

## **SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION**

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### **INTRODUCTION**

#### **SUMMARY**

#### **Question 1: Which human rights and responsibilities should be protected and promoted?**

Australia should fully and comprehensively protect and promote within its domestic jurisdiction all the international human rights it has voluntarily accepted legal obligations with respect to. That is, Australia should fully and comprehensively protect and promote civil, political, economic, social and cultural rights, as per its international legal obligations under the *International Covenant on Civil and Political Rights* (1966), the *International Covenant on Economic, Social, and Cultural Rights* (1966), and the suite of international conventions expanding upon these two primary covenants.

The rights of indigenous peoples should be specifically recognised in any federal human rights instrument, including the right to self-determination and the economic, social and cultural rights that flow from this. Conversely, the right to property ought not be recognised or specifically protected in a federal human rights instrument.

Any comprehensive and formal protection of human rights in Australia must extend to all individuals within the territory and subject to the jurisdiction of Australia.

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**Question 2: Are human rights sufficiently protected and promoted?**

At the federal level, Australia does not have comprehensive and formal recognition of human rights within its domestic laws. The domestic law of Australia lacks effective human rights protections. 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. In essence, change is needed to better protect human rights within Australia.

The insufficiency of protection and promotion of human rights in Australia is due to three main factors: (a) the lack of constitutionally protected human rights; (b) the partial and fragile nature of statutory human rights protection; and (c) the domestic impact (or lack thereof) of our international human rights obligations.

**Question 3: How could Australia better protect and promote human rights?**

In order to better protect and promote human rights, Australia needs to fully and comprehensively guarantee human rights in a domestic human rights instrument. Such instrument should respect the separation of powers entrenched in the *Commonwealth Constitution* and preserve the sovereignty of parliament.

Ideally, this should be done by enacting a domestic human rights instrument which is inserted into the *Commonwealth of Australia Constitution* (the ‘*Australian Constitution*’)<sup>1</sup> and entrenched. If the constitutional route is to be taken, it should be modelled on the *Canadian Charter of Rights and Freedoms 1982* (Can) (the ‘*Canadian Charter*’).<sup>2</sup> Despite being a constitutional document, the *Canadian Charter* has mechanisms that protect the sovereignty of parliament. The *Canadian Charter* thus addresses the Commonwealth Government’s concern of preserving the sovereignty of parliament, as expressed in the terms of reference to the National Human Rights Consultation.<sup>3</sup> Moreover, despite being a constitutional document, the *Canadian Charter* has numerous mechanisms which allow parliament to restrict and limit rights in the public interest (ss 1 and 33 therein). In short, any federal human rights instrument should be modelled on the *Canadian Charter*, including the guarantee of human rights, the inclusion of a general limitations power (which accounts for non-derogable rights, as discussed below), and the inclusion of an override provision (modelled on the derogation provisions under the *ICCPR*, as discussed below).

If a fully entrenched constitutional document is not politically viable at this stage in Australia, the next best alternative is to entrench human rights protection via a manner and form provision. Under this option, the basics of the *Canadian Charter* would be

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<sup>1</sup> *Commonwealth of Australia Constitution Act 1900* (Imp) 63&64 Vict, c 12 (“*Australian Constitution*”).

<sup>2</sup> *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.

<sup>3</sup> National Human Rights Consultation Secretariat (Attorney-General’s Department), *National Human Rights Consultation Background Paper* (2009) 16.

adopted (i.e. a guarantee of rights, the inclusion of a general limitation clause subject to non-derogability rules, and inclusion of an override clause based on the derogation provisions under the *ICCPR*) and the manner and form provision would be modelled on s 2 of the *Canadian Bill of Rights 1960* (Can) (the ‘*Canadian BoR*’).<sup>4</sup>

The main differences between my preferred option (the *Canadian Charter* option) and this option (the *Canadian BoR* option) are, under the latter: (a) the method of entrenchment is via a manner and form provision, not constitutional amendment, and (b) any laws that cannot be interpreted to be rights-compatible will be able to be judicially declared inoperative rather than invalid.<sup>5</sup> Accordingly, the main focus of discussion below will be on the *Canadian Charter*, with discussion of the *Canadian BoR* only when constitutionality under the *Australian Constitution* is discussed.

