the representative monopoly argument because Senators are representatives of the people and thus motivated by majoritarian concerns (as opposed to the non-majoritarian judiciary). Nor does this undermine the executive dominance argument because the executive's initiatives are not routinely blocked by the Senate and, where points of difference arise between the Senate and the executive, compromise positions that allow the initiative to proceed are often brokered.

39 For further discussion about how parliamentary sovereignty in theory and practice does not protect human rights, see Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, Canberra, 1994). For British perspectives on these issues, see Francesca Klug, Keir Starmer and Stuart Weir, *The Three Pillars of Liberty: The Democratic Audit of the United Kingdom* (Routledge, London, 1996) 47; Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, Oxford, 1997) 24.

40 Collective responsibility is the principle that the executive arm must command the confidence of a majority in the most populous house of the legislature. If the executive fails to retain the confidence of the most populous house (whether it be through defections, by-elections or coalition breakdowns), collective responsibility requires the executive to resign. Individual responsibility refers to the individual minister's responsibility to parliament for the activities that occur within the department(s) of government under their charge. Historically, constitutional convention dictated that a minister may be required to resign over serious errors within their departments, or if the minister misled parliament over departmental activities.

turn is responsible to the people via representative government.[41] Given this chain of responsibility to the people, it was envisaged that any attempts by the executive or parliament to undermine human rights would be addressed at the ballot box. As Prime Minister Menzies stated:

> Should a Minister do something which is thought to violate fundamental human freedom he can be brought to account in Parliament. If his Government supports him, the Government may be attacked, and, if necessary, defeated. And if that … leads to a new General Election, the people will express their judgment at the polling booths.
>
> In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights.[42]

Responsible government, however, does not adequately protect human rights. In theory, responsible government has no greater commitment to human rights than parliamentary sovereignty does. Responsible government relies on the people bringing the executive and parliament to account through elections. However, there is no guarantee that the majority will act in the best interests of others, particularly minority groups, the marginalised or the unpopular. Human rights concerns are unlikely to be the motivating force behind electoral choices at the ballot box.

In any event, responsible government does not function in practice as envisaged. Collective responsibility, via a vote of no confidence in the government, is unlikely because of government control of the lower house and strict party discipline. Just as executive dominance in parliament undermines parliamentary sovereignty, so it undermines collective responsible government. Further, individual ministerial responsibility is weakened in modern Australia. Because the functions of the executive have become so wide and complex in the 20th century, individual ministers are no longer held accountable for mistakes occurring within their areas of responsibility. Thus, the traditional claim that responsible government adequately protects human rights cannot be sustained in either theory or practice.[43]

Accordingly, the two main rationales for *not* incorporating a comprehensive bill of rights into the Constitution are ineffective. Parliamentary sovereignty

41 This ensures parliamentary – and thus popular – supremacy over the executive government.

42 Hilary Charlesworth, "The Australian Reluctance about Rights", in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, Canberra, 1994) 23 (citation omitted). See also George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, Melbourne, 2002) 32.

43 For further discussion about how responsible government in theory and practice does not protect human rights, see Peter Hanks, "Moving Towards the Legalisation of Politics" (1988) 6 *Law in Context* 80, 88-9; Sir Gerard Brennan, "The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective", in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights* (Oxford University Press, Oxford, 1999), 457; A J Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judiciary" [1992] 21 *Federal Law Review* 48.

and responsible government do not adequately protect human rights today, and it is doubtful if they ever could. This effective executive dominance of parliament suggests that (more precisely) the executive monopolises human rights protection in Australia. Such concentration of power in the executive is an ongoing challenge to the functioning of representative democracy, and the more concentrated monopoly amplifies the threat to the effective protection of human rights.

The judicial influence over human rights

[3.80] The Australian judiciary, particularly the High Court of Australia, does have some influence over human rights protection. However, currently this form of judicial review is not an effective counter-balance to the executive and parliamentary monopoly. Although the judiciary has a number of tools to alleviate the executive and parliamentary dominance over human rights protections, its tools are limited, and any rights-friendly decisions made pursuant to these tools are subject to legislative amendment because of parliamentary sovereignty.

First, there are rules of statutory interpretation which give scope for judicial protection of rights. For instance, there is an interpretative presumption that governments intend to legislate consistently with their international obligations, unless expressly indicated otherwise.[44] There is also a presumption that legislation that affects rights will be construed strictly, which has been historically used to protect traditional common law rights.[45] In addition, use has been made of international human rights obligations when interpreting statutory discretions.[46] Further, where legislation is ambiguous, an interpretation consistent with international human rights obligations should be preferred to one that is inconsistent.[47]

Collectively, these rules of statutory interpretation are referred to as the principle of legality. The principle of legality has the capacity to support rights-based statutory interpretation, and is increasingly referred to by the judiciary and commentators. Indeed, the current Chief Justice of the High

44 See recent examples in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70, especially [121].

45 *Coco v The Queen* (1994) 179 CLR 427; *Commissioner of Taxation (Cth) v Citibank Ltd* (1989) 20 FCR 403. Examples of this include the presumption against retrospective law (*Maxwell v Murphy* (1957) 96 CLR 261) and the strict interpretation of penal sanctions so as to give the accused the benefit of any doubt (*R v Adams* (1935) 53 CLR 563; *Beckwith v R* (1976) 135 CLR 569).

46 *Walsh v Department of Social Security* (1996-97) SASR 143, especially Perry J.

47 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 282; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70, [156]; *Plaintiff S157/2002 v Commonwealth* (2003) 214 CLR 230.

Court, Robert French, has referred to this extra-curially.[48] In *R v Momcilovic*, the Victorian Court of Appeal held that the rights-compatible interpretative principle under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter) is a codification of the principle of legality,[49] a notion supported by French CJ when the case went on appeal.[50] Justice Kevin Bell has explored how the principle of legality can protect human rights in the context of the Victorian Charter.[51]

Ultimately, however, as a *principle* of statutory interpretation, the principle of legality is still subject to parliamentary sovereignty. This means that any express or implicit parliamentary indication circumscribing rights *prevents* judicial rights-based interpretation, thereby reinforcing the executive and parliamentary monopoly over human rights.

Secondly, international human rights law influences the common law. It can help identify rights in the common law and can assist in the development, change and renewal of the common law.[52] The decision of *Mabo v Queensland (No 2)* ("*Mabo*")[53] is the classic example of this:

> If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. … The expectations of the international community accord in this respect with the contemporary values of the Australian people. … The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[54]

48 Chief Justice French, *Protecting Human Rights without a Bill of Rights* (Speech, 26 January 2010, John Marshall Law School, Chicago) especially 29-34.

49 *R v Momcilovic* [2010] VSCA 50 [102]-[104].

50 *Momcilovic v The Queen* (2011) 280 ALR 221, 241-245, especially 244-5.

51 *PJB v Melbourne Health and State Trustees* [2010] VSC 327 at [270-271].

52 Kate Eastman and Chris Ronalds, "Using Human Rights Laws in Litigation: A Practitioner's Perspective", in David Kinley (ed), *Human Rights in Australian Law* (Federation Press, Sydney, 1998) 319, 328-9. See, for example, Brennan J's discussion of the racially discriminatory notion of "terra nullius", which meant that the indigenous inhabitants of Australia had no proprietary interest in the land, in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42.Whether customary international law automatically becomes part of the common law is uncertain: Eastman and Ronalds, 330-2. See generally, Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (University of New South Wales Press, Sydney, 2002) 58.

53 *Mabo v Queensland (No 2)* (1992) 175 CLR 1. See also *Dietrich v R* (1992) 177 CLR 292; *Rienzie Premalal v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 117.

54 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J). Compare this to the later case of *Nulyarimma v Thompson* (1999) 165 ALR 621, in which the Federal Court of Australia refused domestic recognition of the international customary international law norm of the prohibition of genocide: see Hilary Charlesworth, *Writing in Rights: Australia and the*

However, the ability of the common law to protect "human rights is sectional in nature, and addresses only certain rights, with varying degrees of completeness".[55] Rights-protective advances made by the common law are also vulnerable to legislative alteration.[56]

Thirdly, the judiciary has held that the executive cannot ignore the international obligations it freely enters into. In *Teoh*,[57] the High Court held that ratification of an international treaty (alone, without incorporation) gives rise to a legitimate expectation that an administrative decision-maker will act in accordance with the treaty, unless there is an executive or legislative indication to the contrary. This principle is relatively weak because a legitimate expectation gives rise to a procedural right only: if the decision-maker is going to decide contrary to the treaty, an applicant must be given the opportunity to argue against adopting such a course. It does not confer a substantive right to have the decision made in accordance with the treaty obligations.[58] Despite this weakness, the Australian government sought to neutralise this decision by an executive indication to the contrary,[59] and by legislation.[60] Obiter statements by four High Court

Protection of Human Rights (University of New South Wales Press, Sydney, 2002) 60-1. Genocide has since been incorporated into Australian law in the implementation of the Rome Statute of the International Criminal Court – see *Criminal Code Act 1995* (Cth), Sch 1, Div 268B.

55 Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (Butterworths, Australia, 2000) [14.34]. See also Nick O'Neill and Robin Handley, *Retreat from Injustice: Human Rights in Australian Law* (2nd ed, Federation Press, Sydney, 2004) 108.

56 Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (Butterworths, Australia, 2000) [14.4]. See also Nick O'Neill and Robin Handley, *Retreat from Injustice: Human Rights in Australian Law* (2nd ed, Federation Press, Sydney, 2004) 112.

57 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

58 See generally Margaret Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law" [1995] 17 *Sydney Law Review* 204. In the 2011 cases of *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, the High Court referred to human rights and refugee conventions which Australia has ratified in invalidating a declaration made by the Minister for Immigration and Citizenship. This was based on references to human rights in the declaration-making power itself, which is contained in the *Migration Act 1958* (Cth), rather than any expectation that the Executive would substantively comply with the relevant treaties simply because Australia had ratified them. The Government subsequently introduced a Bill in an attempt to remove the human rights restrictions on the removal power (*Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*). For an in-depth discussion of this see Chapter 14 by Tania Penovic "Boat People and the Body Politic".

59 See for example, Gareth Evans (Minister for Foreign Affairs) and Michael Lavarch (Attorney-General), *Joint Statement*, 10 May 1995; and Alexander Downer (Minister for Foreign Affairs) and Daryl Williams (Attorney-General), *Joint Statement*, 25 February 1997.

judges in the more recent case of *Lam* criticised the *Teoh* decision, signalling that it may not survive a direct challenge.[61]

Overall, although the judiciary has some capacity to ensure Australia's international human rights obligations are reflected in domestic law, it is very restricted. The limited judicial role in protecting human rights bolsters the monopoly over human rights that the representative arms of government enjoy.

Statements of compatibility and parliamentary committees

[3.90] One positive outcome from the National Consultation is the introduction of pre-legislative human rights scrutiny under the *Human Rights (Parliamentary Scrutiny Act) 2011* (Cth), as discussed in detail in Chapter 2. Under s 8, Members of Parliament (in most instances, the executive) have to attach a statement of rights-compatibility to all Bills presented to Parliament.[62] Under s 4, a new "Parliamentary Joint Committee on Human Rights" has been established, with a specific human rights scrutiny brief under s 7.[63]

It is too early to assess whether these mechanisms will generate genuine human rights scrutiny and result in more rights-protective laws. Although such heightened human rights scrutiny is welcomed, it does not alter the monopoly power the executive and parliament have over human rights protection. Pre-legislative scrutiny poses a procedural hurdle, not a substantive hurdle. That is, the executive and parliament are still able to enact laws that substantively restrict our rights; but when doing so, procedurally they have to identify and debate any rights that will be

60 See for example, the *Administrative Decisions (Effect of International Instruments) Bill 1996* (Cth), which was introduced and lapsed with the proroguing of Parliament for an election in 1996. To date, only South Australia has passed legislation overriding *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; see *Administrative Decisions (Effect of International Instruments) Act 1995* (SA).

61 *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1. In *Untan v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 69, the Full Federal Court confirmed that the doctrine of legitimate expectation is only of assistance where there has been a breach of procedural fairness – see Henry Burmester, *Teoh Revisited after Lam (2004/Jan) 40 AIAL Forum 33, 38-9*.

62 See Attorney-General's Office, *Human Rights check for New Laws* (Media Release, 4 January 2012),. Like equivalent provisions discussed below at n 123 and accompanying text, statements of compatibility are not binding on courts and tribunals, and a failure to comply with s 8 does not affect the validity, operation of enforcement of subsequent enacted law: *Human Rights (Parliamentary Scrutiny Act) 2011* (Cth) (the Scrutiny Act), s 8(4) and (5).

63 Its functions are outlined in s 7 of the Scrutiny Act. The definition of "human rights" for both the executive and parliamentary obligations is by reference to the seven international human rights treaties that Australia is a party to under s 3 of the Scrutiny Act: ICCPR, ICESCR, CERD, CEDAW, CAT, CRC, CRPD.

limited and the justification for the limitation. To be sure, this increases human rights transparency and accountability; but it does not constrain the executive and parliament in its substantive law making power – that is, it does not alter the monopoly.

Executive and parliamentary dominance over international human right obligations

[3.100] In addition to the domestic human rights regime, Australia has international legal obligations. As discussed above, Australia has voluntarily ratified seven of the nine major international human rights treaties and submitted to human rights compliance – oversight by the treaty-monitoring bodies established under these treaties.[64] However, the executive and parliament enjoy a monopoly over the choice of Australia's international human rights obligations and their implementation in the domestic legal regime. The attitude of the executive and parliament to the international treaty-monitoring bodies, and a selective engagement with the international human rights regimes, reinforces the monopoly.

International influence over domestic human rights laws

[3.110] The representative arms of government have a monopoly over what international human rights instruments Australia should adopt and their relevance within the domestic legal system.