If the *Canadian Charter* model – whether fully entrenched or enacted subject to a manner and form provision – is 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 ‘*UK HRA*’). This model has essentially been adopted by, and in some respects improved in, Victoria under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the ‘*Victorian Charter*’) and the ACT under the *Human Rights Act 2004* (ACT) (the ‘*ACT HRA*’). Where there are differences between the *UK HRA*, the *Victorian Charter* and the *ACT HRA*, they will be noted and an indication of the preferred alternative indicated.

The New Zealand *Bill of Rights 1990* (NZ) does not offer adequate protection. In my opinion, this model offers little more protection than the current common law in Australia. Granted, this model does explicitly state the protected rights in domestic legislation and guide the judiciary on the interpretation of legislation in light of the protected rights. However, the interpretative provision is not that dissimilar to the current common law position, there is no formal mechanism for the judiciary to give feedback to the executive and parliament on the rights-compatibility of laws, and there are no obligations on public authorities to act and decide compatibly with the protected rights – all reasons to avoid the New Zealand model.

In terms of the impact of a federal human rights instrument on public decision-making, the Consultation Committee should recommend that (a) human rights obligations fall on core/wholly public authorities and hybrid/functional public authorities (as per the *UK HRA*, the *Victorian Charter* and the *ACT HRA*); (b) that

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<sup>4</sup> *Canadian Bill of Rights*, SC 1960, c 44.

<sup>5</sup> For a discussion of the viability of this model under the terms of the Australian Constitution, see George Winterton, “Can the Commonwealth Parliament Enact ‘Manner and Form’ Legislation?” (1980) 11 *Federal Law Review* 167, espec 182-89, 190-91. See also Michael McHugh AC QC, ‘A Human Rights Act, the Courts and the Constitution’, presentation at the Australian Human Rights Commission, 5 March 2009, 19, available via <[http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc)>; Jeremy Webber, ‘A Modest (but Robust) Defence of Statutory Bills of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 263, espec 269-70; Greg Taylor, *The Constitution of Victoria* (Federation Press, NSW).

those obligations include substantive and procedural human rights considerations (as per the *Victorian Charter*); and (c) that there is a free-standing right of action if a public authority fails to meet its human rights obligations; that being breach of a statutory duty, with the statutory duty being those created under the human rights instrument (as per the *UK HRA* and the *ACT HRA*).

### **THIS SUBMISSION**

This submission to the National Human Rights Consultation is in two parts: (a) the first part addresses the substance of the three questions posed under the Terms of Reference of the National Human Rights Consultation; and (b) the second part appends my past research and publications that form the basis of the submission and more fully explore the issues. The first part is intended as a detailed overview of the relevant matters, with the second part providing the National Human Rights Consultation Committee (the ‘Consultation Committee’) with further elaboration and discussion where considered necessary. For ease of reference, in the first part I direct the Consultation Committee to specific page references in the second part.

**QUESTION 1: WHICH HUMAN RIGHTS (INCLUDING RESPONSIBILITIES) SHOULD BE PROTECTED AND PROMOTED?**

Any formalisation of human rights in Australia should protect all human rights (as recognised by Australia according to its international human rights law obligations) and should explicitly contain recognition of the special rights of Indigenous Australians. Any human rights instrument should not guarantee a right to property, but should extend to all individuals within the territory and subject to the jurisdiction of Australia.

**NATIONAL HUMAN RIGHTS CONSULTATION BACKGROUND PAPER AND TERMS OF REFERENCE**

It is refreshing to see that the Australian Government did not pre-empt the issue of what human rights should be protected, and thereby restrict and limit the national human rights consultation to consideration of civil and political rights only.<sup>6</sup>

**AUSTRALIA'S INTERNATIONAL OBLIGATIONS**

Australia has international human rights obligations that span the range of civil, political, economic, social and cultural rights. Australia has ratified most of the universal international human rights treaties,<sup>7</sup> as follows:

- *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 and Degrading Treatment or Punishment* (1987) (“CAT”),
- *Convention on the Rights of the Child* (1989) (“CRC”),
- *Convention on the Rights of Persons with Disabilities* (2006) (“CPD”).<sup>8</sup>

<sup>6</sup> This is to be contrasted with the Victorian consultation (see *Statement of Intent*) and the Western Australian Consultation (see *Statement of Intent of the Western Australian Government and the Human Rights for WA Discussion Paper*).

<sup>7</sup> Australia is yet to ratify the *Convention on the Protection of the Rights of All Migrant Workers and members of their Families* (1990).