In terms of adoption, the Constitution empowers the Commonwealth Executive to enter into treaties under s 61 of the Constitution.[65] The Commonwealth Executive is free to accept or decline internationally negotiated human rights laws.[66] In terms of domestic relevance, the ratification of an international human rights treaty by the executive gives rise to international obligations only. A treaty does *not* form part of the

64 See above n 20 and accompanying text.

65 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

66 There are two "restrictions" on this monopoly. First, the Federal Government has a commitment to consult with its State and Territory counterparts: see Senate Legal and Constitutional References Committee, Parliament of Australia, *Trick or Treat Report? Commonwealth Power to Make and Implement Treaties* (1995), especially Recommendation 7; Commonwealth Department of Foreign Affairs and Trade, *Australia and International Treaty Making: Information Kit*, July 2000, especially 67-82. Secondly, before ratification, treaties are tabled in Parliament with a National Interest Analysis explaining the impact on the national interest of the treaty. Treaties are tabled for between 15 and 20 parliamentary joint sitting days, depending on how routine, complex and controversial the treaty is, allowing parliamentary scrutiny: see further http://www.dfat.gov.au/treaties/making/tabling-of-treaty-actions-in-parliament.html. Both "restrictions" are based on convention only.

domestic law of Australia until it is incorporated into domestic law by the Commonwealth Parliament under s 51(xxix) of the Constitution.[67]

Thus, Australia's international human rights obligations, and their relevance within Australia, are monopolised by the executive and parliament. Although the judiciary has some capacity to introduce international human rights obligations into *its* decision-making process, thereby alleviating the dualist nature of the Australian legal system, that capacity is limited.[68]

Australia's accountability under international law

[3.120] Once Australia ratifies a human rights treaty, it has international legal obligations.[69] These are "enforced" by treaty-monitoring bodies. There are two main "enforcement" mechanisms under the treaty system – periodic state reporting and individual communications of human rights violations by alleged victims.[70] As Kate Eastman's chapter demonstrates, the international human rights treaty system does not adequately hold Australia to account. The Australian Government has a patchy history with the treaty monitoring bodies, at times interacting with them with disapproval and disdain, rather than constructively and cooperatively.

Australia's response to the periodic reporting mechanisms has been disappointing. Kate Eastman traverses numerous examples of this, with an urgent reporting request under CERD providing a classic example.[71] The Committee on the Elimination of Racial Discrimination criticised the Australian government for its proposed amendments to the functions of the Human Rights and Equal Opportunity Commission,[72] for its amendments to the *Native Title Act 1993* (Cth), and the consultation process

67 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Kioa v West* (1985) 159 CLR 550, 570; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-7. This reflects the notion that it is Parliament – not the executive – which is the primary law-maker.

68 See above, [3.80].

69 There are two aspects to the international human rights regime: the *United Nations Charter* based mechanisms and the treaty-based mechanisms. This chapter will focus mainly on the latter. The former are considered briefly here and more fully in Chapter 5 by Kate Eastman, "Australia's Engagement with the UN".

70 For example, under the ICCPR, Art 40 imposes a five-yearly periodic reporting requirement on States parties. The individual communications mechanism is established under the *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) (*First Optional Protocol*). Australia ratified the First Optional Protocol in September 1991, and it came into effect on 25 December 1991.

71 In addition to periodic reporting of States Parties, the Committee on the Elimination of Racial Discrimination ("the CERD Committee") can request urgent reports from a State party: CERD, open for signature 7 March 1966, 660 UNTS 195, Art 9 (entered into force 4 January 1969).

72 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 53rd sess, Supp No 18, [22], UN Doc A/53/18 (1998); CERD, *Additional Information Pursuant to*

preceding the amendments.[73] The Australian Government rejected the views of the treaty-monitoring body in no uncertain terms:

> [The CERD Committee] is not a court, and does not give binding decisions or judgments. It provides views and opinions, and it is up to countries to decide whether they agree with those views and how they will respond to them.[74]

Australia has historically displayed a similar attitude with respect to individual communications. Australia regularly rejects the "views on the merits" of treaty-monitoring bodies, despite the fact that the treaty-monitoring bodies consist of independent experts, that treaty-monitoring bodies are *the* authoritative voice on the application of the treaties, and that Australia voluntarily accepted the individual communication jurisdiction. The case of *A v Australia* is most telling. The mandatory detention of an asylum seeker, A, for four years was found to constitute arbitrary detention in violation of Art 9(1) of the ICCPR because of the length of detention.[75] Moreover, the provision of access to court proceedings to test the lawfulness of detention was found to be lacking in violation of Art 9(4).[76] The Australian Government's responded as follows:

> [A]fter giving serious and careful consideration to the … views of the Committee, the Government does not accept that the detention of Mr A was in contravention of the Covenant, nor that the provision for review of the lawfulness of that detention by Australian courts was inadequate. Consequently, the Government does not accept the view of the Committee that compensation should be paid to Mr A.
>
> The Committee is not a court, and does not render binding decisions or judgments. It provides views and opinions, and it is up to countries to decide whether they agree with those views and how they will respond to them.[77]

The Australian Government's attitude to the international human rights regime has improved under the Rudd and Gillard Governments. For

Committee Decision: Australia, UN Doc CERD/C/347 (1999); CERD, *Decision 2(54) on Australia: Concluding Observations/Comments*, [6]–[8], UN Doc CERD/C/54/Misc.40/Rev.2 (1999); *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 54th sess, Supp No 18, [23], UN Doc A/54/18 (1999); CERD, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, [11], UN Doc CERD/C/304/Add.101 (2000).

73 CERD, *Decision 2(54) on Australia: Concluding Observations/Comments*, [6]–[8], UN Doc CERD/C/54/Misc.40/Rev.2 (1999).

74 Daryl Williams (Attorney-General), *United Nations Committee Misunderstands and Misrepresents Australia* (Press Release, 19 March 1999).

75 Human Rights Committee, *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (1997) [9.2]-[9.4].

76 Human Rights Committee, *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (1997) [9.5]. As Kate Eastman notes in Chapter 5, there have since been a myriad of cases in the area of immigration, asylum seekers and mandatory detention, which have been dismissed by Australian governments of all political persuasions.

77 Daryl Williams (Attorney-General) and Philip Ruddock (Minister for Immigration), *Australian Government Responds to the United Nations Human Rights Committee* (Press Release, 17 December 1997).

example, the Rudd Government ratified the individual communications *Optional Protocol to CEDAW*,[78] and ratified the CRPD and its individual communication First Optional Protocol.[79] The Rudd Government also issued a Standing Invitation under the United Nations Charter mechanisms, opening the door to visits from human rights experts and Special Rapporteurs.[80] The previous Howard Government refused to do each of these. The Gillard Government accepted 137 of the 145 recommendations made under the Universal Periodic Review process within the United Nations Charter system.[81]

Despite these positive signs of constructive engagement, there is still resistance to increasing international monitoring of Australia's human rights performance, and resistance to altering domestic law and policy on human rights because of international human rights obligations freely entered into: the following two examples will illustrate. First, the Australian Government is yet to ratify the individual communication *Optional Protocols* to ICESCR and CRC.[82] Secondly, although the Australian Government has responded more consistently to the treaty-monitoring bodies' "views on the merits" of individual communications, none of the responses has ever accepted responsibility for breaches found.[83] And, although the language may have softened, the successive Labour

78 Australia ratified the *Optional Protocol to CEDAW*, UN Doc A/RES/54/4 (15 October 12999) on 4 December 2008.

79 Australia ratified the CRPD, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) on 17 July 2008 and the *Optional Protocol to the CRPD* on 21 August 2009.

80 There have been many visits to date: the High Commissioner for Human Rights in May 2011; the Special Rapporteur on Trafficking in Persons, Especially Women and Children (November 2011); the Special Rapporteur on the Rights of Indigenous Peoples (2009 and April 2011); the Independent Expert on the Effects of Foreign Debt (November 2011); and the Special Rapporteur on Violence Against Women (April 2012).

81 See the report on Australia (Human Rights Council, *Report of the Working Group on the UPR: Australia*, UN doc A/HRC/17/10 (24 March 2011)) and Australia's response to the report (Human Rights Council, *Report of the Working Group on the UPR: Australia*, UN doc A/HRC/17/10/Add.1-Australia (31 May 2011)). See Robert McClelland (Attorney-General), *Ministerial Statement: Universal Periodic Review*, Parliament House (Canberra, 2 March 2011).

82 *Optional Protocol to ICESCR*, UN Doc A/RES/63/117 (10 December 2008) (open for signature but not yet entered into force); *Optional Protocol to CRC on a Communications Procedure*, UN Doc A/RES/66/138 (open for signature 28 February 2012). The Australian Government has also refused to ratify the *Optional Protocol to CAT* (OPCAT), which allows a dual system of international and national monitoring of closed environments, until its national preventative mechanism (NPM) is in place. This is despite the fact that Art 24 of the OPCAT allows a State Party to postpone the implementation of the NPM for three years. See *Optional Protocol to the Convention against Torture*, open for signature 18 December 2002, UN Doc A/RES/57/199 (entered into force 22 June 2006). In February 2012, the National Interest Analysis on OPCAT was finally presented to Parliament.

83 It should be noted that some responses are silent on responsibility by, for example, focussing on factual matters (see for example, Australian Government Response in *Kwok v Australia*, HRC Communication 1442/2005). For recent Government responses, see

Governments have continued to reject treaty monitoring body views. For example, in *Nystrom*,[84] the Australian Government "respectfully disagreed" with the Human Rights Committee that it was in breach of Arts 12(4), 17, and 23(1) of the ICCPR, and consistently agreed with the individual (dissenting) opinions of committee members.[85] In its response to *Shams*,[86] the Labour Government essentially maintains the Howard Government's stance on arbitrary detention.[87]

With the views of the international community being at best influential, the representative arms of government retain their monopoly on human rights protection in Australia.

Conclusion

[3.130] This review of the domestic and international regimes illustrates deficiencies with human rights protection in Australia. Comprehensive human rights considerations are not *necessarily* part of the decision-matrix of the executive, legislature and the judiciary. That is *not* to say that human rights considerations are never accounted for; rather, that there is no mandatory or systematic requirement to account for them.[88] Aside from the few express and implied constitutional rights in the Constitution, the representative arms of government have a monopoly over human rights. This monopolistic power places rights-protective common law and statutory rules in a precarious position, and allows the international human rights regime to be manipulated as it suits political fortunes.

This causes concern on many levels. It illustrates an "under-enforcement"[89] of human rights, both internationally and domestically. Moreover, aggrieved

http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/default.aspx. The singular exception of the *Toonen case* (Human Rights Committee, *Communication No 488/1992: Australia 04/04/94* UN Doc CCPR/C/50/D/488/1992 (1994)) must be noted, where the Australian Government made partial concessions, and enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth), which led to the invalidation of the Tasmanian law criminalising consensual adult homosexual activity under s 109 of the Constitution.

84 *Nystrom et al v Australia* Communication No 1557/2007.

85 Commonwealth Attorney-General's Department, *Response of the Australian Government to the Views of the Committee in Communication No 1557/2007, Nystrom et al v Australia, [4], [8], [9], [12], [14]*. This could never be done in a domestic setting.

86 *Shams et al v Australia* Communication No 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004, 1288/2004.

87 Commonwealth Attorney-General's Department, *Response of the Australian Government to the views of the Committee in Communication No 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004, 1288/2004, Shams et al v Australia*.

88 See ACT Bill of Rights Consultative Committee, *ACT Consultation Report*, [2.77]; Human Rights Consultative Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) (*Victorian Consultation Report*) 5-6; Human Rights Consultation Committee, *National Consultation Report*, [12.2].

89 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001) 230.

persons and groups are denied an effective rights-focussed, non-majoritarian forum within which their human rights claims can be assessed. Further, the conventional safeguards against human rights abuses – parliamentary sovereignty and responsible government – are inadequate. With these problems in mind, we now consider the options for comprehensive protection of human rights.

OPTIONS FOR COMPREHENSIVE PROTECTION OF HUMAN RIGHTS

[3.140] To better protect human rights, Australia could comprehensively guarantee human rights in a domestic human rights instrument. Such an instrument must respect the separation of powers entrenched in the Constitution,[90] and politically it must preserve the sovereignty of parliament.[91] The issue that dominates debate about human rights instruments is whether formal human rights guarantees may be reconciled with democracy; in particular, whether judicial enforcement of human rights may produce anti-democratic tendencies. These issues will be explored as we consider the range of comparative models.

Monopoly/monologue models

[3.150] We begin this discussion with two models that locate power in one or other arm of government.

The first is the current Australian model, where the representative arms monopolise the protection of human rights. This executive and parliamentary monopoly over human rights is problematic. There is no systematic requirement for the executive and the parliament to assess their actions against human rights standards. Where the executive and parliament voluntarily make such an assessment, it proceeds from a certain viewpoint – that of the representative arms, whose role is to negotiate compromises between competing interests and values which promote the collective good, and who are mindful of majoritarian sentiment, and the political, media and electoral pressures of the day. There is no requirement on the executive and parliament to engage with institutionally diverse viewpoints, such as that of the differently placed and motivated judiciary. Actions and decisions need not be evaluated against matters of principle in addition to competing interests and values; against requirements of human rights, justice, and fairness in addition to the collective good; against unpopular or minority interests in addition to majoritarian sentiment.

90 Separation of powers was a major issue in the first test case of the Victorian Charter in the High Court of Australia: see *R v Momcilovic* [2010] VSCA 50.

91 Most of the recent suite of human rights consultations have proceeded on the basis that parliamentary sovereignty must be preserved, see for example: Victoria Government, *Statement of Intent* (May 2005) [8]; National Human Rights Consultation Secretariat (Attorney-General's Department), *National Human Rights Consultation Background Paper* (2009) 16.

In essence, there is no systematic, institutional check on the partiality of the executive and parliament; no broadening of their comprehension of the interests and issues affected by their actions through exposure to diverse standpoints; and no realisation of the limits of their knowledge and processes of decision-making.

One way to move beyond this is the adoption of a human rights instrument which requires governmental actions to be justified against human rights standards, and gives all arms of government – particularly the judiciary – a role in the implementation of the human rights. This is not, however, without controversy. We return to the debate about democracy.

The anti-democratic concerns relating to judicial enforcement of human rights are grounded in the United States' model. The United States adopted a constitutional model of human rights protection, which relies heavily on judicial review of legislative and executive actions against human rights standards. Under the *United States Constitution* ("US Constitution"),[92] the judiciary is empowered to invalidate legislative and executive actions that violate the rights contained therein.

If the legislature or executive disagree with judicial invalidation, their responses are limited. The legislature or executive could attempt to avoid the human rights issue by amending the US Constitution, an onerous task that requires a Congressional proposal for amendment which must be ratified by the legislatures of three-quarters of the States of the Federation.[93] Alternatively, they can attempt to control the judiciary (through court-stacking and/or court-bashing)[94] in a bid to secure more "rights-friendly" decisions, a problematic response particularly from a separation of powers perspective.

Thus, the US Constitution essentially gives judges the final word on human rights. Allowing the *unelected* judiciary to review and invalidate the decisions of the *elected* arms of government supposedly undermines democracy; and hence, the perception that human rights instruments: (a) replace the representative monopoly/monologue over human rights with a judicial monopoly/monologue; (b) transfer supremacy from parliament to the judiciary; (c) and result in illegitimate judicial sovereignty, rather than legitimate representative sovereignty.