<sup>8</sup> *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

The *ICCPR* and *ICESCR*, along with the *Universal Declaration of Human Rights* (1948), are said to constitute the international bill of rights. The international bill of rights guarantees the full range of civil, political, economic, social and cultural rights. The additional universal human rights treaties focus on specific human rights contained in the international bill of rights, in an effort to further elaborate those minimum standards States Parties are obliged to secure in order to guarantee the rights. Many of the specific human rights treaties contain a combination of civil, political, economic, social and cultural rights.<sup>9</sup>

### **DOMESTIC RECOGNITION OF AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS**

Australia must guarantee within our domestic jurisdiction the full range of civil, political, economic, social and cultural rights. This is for a number of reasons. First and foremost, to avoid a hypocritical situation where 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, if the purpose of protecting and promoting human rights is to ensure ‘that basic safeguards for equality and fairness are in place so that we can prevent the violation of rights, and provide remedies when a violation does occur’,<sup>10</sup> at a minimum economic, social and cultural rights, in addition to civil and political rights, must be protected.

Thirdly, under the *Australian Constitution*, the Federal Parliament must have a head of power enabling it to legislate on human rights. Presumably, the external affairs power<sup>11</sup> will be relied upon to embed human rights into domestic law. Ratification of both the *ICCPR* and *ICESCR* enliven the external affairs power, providing the Federal Parliament with the authority to embed civil, political, economic, social and cultural rights in the domestic jurisdiction.

Finally, the weight of international human rights law and opinion supports the indivisibility, interdependence, inter-relationship and mutually reinforcing nature of all human rights civil, political, economic, social, cultural, developmental,

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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’*); 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’*). Most recently it has ratified the *Convention on the Rights of Persons with Disabilities* (2006) (*‘CPD’*).

<sup>9</sup> For example, *CERD*, *CEDAW*, *CROC*, *CRPD*.

<sup>10</sup> National Human Rights Consultation Secretariat (Attorney-General’s Department), *National Human Rights Consultation Background Paper* (2009) 6.

<sup>11</sup> *Australian Constitution* 1901, s 51(29).

environmental and other group rights. This was recently confirmed, as a major outcome, at UN World Conference on Human Rights in Vienna.<sup>12</sup> Any domestic human rights package must comprehensively protect and promote all categories of human rights for it to be effective.<sup>13</sup>

There are four areas of anticipated controversy: (a) the difficulty of enforcing economic, social and cultural rights; (b) specifically recognising the rights of indigenous peoples, particularly the right to self-determination; (c) whether a right to property is recognised; and (d) whether rights should extend to Australian citizens only or people within the territory and jurisdiction of Australia. I will address these in turn.

### **Economic, Social and Cultural Rights**

Two arguments are often rehearsed against the domestic incorporation of economic, social and cultural rights. The two 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.<sup>14</sup>

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 considered to be justiciable. These historical assumptions have 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 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. Traditionally, civil and political rights are considered to fall within the former category, whilst economic, social and cultural rights fall within the latter category.<sup>15</sup>

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<sup>12</sup> 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.

<sup>13</sup> 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).

<sup>14</sup> 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.

<sup>15</sup> 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.<sup>16</sup> 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,<sup>17</sup> 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. 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

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<sup>16</sup> 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.

<sup>17</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

measures taken by the government to protect the right to adequate housing were reasonable.<sup>18</sup> 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 Australia. 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),<sup>19</sup> 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),<sup>20</sup> 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),<sup>21</sup> HIV/AIDS treatment was in issue. In particular, the case concerned the provision of a drug to

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<sup>18</sup> 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).

<sup>19</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC).

<sup>20</sup> *Government of the Republic South Africa & Ors v Grootboom and Ors* 2000 (11) BCLR 1169 (CC).

<sup>21</sup> *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).

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 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.<sup>22</sup>

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.<sup>23</sup>

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<sup>22</sup> *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 [80].

<sup>23</sup> See generally Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008).

Moreover, the clarity of economic, social and cultural rights is being improved by the United Nations Committee on Economic, Social and Cultural Rights<sup>24</sup> currently through its concluding observations to the periodic reports of States' Parties<sup>25</sup> and through its General Comments. This is only set to improve, given the recent adoption of the United Nations (by consensus) of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008),<sup>26</sup> which allows individuals to submit complaints to the Committee about alleged violations of rights under *ICESCR*. Once the Optional Protocol comes into force, there will be even greater clarity of 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 Australia to navigate its responsibilities with a greater degree of certainty.