92 *United States Constitution* (1787).

93 *United States Constitution* (1787), Art V. The Australian and Canadian Constitutions similarly employ restrictive legislative procedures for amendment: see respectively *Constitution 1900* (IMP) 63 & 64 Vict, c 12, s 128; *Constitution Act 1982*, being Sch B to the *Canada Act 1982* (UK) c 11, s 38.

94 Archibald Cox, "The Independence of the Judiciary: History and Purpose" [1996] 21 *University of Dayton Law Review* 566, 574.

Dialogue models

[3.160] The models discussed either support a representative monopoly (Australian) or a judicial monopoly (United States), both of which pose problems. Many modern human rights instruments instead establish an institutional dialogue between the three arms of government about the definition, scope and limits of human rights. Each arm of government has a legitimate and constructive role to play in interpreting and enforcing human rights. Neither the judiciary, nor the executive and parliament, have a monopoly over the rights project. The Canadian and British examples are the prominent dialogue models, and we also consider the New Zealand model.

The first example is *constitutional* protection based on a dialogue structure, as exemplified in the *Canadian Charter of Rights and Freedoms 1982* (CAN) ("Canadian Charter"), which is contained within the Canadian Constitution.[95] Section 1 of the Charter essentially guarantees civil and political rights.[96] However, limits may justifiably be imposed on the rights under s 1, which provides that rights may be subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In terms of enforcement, the judiciary is empowered to invalidate legislation that restricts a right and which cannot be justified under s 1.[97] In terms of parliamentary sovereignty, the Canadian Charter also contains an "override clause". Section 33(1) allows the parliament to enact legislation notwithstanding the provisions of the Canadian Charter.

Under this model, the judiciary does *not* have the final say over human rights protection. Both ss 1 and 33 operate to preserve and bolster parliamentary sovereignty. There is great scope for parliament to respond to a judicial decision invalidating legislation that unjustifiably limits rights under s 1, particularly through altering the legislative means by which rights are limited; and parliament can respond to judicial invalidation by re-enacting the law under the s 33 override provision.[98] Despite being a constitutional document, the Canadian Charter has mechanisms that protect the sovereignty of parliament.[99]

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95 Canadian Charter, Pt I of the *Constitution Act 1982*, being Sch B to the *Canada Act 1982* (UK) c 11.

96 Such as fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, official language rights, and minority language educational rights: see Canadian Charter, Pt I of the *Constitution Act 1982*, being Sch B to the *Canada Act 1982* (UK) c 11, ss 2 – 23.

97 *Constitution Act 1982*, being Sch B to the *Canada Act 1982* (UK) c 11, ss 51 – 52.

98 See Julie Debeljak, "Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making" (2007) 33 *Monash University Law Review* 9-71, especially 17-25 (Parliamentary Sovereignty and Dialogue).

99 If constitutional amendment is politically unviable in Australia, another option is to entrench human rights protection via a manner and form provision. Under this option, the

The second example is statutory protection, as exemplified by the *Human Rights Act 1998* (UK). The *Human Rights Act 1998* (UK) is an ordinary Act of Parliament. It incorporates the rights in the *European Convention on Human Rights* (1951) ("ECHR") into the domestic law of Britain.[100] The major enforcement mechanism is the interpretative obligation: the judiciary must interpret legislation, so far as it is possible to do so, in a way that is compatible with the rights under s 3.[101] However, the judiciary is *not* empowered to strike down legislation that cannot be read compatibly with rights. Rather, rights-*in*compatible legislation stands and must be enforced, with the judiciary limited to making an unenforceable declaration of rights-incompatibility under s 4.[102] A declaration is a warning bell to parliament and the executive that something is wrong with the law.

As with the Canadian Charter, the judiciary does *not* have the final say under the *Human Rights Act 1998* (UK). The representative arms of government have a number of options to s 3 rights-compatible interpretations and s 4 declarations. The parliament may pass legislation to alter an unwelcome rights-compatible interpretation made under s 3, ensuring a rights-incompatible interpretation of a law; it may ignore a s 4 declaration ensuring that rights-incompatible legislation stands; it may choose to repeal or amend rights-incompatible legislation by the ordinary legislative process; or it may choose to derogate from the rights obligations to ensure rights-incompatibly legislation remains.[103] The Victorian Charter and the *Human Rights Act 2004* (ACT) were both modelled on the UK Act. The Victorian Charter will be discussed below.

A third model is the New Zealand *Bill of Rights 1990* (NZ). The New Zealand *Bill of Rights* is an ordinary Act of Parliament. It protects essentially civil and political rights,[104] and allows for the justifiable

basics of the Canadian Charter would be adopted (that is, a guarantee of rights, the inclusion of a general limitation clause, and inclusion of an override clause) and the manner and form provision would be modelled on s 2 of the *Canadian Bill of Rights*, SC 1960, c 44.

100 See *Human Rights Act 1998* (UK) c 42, sch 1. In particular, the *Human Rights Act 1998* (UK) incorporates *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 222, Arts 2 – 12 and 14 (entered into force 3 September 1953); the (first) *Protocol to the ECHR*, opened for signature 20 March 1952, 213 UNTS 262, Arts 1 – 3 (entered into force 18 May 1954); *Protocol Number Six to the ECHR*, opened for signature 28 April 1983, ETS 114, Arts 1 and 2 (entered into force 1 March 1985).

101 *Human Rights Act 1998* (UK) c 42, s 3. See also United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [2.7].

102 *Human Rights Act 1998* (UK) c 42, s 6.

103 See Julie Debeljak, "Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making" (2007) 33 *Monash University Law Review* 9-71.

104 See Pt II of the *New Zealand Bill of Rights Act 1990* (NZ).

limitation of rights, like the Canadian Charter.[105] The major enforcement mechanism is an interpretation obligation, but this is much weaker than the *Human Rights Act 1998* (UK). Section 6 requires the courts where possible to interpret legislation to be consistent with the guaranteed rights and freedoms. If legislation cannot be interpreted consistently, the judiciary has no power to invalidate the legislation, impliedly repeal the legislation, or make a formal declaration of inconsistency.

Although this model preserves parliamentary sovereignty, it has a number of drawbacks. The absence of a formal feedback mechanism about the rights-compatibility of laws for the judiciary reinforces representative monologues on rights, and does not promote an institutional dialogue. Moreover, the s 5 interpretative provision is not that dissimilar to the current Australian common law position discussed above. This third model offers little more protection of human rights than the current common law in Australia.

Given the difficulty in achieving constitutional change in Australia, and the lead of Victoria and the Australian Capital Territory, it is much more likely that a statutory instrument loosely based around the British and/or New Zealand models will suit the Australian context. In order to explore how such models may operate in Australia, we now turn to consider the Victorian Charter.

A HUMAN RIGHTS INSTRUMENT IN ACTION: THE VICTORIAN CHARTER

Introduction

[3.170] The Victorian Charter was passed in 2006 with the aim of protecting and promoting human rights. There are two underlying objectives of the Victorian Charter: the preservation of the sovereignty of parliament, and the establishment of a dialogue about human rights between the executive, parliament and judiciary.[106]

105 *Bill of Rights 1990* (NZ) s 5 states that the protected rights are made subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

106 Julie Debeljak, "Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making" (2007) 33 *Monash University Law Review* 9, 9-10, 15-16. It must be noted that French CJ, in *Momcilovic* described the dialogue metaphor as "inapposite". In his Honour's opinion, "[a]t best, it distracts from recognition of the subsisting constitutional relationship between the three branches of government. At worst, it points misleadingly in the direction of invalidity": *Momcilovic v The Queen* (2011) 280 ALR 221, 259. Justice Gummow, with whom Hayne J concurred, also noted that "[r]eferences to 'dialogue', going beyond the interaction between the legislature and the courts described in *Zheng v Cai* … are apt to mislead": at 273 (citations omitted). In their joint judgment, Crennan and Kiefel JJ note that "'dialogue' is an inappropriate description of the relations between the Parliament and the courts and it is inaccurate to describe the

Parliamentary sovereignty is preserved under the Victorian Charter in two ways: it is an ordinary Act of Parliament rather than a constitutional document; and the powers of the judiciary are limited to rights-compatible interpretation and non-enforceable judicial declarations, rather than invalidation. An institutional dialogue is achieved by placing pre-legislative human rights scrutiny obligations on the government and the parliament,[107] and by limiting the powers of the judiciary to interpretation and declaration.

There are two main aspects of the Victorian Charter.[108] The first is the guarantee of minimum human rights standards, subject to the justifiable limitation of those rights. The second is the two Victorian Charter mechanisms which operate to protect and enforce the guaranteed rights. The first mechanism relates to legislation, and is the focus in this chapter. The second mechanism is the obligation placed on "public authorities" to act in a way that is compatible with human rights, and to give proper consideration to human rights when making decisions.[109] There is no scope to detail the impact on public authorities in this chapter, although it is well covered elsewhere.[110]

The rights and limits

[3.180] The protected rights are found in ss 8 to 27 of the Victorian Charter. A range of civil and political rights are protected, based primarily on the rights contained in the ICCPR. Only natural persons are beneficiaries

process suggested by s 36(2) as involving a dialogue": at 375. Their Honours then note that "[t]he reference to a dialogue does, however, serve to highlight the novel aspect of s 36(2)": at 375. Whether the dialogue metaphor survives the disparate judgments of the High Court in *Momcilovic* remains to be seen. The answer may be neither here nor there in any event, because the metaphor serves a political as well as legal purpose, and the fact remains that the Victorian Charter was enacted on the basis of creating an interaction between all the arms of government.

107 See Victorian Charter, ss 28 and 30.

108 Since amendments that flowed from its mandated review process, the *Human Rights Act 2004* (ACT) is very similar to the Victorian Charter in relation to the rights protected and justifiable limitations, and the first mechanism which relates to legislation. Originally, the *Human Rights Act 2004* (ACT) did not contain a "public authorities" mechanism. However, after its mandated review, such a mechanism was introduced, based on the *Human Rights Act 1998* (UK), such that it now has stronger remedial force than the Victorian Charter. There is no capacity to consider the *Human Rights Act 2004* (ACT) in this chapter, but the place to start with the *Human Rights Act 2004* (ACT) is the ACT Human Rights Act Portal at http://www.acthra.anu.edu.au.

109 See Victorian Charter, ss 4, 38 and 39.

110 Melissa Castan and Julie Debeljak, "Indigenous Peoples' Human Rights and the Victorian Charter: a Framework for Reorienting Recordkeeping and Archival Practice" (2012) 12 *Archival Science* 213-34, 227-30; Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) ch 2; Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Lawbook Co, 2008) [5030]-[5230].

of rights.[111] When considering the meaning and scope of the rights, guidance can be gleaned from international, regional and comparative human rights jurisprudence.[112]

Rights are not absolute; they must be balanced by other countervailing interests.[113] This is reflected in the general limitations provision in s 7(2) of the Victorian Charter,[114] which provides that human rights "may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom". Section 7(2) then provides the following inclusive list of relevant factors:[115]

a) the nature of the right;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the relationship between the limitation and its purpose; and

e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Section 7(2) essentially comes down to a balancing act, weighing the competing objectives of the rights-limiting legislation against the objectives of the right itself, and assessing whether the legislative means to achieve the rights-limiting legislative objective are appropriate. The British and Canadian jurisprudence indicates that the balancing usually comes down to the minimum impairment test (s 7(2)(e)), followed by rationality/proportionality (s 7(2)(d)).[116] This is most important for parliamentary sovereignty and dialogue. When focussing on minimum impairment and

111 Victorian Charter, s 6(1).

112 Victorian Charter, s 32(2).

113 See generally Julie Debeljak, "Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*" (2008) 32 *Melbourne University Law Review* 422, 427-33.

114 This provision reflects the limitations provisions of comparative jurisdictions and jurisprudence developed under them, namely the Canadian Charter (s 1), the *Bill of Rights 1990* (NZ) (s 5), and the *South African Bill of Rights 1996* (RSA) s 36, and most particularly the Canadian Supreme Court decision of *R v Oakes* [1986] 1 SCR 103.

115 For a discussion about the operation of the limitations provision, see Melissa Castan and Julie Debeljak, "Indigenous Peoples' Human Rights and the Victorian Charter: a Framework for Reorienting Recordkeeping and Archival Practice" (2012) 12 *Archival Science* 213-34, 223-4.

116 See Leon E Trakman, William Cole-Hamilton and Sean Gatien, "*R v Oakes* 1986 - 1997: Back to the Drawing Board" (1998) 36 *Osgoode Hall Law Journal* 83; Peter W Hogg and Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter* of Rights Isn't Such a Bad Thing after All)" (1997) 35 *Osgoode Hall Law Journal* 75; see Nicholas Blake, "Importing Proportionality: Clarification or Confusion" [2002] *European Human Rights Law Review* 19, 23. It is too early to tell if the Victorian jurisprudence will follow suit, especially in light of the *R v Momcilovic* and *Momcilovic v The Queen* decisions.

rationality, judges tend to not take issue with the legislative *objectives* being pursued by the government and parliament; rather, judges have a problem with the legislative *means* chosen to achieve this objective. Thus, the executive and parliament are able to pursue their legitimate legislative objectives, but need to tweak the legislative means used. Parliamentary sovereignty is preserved to the extent that parliament can still pursue its policy and legislative objectives; however, through the educative dialogue, parliament may decide to choose less rights-restrictive and/or rational means to achieve those objectives.

The impact on legislation

[3.190] The Victorian Charter imposes an obligation of statutory interpretation. Section 32 requires statutory provisions to be interpreted in a way that is compatible with protected rights, so far as it is possible to do so, consistently with the statutory purpose. This gives rise to a presumption in favour of rights-compatible interpretations of legislation. This presumption is rebutted only when parliament includes clear legislative words, or necessary intention, that the statutory provisions be interpreted to the contrary.

Where legislation cannot be read compatibly with human rights, the judiciary is *not* empowered to invalidate the law (thereby preserving parliamentary sovereignty). Instead, the Supreme Court or Court of Appeal of Victoria may issue an unenforceable "declaration of inconsistent application" under s 36. A declaration under s 36 does not affect the validity, operation or enforcement of the legislation, or create in any person any legal right or give rise to any civil cause of action (s 36(5)). A declaration will not affect the outcome of the case in which it is issued, with the judge compelled to apply the rights-*in*compatible law. Nor will a declaration impact on any future applications of the rights-*in*compatible law – the rights-incompatible law remains in force and is applied to all future cases. A s 36 declaration is simply a warning to the executive and parliament that legislation is inconsistent with the *judiciary's understanding* of the protected rights (s 36(6) and (7)). This then prompts the government and parliament to review their assessment of the rights-compatibility of the legislation – indeed, under s 37, the responsible Minister has six months to prepare a written response to a s 36 declaration and to table it in parliament.