Finally, 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.<sup>27</sup> It essentially 'imposes an obligation to move *as expeditiously and effectively as possible* towards'<sup>28</sup> the goal of eventual full realisation. Surely this is not too much to expect of a developed, wealthy, democratic country such as Australia?

### **Specific Rights of Indigenous Australians**

Particularly in Australia, any formal and comprehensive domestic recognition of human rights should contain specific recognition of the rights of indigenous peoples, which must include the right to self-determination and the economic, social and

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<sup>24</sup> 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)).

<sup>25</sup> *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, arts 16 and 17 (entered into force 3 January 1976).

<sup>26</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008) UN Doc No A/RES/63/117 (on 10 December 2008).

<sup>27</sup> 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)

<sup>28</sup> 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]

cultural rights that flow from this. Moreover, the rights protected must be broad enough to counter the dispossession, discrimination and inequalities suffered.

Subsuming the rights of indigenous peoples under the generic human right aimed at protecting minorities – in particular under the protection of minorities in art 27 of the *ICCPR* – is not sufficient. Such generic minority protection does not recognise the special place that indigenous peoples have in Australian history (*vis-à-vis* other minority groups) and it does not address all the areas of human rights protection owed to indigenous peoples (rather, it only covers religious, linguistic and cultural issues).

For a more detailed consideration of this issue, I refer the National Human Rights Consultation Committee (the ‘Consultation Committee’) to the submission of the Castan Centre for Human Rights Law, Faculty of Law, Monash University (“Castan Centre”), which I endorse.

### **Property rights**

I endorse the position taken in the submission of the Castan Centre on property rights. I do not recommend the inclusion of a right to property in any instrument that comprehensively and formally protects rights in Australia. The right to property is not a universally recognised international human rights obligation. There is no form of property right in the *ICCPR* or *ICESCR*, the two international covenants which will presumably form the basis of any domestic protection. Accordingly, a right to property should not be included in any Australian human rights document.

The limited right to just compensation upon compulsory acquisition of property under s 51(31) of the *Australian Constitution* is adequate protection of property rights in Australia.

### **Rights to Extent to all Individuals within the Territory and Jurisdiction of Australia**

To ensure consistency with Australia’s international human rights obligations, particularly under art 2(1) of the *ICCPR*,<sup>29</sup> any comprehensive and formal protection of human rights in Australia must extend to all individuals within the territory and subject to the jurisdiction of Australia. Any suggestion to limit the protection of rights to Australian citizens or residents must be vigorously resisted.

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<sup>29</sup> See also Human Rights Committee, General Comment 15: The Position of Aliens under the Covenant (11 April 1986).

**QUESTION 2: ARE THESE HUMAN RIGHTS CURRENTLY  
SUFFICIENTLY PROTECTED AND PROMOTED?**

At the federal level, Australia does not have comprehensive and formal recognition of human rights within its domestic laws. The domestic law of Australia lacks effective human rights protections. 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. In essence, change is needed to better protect human rights within Australia.

The insufficiency of protection and promotion of human rights in Australia is due to three main factors.

**THE PAUCITY OF CONSTITUTIONALLY PROTECTED HUMAN RIGHTS  
GUARANTEES**

The *Australian 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 the rights protected under the *Australian Constitution* with the *ICCPR* demonstrates this.

Moreover, the few rights that are constitutionally protected have most often been interpreted narrowly by the courts,<sup>30</sup> giving greater freedom to the representative arms of government in their creation and enforcement of Commonwealth law.<sup>31</sup> For

<sup>30</sup> See, eg, *Cheng v The Queen* (2000) 203 CLR 248; *King v Jones* (1972) 128 CLR 221; Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, Butterworths, Australia, 1997) 400-423 ('*The High Court*'); Hilary Charlesworth, 'Individual Rights and the Australian High Court' (1986) 4 *Law In Context* 52, 53 ('Individual Rights'); Hilary Charlesworth, 'The Australian Reluctance About Rights' in Alston, P (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, Canberra, 1994) 21 23-4; Hilary Charlesworth, *Writing in Rights, Writing in Rights: Australia and the Protection of Human Rights* (University of New South Wales Press, Sydney, 2002), 27; Stephen Gageler and Arthur Glass, 'Constitutional Law and Human Rights', in David Kinley (ed), *Human Rights in Australian Law* (Federation Press, Sydney, 1998) 47-62; Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (Butterworths, Australia, 2000) [11.8]; ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act* (2003), [2.48]; Nick O'Neill and Robin Handley, *Retreat from Injustice: Human Rights in Australian Law* (Federation Press, Sydney, 1994) 73-4.