As with the Canadian Charter and the *Human Rights Act 1998* (UK), the executive and parliament have a suite of responses to s 32 rights-compatible interpretations and s 36 declarations. The executive and parliament may neutralise an unwanted s 32 rights-compatible interpretation by legislatively reinstating a rights-incompatible provision.[117]

117 See *RJE v Secretary to the Department of Justice, AG, and VHREOC* [2008] VSCA 265, where a rights-compatible interpretation of "likely to commit a relevant offence" under the

In response to a s 36 declaration, the executive and parliament may be persuaded by the judicial viewpoint and amend the law to make it rights-compatible; equally, they may not be persuaded and maintain the rights-incompatible law. Where the rights-incompatible law is retained, the only solution to the apparent human rights violation is the democratic solution – allowing people to indicate their dissatisfaction with the government's human rights record at election time. Thus, the ultimate say on how to protect minority interests, the vulnerable and the unpopular, is through majoritarian (albeit democratic) politics. As noted earlier, ultimately leaving the protection of minority rights to the whims of the majority is a weak form of human rights protection.

In terms of the Victorian Charter providing remedies, s 32 is viewed as a "remedial" provision; that is, a rights-compatible interpretation of a law is a complete remedy for a person whose rights would have otherwise been violated had the law been interpreted rights-incompatibly. Section 36 does not provide a remedy for the case at hand, nor does it provide a remedy for future applications of the law. Remedies under Section 36 depend entirely on how the executive and parliament react to a declaration.

Given the central importance of s 32 as a remedy under the Victorian Charter, it was always going to be highly contested, particularly the ability of s 32 to provide a remedy by way of rights-compatible interpretation. Three Victorian judges in three separate cases followed the lead of the British jurisprudence in giving s 32 a strong remedial reach – that is, those judges would allow the courts to "re-interpret" legislation that was rights-incompatible, in order to "fix" any human rights problems in the legislation.[118]

However, three judges in the Court of Appeal in the later case of *R v Momcilovic* were not willing to go as far, giving Section 32 a weaker remedial reach.[119] Their Honours decided that s 32 could not be used to "re-interpret" laws that were rights-incompatible, and that the section's use was limited to the initial interpretation of the law before the rights and limitations were considered.[120] This decision was appealed to the High Court, which was split on the meaning of s 32 and its interaction with

Serious Sex Offenders Monitoring Act 2005 (Vic) was given by Maxwell P and Weinberg JA on the basis of the common law and by Nettle JA on the basis of s 32. Parliament was very quick to respond to this case. It enacted legislation within weeks essentially overturning the rights-compatible interpretation. The *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic) amends the definition of "likely to commit a relevant offence" from the *RJE* "more likely than not" meaning to "a lower threshold than a threshold of more likely than not". This law was enacted with a minimum of fuss in either House of Parliament.

118 See Nettle JA in *RJE v Secretary to the Department of Justice & Others* [2008] VSCA 265; Bell J in *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646; and Warren CJ in *re Application under the Major Crime (Investigate Powers) Act 2004* [2009] VSC 381.

119 *R v Momcilovic* [2010] VSCA 50.

120 *R v Momcilovic* [2010] VSCA 50 [35].

ss 7(2) and 36. Three Justices in essence supported a weaker remedial approach to s 32,[121] whilst three Justices supported a stronger remedial approach.[122] The implications from the High Court decision in *Momcilovic* are far from clear and settled. However, in the later case of *Slaveski v Smith*, the Court of Appeal held that the High Court did not overrule the earlier Court of Appeal decision in *Momcilovic*, and accordingly continues to follow the precedent set in the Court of Appeal decision in *Momcilovic*.[123]

With this in mind, we will now consider how the three arms of government interact under the Victorian Charter's (dialogue) structure. The executive and parliament have pre-legislative human rights scrutiny roles, which contribute to the dialogue cycle. The government makes the *first* contribution to dialogue through policy formulation and legislative drafting. This is formally recognised through s 28 of the Victorian Charter, which requires parliamentarians introducing legislation into Parliament to make a statement assessing its rights-compatibility. Section 28(3) dictates that a statement must either state that, in the member's opinion, the Bill is compatible with protected rights and how it is so, or that the Bill is not compatible and the nature and extent of the incompatibility. Section 28(4) provides that such statements do not bind the judiciary.[124] Through s 28 statements, the executive tells parliament and the judiciary what *its* understanding of the rights are, whether the legislation limits rights, and whether the limits are justified under s 7(2).

Parliament makes the *second* contribution to the dialogue through its constitutional roles of legislative scrutineer and law-maker. Under s 30, the Scrutiny of Acts and Regulations Committee (SARC) must scrutinise all proposed legislation and accompanying statements of compatibility against the Victorian Charter rights and any limitations thereto. SARC reports to the Victorian Parliament, and parliament then must debate the legislation and decide whether to enact the law. The SARC report, the parliamentary debate, and the final legislation similarly indicate to the executive and the judiciary what *parliament's* understanding of the rights are, whether the legislation limits rights, and whether the limits are justified under s 7(2).

If the rights-compatibility of the law is challenged, the judiciary makes the *third* contribution to the dialogue. According to the Court of Appeal in *Momcilovic*, the judiciary must "ascertain the meaning of the relevant provision by applying s 32(1) of the Victorian Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of*

121 *Momcilovic v The Queen* (2011) 280 ALR 221, 244-5 (French CJ); 384 (Crennan and Kiefel JJ)

122 *Momcilovic v The Queen* (2011) 280 ALR 221 273-5, 280 (Gummow J, with Hayne J concurring); [683], [684] (Bell J).

123 *Slaveski v Smith & Another* [2012] VSCA 25 [20]-[25], especially [23] and [24].

124 These provisions are modeled on the New Zealand and British models (*Bill of Rights 1990* (NZ), s 33, and *Human Rights Act 1998* (UK), c 42, s 19 respectively). Similar provisions have been enacted in Canada (*Department of Justice Act*, RSC 1985, c J-2, s 4; *Statutory Instruments Act*, RSC 1985m c S-22).

Legislation Act 1984"; it must then consider whether, so interpreted, "the relevant provision breaches a human right protected by the Victorian Charter; and if so, apply s 7(2) of the Victorian Charter to determine whether the limit imposed on the right is justified".[125] If the limitation is not justified, the judiciary must then decide whether to issue a s 36 declaration of inconsistent interpretation. The outcomes of judicial review feedback into the dialogue loop, with the executive and parliament then responding to the judicial conclusions, as discussed earlier.