<sup>31</sup> Not surprisingly, the two economic rights in the *Constitution*, ss 51(xxxi) and 92, have been interpreted more expansively than the human rights: see, eg, Zines, *The High Court*, above n 30, 402; Charlesworth, 'The Australian Reluctance about Rights', above n 30, 24.

example, let us consider s 116 which prohibits the Commonwealth making any law that establishes a religion, imposes religious observance, prohibits the free exercise of religion, or imposes religious tests as a qualification for any office or public trust under the Commonwealth.

The prohibition on establishing a religion did not prevent the Commonwealth providing financial aid to religious schools, with the word ‘establishment’ being given a narrow interpretation.<sup>32</sup> Moreover, compulsory training provisions under defence legislation were held not to prohibit the free exercise of religion of a person whose religious beliefs prevented him taking part in military activities.<sup>33</sup> Section 116 was narrowly interpreted to protect only things done in pursuit of religion, not things done outside religion, such as military service.<sup>34</sup> Furthermore, a declaration made under Commonwealth legislation that the Jehovah’s Witnesses was unlawful, resulting in its dissolution, was held not to prohibit the free exercise of religion. The Governor-General could make such declarations if, in their opinion, a body was prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, which the Jehovah’s Witnesses were considered to be because of their pacifism.<sup>35</sup>

Furthermore, the trend of the High Court of Australia to imply ‘rights proper’ into the *Australian Constitution* appears to have stalled, as evidenced by the curial denunciation of the implied right to legal equality and rejection of the implied right to equality in voting power.<sup>36</sup> Whether or not one is in favour of a restricted reading of our express rights or the practice of implying rights into the *Australian Constitution*,<sup>37</sup>

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<sup>32</sup> *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559 (‘*DOGS Case*’). See Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Law Book Company, Sydney, 2001) 306-7.

<sup>33</sup> *Krygger v Williams* (1912) 15 CLR 366.

<sup>34</sup> In other words, s 116 only prevents the Commonwealth making a law which prohibits religious practices.

<sup>35</sup> *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116. See Zines, *The High Court*, above n 30, 402-403; Joseph and Castan, above n 32, 307-309; Charlesworth, *Writing in Rights*, above n 30, 28-30.

<sup>36</sup> For judicial statements on an implied right to legal equality, see *Leeth v Commonwealth* (1992) 174 CLR 455 (especially Gaudron J) and *Kruger* (1997) 190 CLR 1. For a discussion of an implied right to equality of voting power, see *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, *McGinty v WA* (1996) 186 CLR 140 and *Langer v Commonwealth* (1996) 186 CLR 302. See also Jeremy Kirk, ‘Constitutional Implications (II): Doctrines of Equality and Democracy’ (2001) 25 *Melbourne University Law Review* 24; Sir Anthony Mason, ‘The Role of the Judiciary in Developing Human Rights in Australian Law’, in David Kinley (ed), *Human Rights in Australian Law* (Federation Press, Sydney, 1998) 29-30 (‘The Role of the Judiciary’) 41-43.

<sup>37</sup> I have two concerns about the implication of a bill of rights into the *Constitution*. My first concern is based on the public perception of the proper role of the judiciary. Judicial introduction of human rights standards, for instance via administrative law, will cause (and has caused) controversy and may be considered an improper exercise of the judicial function. Moreover, I am concerned that judicial introduction of human rights standards will be piecemeal and incomprehensive, with some rights being readily compatible with our existing legal regime and others not being so. I would prefer a constitutional bill of rights to be introduced via the s 128 amending provisions of the *Constitution*. See also Winterton,

the fact remains that the *Australian Constitution* does not provide comprehensive protection of human rights.<sup>38</sup> This enhances the monopoly the representative arms of government have over the protection and promotion of human rights in Australia

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 of the representative arms of government to impact on our human rights.

See further:

- 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, 287-288
- Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australian from Canada and the United Kingdom*, PhD Thesis, Monash University, 2004, pp 12 to 16 of ('*Human Rights and Institutional Dialogue*')

### **THE PARTIAL AND FRAGILE NATURE OF STATUTORY HUMAN RIGHTS PROTECTION**

Commonwealth and State 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.<sup>39</sup>

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Winterton, George, 'The Separation of Judicial Power as an Implied Bill of Rights' in Lindell, G (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press with the Centre for Public and International Law and the Law Faculty at Australian National University, Sydney, 1994) 185, 208; Zines, *The High Court*, above n 30, 421-3; Peter Bailey, 'Australia – How Are You Going, Mate, Without a Bill of Rights? Or Righting the Constitution' [1993] 5 *Canterbury Law Review* 251, 267 ('Australia – How Are You Going, Mate'); Justice Michael Kirby, 'A Bill of Rights for Australia – But do we need it?' (1995) *Commonwealth Law Bulletin* 276, 281 ('A Bill of Rights for Australia'); Charlesworth, *Writing in Rights*, above n 30, 40.

<sup>38</sup> 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, 2001) 22 ('National Implementation'); Geoffrey Lindell, 'The Australian Constitution: Growth, Adaptation and Conflict — Reflections about Some Major Cases and Events' (1999) 25 *Monash University Law Review* 257; Timothy Jones, 'Fundamental Rights in Australia and Britain: Domestic and International Aspects' in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights* (1<sup>st</sup> ed, Mansell Publishing Ltd, London, 1996) 91, 100; O'Neill and Handley, above n 30, 75-84; Bailey, 'Australia – How Are You Going, Mate', above n 37; George Williams, *Human Rights Under the Australian Constitution* (Oxford University Press, Melbourne, 1999) ch 3 ('*Human Rights Under the Australian Constitution*'); George Williams, *A Bill of Rights for Australia* (University of New South Wales Press, Sydney, 2000) 14-26.

<sup>39</sup> The *Racial Discrimination Act 1975* (Cth) ('*RDA*') partially implements *CERD*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); the *Sex Discrimination Act 1984* (Cth) ('*SDA*') partially implements *CEDAW*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); the *Disability Discrimination Act 1992* (Cth) ('*DDA*') partially implements the International Labour Organisation's *Convention Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force

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.<sup>40</sup> 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;<sup>41</sup>
- b) there are exemptions from the statutory regimes, allowing exempted persons to act free from human rights obligations;<sup>42</sup>
- c) the interpretation of human rights statutes by courts and tribunals has generally been restrictive;<sup>43</sup>
- d) the human rights commissions established under the statutes are only as effective as the representative arms of government allow them to be<sup>44</sup> (or fund them to be)<sup>45</sup>; and

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15 June 1960) and the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (*HREOC Act*) establishes a national human rights body, the HREOC, whose roles include human rights education, law reform, powers to intervene in court proceedings where human rights issues are in issue, and powers of investigation and conciliation when there are disputes under the *RDA 1975* (Cth), the *SDA 1984* (Cth), and the *DDA 1992* (Cth).

<sup>40</sup> See especially Peter Bailey, ““Righting” the Constitution Without a Bill of Rights”, (1995) 23 *Federal Law Review* 1, 34; Charlesworth, *Writing in Rights*, above n 30, 57-8. For a British perspective, see Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights*, (Penguin Books, London, 2000), 37.

<sup>41</sup> For example, the *RDA 1975* (Cth), the *SDA 1984* (Cth) and the *DDA 1992* (Cth) ‘fall short of providing for equality and protection from discrimination on *any* ground as required by Article 26 of the [*ICCPR*]’: Evatt, ‘National Implementation’, above n 38, 20-1. See also O’Neill and Handley, above n 30, 106; Charlesworth, *Writing in Rights*, above n 30, 58; ACT Consultative Committee, above n 30, [2.52] – [2.53].

<sup>42</sup> 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, combat duties, and exemptions with respect to the employment of staff in religious educational institutions. See Evatt, ‘National Implementation’, above n 38, 20; Charlesworth, ‘The Australian Reluctance about Rights’, above n 30, 38; Charlesworth, *Writing in Rights*, above n 30, 57-8; 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, 297-9.

<sup>43</sup> Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ [2002] 26 *Melbourne University Law Review* 325, 341. See generally Charlesworth, ‘The Australian Reluctance about Rights’, above n 30; **Error! Bookmark not defined.**, 40; 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, 325.

<sup>44</sup> A case in point is the indirect methods of enforcement given to commissions under human rights legislation. The indirect methods of enforcement include the investigation and conciliation of a complaint, followed by an inquiry by a specialist body. At the Commonwealth level, due to the separation of judicial powers doctrine implied in the *Constitution*, HREOC (an administrative body), not being a Chapter III court, does not have the power to enforce decisions flowing from the hearing process because enforcement is a judicial function: *Brandy* (1995) 183 CLR 245. This is not the case for the State specialist bodies. See generally Charlesworth, ‘The Australian Reluctance about Rights’, above n30, 38; O’Neill and Handley, above n 30, 105; Bailey and Devereux, above n 42, 306, especially n 68;

- e) these are only statutory protections – parliament can repeal or alter these protections via the ordinary legislative process.