The pre-legislative scrutiny obligations of the executive and parliament are intended to better protect and promote human rights by making them explicit considerations in the policy-making and law-making process. The obligations are also intended to create more transparent and accountable government. Human rights assessment within statements of compatibility, SARC reports, and in parliamentary debates require policy and law makers to be upfront about the impact their policies and laws have on human rights, which makes their reasoning more transparent and them more accountable to the electorate for human rights issues. None of this should be under-estimated. However, it is expected that such pre-legislative scrutiny, when coupled with judicial review (as under the Victorian model), will be much more effective than pre-legislative scrutiny alone (as under the Federal model)

The four-year review

[3.200] There was a statutorily mandated four-year review of the Victorian Charter in 2011.[126] The review uncovered the human rights protective work that the Victorian Charter has achieved in its early days. The submissions to the review contain a wealth of evidence and case studies about the positive impact the Victorian Charter is having on government practices and policies, on the parliamentary processes, on the development and renewal of the law, on the administration of public authorities, and on people's daily lives.[127]

The review process, however, was disappointing. Having expected the Labour Government (that enacted the Victorian Charter) to appoint an independent expert to undertake the review, the incoming Coalition

125 *R v Momcilovic* [2010] VSCA 50 [35]

126 Victorian Charter, s 44. There is also a statutorily mandated eight-year review: Victorian Charter, s 45.

127 The review received 329 submissions, which are available at http://www.parliament.vic.gov.au/sarc/article/1447. See especially: Submission 82 (PILCH Homeless Persons' Legal Clinic); Submission 95 (Victorian Bar Council); Submission 205 (Federation of Community Legal Services); Submission 247 (Law Institute of Victoria); Submission 257 (Public Interest Law Clearing House); Submission 262 (Victorian Council of Social Service); Submission 263 (Human Rights Law Centre); Submission 278 (Victorian Equal Opportunity and Human Rights Commission); and Submission 285 (Castan Centre for Human Rights Law, Monash University).

government instead asked SARC to review the Victorian Charter. The SARC report was divided on party political lines – unfortunately providing us with another example of how monopoly power drives human rights agendas, even though human rights are meant to protect minority interests, the vulnerable and the unpopular. The recommendations of the Coalition-dominated majority essentially sought to gut the Victorian Charter, whilst the recommendations of the minority sought to retain the Victorian Charter in a modified form.

In short, SARC recommended one of two options. The option preferred by the Coalition-dominated majority was to only retain the pre-legislative scrutiny roles under the legislation-related Victorian Charter mechanisms, and to repeal the s 32 interpretation and s 36 declaration provisions in relation to legislation, and to repeal the ss 38 and 39 obligations on public authorities.[128] Repeal of judicial oversight and the obligations on public authorities would essentially remove all enforcement mechanisms under the Victorian Charter. The option preferred by the minority was to retain both the legislation and public authority Victorian Charter mechanisms, with various modifications – being a mixture of strengthening and weakening human rights protection and enforcement.[129]

Ultimately, the Government Response to the review Victorian Charter was much more supportive, indicating that:

> [t]he Government is strongly committed to the principles of human rights and considers that legislative protection for those rights provides tangible benefit to the Victorian community. The Government considers that this review process provides an opportunity to improve protection for human rights and to make the operation of the Victorian Charter clearer, simpler and more accessible.[130]

In particular, the response states that "[t]he Government believes that there is an ongoing place for the courts in protecting rights in relation to the Victorian Charter".[131] The Government acknowledged the concerns of SARC regarding the particular operation of the interpretation provision and the obligations on public authorities, but "considered that these

128 See Recommendation 35 of the Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) (*SARC Review*).

129 *SARC Review*, Recommendation 35. Some of the modifications proposed include amending s 32 so that it equates to the common law rule of interpretation as codified in s 35(a) of the *Interpretation of Legislation Act 1984* (Vic), and to make the relief and remedies available against a public authority that fails to meet its human rights obligations clearer but much more limited: Ibid, Recommendations 24 and 25, and Recommendation 32 respectively.

130 *Victorian Government Response to the Parliament of Victoria Scrutiny of Acts and Regulations Committee "Review of the Charter of Human rights And Responsibilities Act 2006"* (14 March 2012) [1.6] (see http://www.justice.vic.gov.au/home/your+rights/human+rights/review+of+the+charter+act).

131 *Victorian Government Response to the Parliament of Victoria Scrutiny of Acts and Regulations Committee "Review of the Charter of Human rights And Responsibilities Act 2006"* (14 March 2012) [1.12].

questions are not appropriately or adequately addressed by responding to the series of discrete recommendations provided by SARC", but are "best considered on the basis of clear evidence".[132] Accordingly, the Government chose to "seek specific legal advice on the evidence of the operation of the Victorian Charter in the courts and tribunals and in relation to the duties of public authorities", as well the possible inclusion of additional ICCPR rights.[133]

Not only does the Government's response bode well for the retention and strengthening of the Victorian Charter, but the Government must be commended for removing the review out of the political realm and into an independent, evidence-based setting. With no time limit set for the evidence-based review, however, it remains to be seen what, if any, amendments to the Victorian Charter are proposed.

CONCLUSION

[3.210] This chapter has reviewed the current protections of human rights in the Australian system and highlighted its weaknesses. It has explored the main comparative models for comprehensive protection of human rights, paying particular attention to the enduring issues of the preservation of parliamentary sovereignty and the anti-democratic fears associated with giving judges the last (indeed, any) say over the scope and enforcement of human rights. It has also provided a brief overview of how one human rights instrument operates in the Australian jurisdiction of Victoria.

Although many people may believe that the Rudd Government's rejection of the Consultation Committee's recommendation in favour of a Human Rights Act signalled the death knell for a federal human rights instrument, human rights are increasingly part of the common parlance in Australia today. We need look no further than the daily newspaper to find debate and discussion about the state of human rights. Human rights debates have been sparked by a wide and varied array of issues: the Northern Territory "National Emergency Response" (originally known as the "Intervention", and now known as the "Stronger Futures" legislation); the ongoing difficulty of obtaining redress for the human rights violations of the "Stolen Generation"; the ongoing politicisation of the treatment of asylum seekers; the debate over laws designed to deal with modern forms of terrorism; the

132 *Victorian Government Response to the Parliament of Victoria Scrutiny of Acts and Regulations Committee "Review of the Charter of Human rights And Responsibilities Act 2006"* (14 March 2012) [1.12].

133 *Victorian Government Response to the Parliament of Victoria Scrutiny of Acts and Regulations Committee "Review of the Charter of Human rights And Responsibilities Act 2006"* (14 March 2012) [1.14]. The Government also cited two major judicial decisions (*Momcilovic v The Queen* (2011) 280 ALR 221 and *Director of Housing v Sudi* [2011] VSCA 266), which were handed down days before the *SARC Review*, as reasons to seek legal advice independently of the *SARC Review*: at [1.13].

continued discrimination in relation to sexuality; the appropriate scope of public health care; the increasing problems of homelessness; and – perhaps the largest debate of all – the Government's rejection of a national bill of rights in the face of overwhelming support for one.

The enactment of a comprehensive human rights instrument, reflecting the values of human dignity and worth, will help Australians resolve the moral, ethical and legal dilemmas presented in such debates.

Additional resources

Andrew Byrnes, Hilary Charlesworth and Gabrielle MacKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, Sydney, 2007).

Julie Debeljak, "Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights" (2002) 26 *Melbourne University Law Review* 285-324.

Julie Debeljak, "Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making" (2007) 33 *Monash University Law Review* 9-71.

Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008).

Flynn Martin, *Human rights in Australia, Treaties Statutes and Cases* (LexisNexis, 2011).

Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009).

Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Lawbook Co, 2008).

George Williams, *A Charter of Rights for Australia* (University of New South Wales Press, Sydney, 2007).