These limitations impair the protection and promotion of human rights, highlight the fragility of statutory protection of human rights, and, in turn, strengthen the monopoly power the representative arms have over human rights.

See further

- 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, 289-290.
- Julie Debeljak, *Human Rights and Institutional Dialogue*, p 17 to 22.

### **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. In terms of choice, the Commonwealth Executive decides which international human rights treaties Australia should ratify (s 61 of the *Australian 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. No international human rights treaty has been fully and comprehensively incorporated into domestic law.

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

- 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

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ACT Consultative Committee, above n 30, [2.35]. For criticisms of the conciliation process, see Bailey and Devereux, above n 42, 302-6, especially 303. For discussion of the post-*Brandy* reform process, see Piotrowicz and Kaye, above n 30, [12.42]-[12.46].

<sup>45</sup> HREOC is semi-independent: see generally *HREOC Act 1986* (Cth) and HREOC, 'Australian Human Rights and Equal Opportunity Commission: About the Commission' (2002) <[http://www.hreoc.gov.au/about\\_the\\_commission/index.html](http://www.hreoc.gov.au/about_the_commission/index.html)> at 19 February 2004. HREOC is funded by the executive, but it is free to criticise the executive. The amount of funding impacts on the quantity and quality of the work HREOC can undertake. A funding cut to HREOC in the late 1990s resulted in fewer commissioners, staff and resources to undertake its work. For example, although HREOC has six main areas of interest, there are only three Commissioners, all of whom have responsibility for two portfolios.

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. 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 – successive Executive statements have sought to undermine any legitimate expectation that may arise from the ratification of a treaty,<sup>46</sup> the Commonwealth legislature may override the *Teoh* principle by legislation,<sup>47</sup> and a majority of judges on the High Court of Australia have recently questioned the correctness of the decision in *Teoh*.<sup>48</sup>

See further:

- 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, 290-93.
- Julie Debeljak, *Human Rights and Institutional Dialogue*, pp 22 to 36.

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<sup>46</sup> Gareth Evans (Minister for Foreign Affairs) and Michael Lavarch (Attorney-General) 'International Treaties and the High Court Decision in *Teoh*' (Joint Statement, 10 May 1995); Alexander Downer (Minister for Foreign Affairs) and Daryl Williams (Attorney-General and Minister for Justice), 'The Effect of Treaties in Administrative Decision-making' (Joint Statement, 25 February 1997. The legal status of the executive statements is unclear. In *Re Adams & Australian Fisheries (No 2)* (1995) 38 ALD 435, the Commonwealth Administrative Appeals Tribunal considered the Joint Ministerial Statement to have neutralised *Teoh* (1995) 183 CLR 273. Compare this with single-judge decisions of the Federal Court, which have cast doubt on the capacity of the Joint Ministerial Statement to neutralise *Teoh* (1995) 183 CLR 273: *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431 (Hill J); *Re Sui and Minister for Immigration and Ethnic Affairs* (1996) 42 ALD 163; *Davey Browne v Minister for Immigration and Multicultural Affairs* (1998) AAR 353 (Wilcox J); *William Tien & Ors v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80 (Goldberg J).

<sup>47</sup> The Administrative Decisions (Effect of International Instruments) Bill 1996 (Cth) was introduced and lapsed with the proroguing of Parliament for an election in 1996; it was re-introduced in 1997 and lapsed again with the proroguing of Parliament for an election in 1998; and it was re-introduced and lapsed again with the proroguing of Parliament for an election in 2001. The South Australian Parliament has successively neutralised the effect of *Teoh* in *Administrative Decisions (Effect of International Instruments) Act 1995* (SA).

<sup>48</sup> *Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6. McHugh and Gummow JJ questioned the authority of *Teoh*, particularly as being inconsistent with the earlier case of *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, especially [84] – [102]. Their Honours concluded that if the *Teoh* principle is to continue, 'further attention will be required to the basis upon which *Teoh* rests': at [98]. Hayne J referred with approval to the comments of McHugh and Gummow JJ (at [120] – [122]). Callinan J criticised *Teoh* on the basis that a legitimate expectation should only arise if there is an actual expectation, which would require *Teoh* having knowledge of the treaty (at [145]).

## **PROBLEMATIC CONSEQUENCES OF LACK OF DOMESTIC PROTECTION**

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 most of the major international human rights treaties.<sup>49</sup> Despite this international commitment to the promotion and protection of human rights, there are insufficient mechanisms to enforce these basic human rights within the domestic system.

Secondly, and consequently, aggrieved persons and groups are denied an effective non-majoritarian forum within which their human rights claims can be assessed and remedied.<sup>50</sup> 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, *Human Rights and Institutional Dialogue*, pp 37 to 48.

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 Julie Debeljak, *Human Rights and Institutional Dialogue*, pp 48 to 52.

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<sup>49</sup> 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'). Most recently it has ratified the *Convention on the Rights of Persons with Disabilities* (2006) ('CPD').

<sup>50</sup> The domestic fora have limited rights jurisdictions only and are vulnerable to change; the international fora are non-binding and increasingly ignored.

### **QUESTION 3: HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?**

#### **INTRODUCTION AND SUMMARY OF POSITION**

Whether a comprehensive and formal guarantee of human rights takes the form of a constitutional document or an ordinary statute, all arms of government – the executive, legislature and judiciary – must have a role to play in defining rights and their justifiable limits.

Ideally, a comprehensive statement of rights should be inserted into the *Australian Constitution* and entrenched. Despite the Commonwealth Government's exclusion of the option of a constitutionally entrenched bill of rights in its terms of reference to the National Human Rights Consultation,<sup>51</sup> constitutional entrenchment is by far the superior model.

If the constitutional route is to be taken, it should be modelled on the *Canadian Charter*. Despite being a constitutional document, the *Canadian Charter* has mechanisms that protect the sovereignty of parliament. The *Canadian Charter* thus addresses the Commonwealth Government's concern of preserving the sovereignty of parliament, as expressed in the terms of reference to the National Human Rights Consultation.<sup>52</sup> Moreover, despite being a constitutional document, the *Canadian Charter* has numerous mechanisms which allow parliament to restrict and limit rights in the public interest (ss 1 and 33 therein). In short, any federal human rights instrument should be modelled on the *Canadian Charter*, including the guarantee of human rights, the inclusion of a general limitations power (which accounts for non-derogable rights, as discussed below), and the inclusion of an override provision (modelled on the derogation provisions under the *ICCPR*, as discussed below).

If a fully entrenched constitutional document is not politically viable at this stage in Australia, the next best alternative is to entrench human rights protection via a manner and form provision. Under this option, the basics of the *Canadian Charter* would be adopted (i.e. a guarantee of human rights, the inclusion of a general limitation clause subject to non-derogability rules, and inclusion of an override clause based on the derogation provisions under the *ICCPR*) and the manner and form provision would be modelled on s 2 of the *Canadian Bill of Rights* (1960) (the '*Canadian BoR*').<sup>53</sup>

The main differences between my preferred option (the *Canadian Charter* option) and this option (the *Canadian BoR* option) are, under the latter: (a) the method of

<sup>51</sup> National Human Rights Consultation Secretariat (Attorney-General's Department), *National Human Rights Consultation Background Paper* (2009) 16.

<sup>52</sup> National Human Rights Consultation Secretariat (Attorney-General's Department), *National Human Rights Consultation Background Paper* (2009) 16.

<sup>53</sup> *Canadian Bill of Rights*, SC 1960, c 44.

entrenchment is via a manner and form provision, not constitutional amendment, and (b) any laws that cannot be interpreted to be rights-compatible will be able to be judicially declared inoperative rather than invalid.<sup>54</sup> Accordingly, the main focus of discussion below will be on the *Canadian Charter*, with discussion of the *Canadian BoR* only when constitutionality under the *Australian Constitution* is discussed.

If the *Canadian Charter* model – whether fully entrenched or enacted subject to a manner and form provision – is 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 *UK HRA*. This model has essentially been adopted by, and in some respects improved in, Victoria (under the *Victorian Charter*) and the ACT (under the *ACT HRA*). Where there are differences between the *UK HRA*, the *Victorian Charter* and the *ACT HRA*, they will be noted and an indication of the preferred alternative indicated.

The New Zealand *Bill of Rights 1990* (NZ) does not offer adequate protection. In my opinion, this model offers little more protection than the current common law in Australia. Granted, this model does explicitly state the protected rights in domestic legislation and guide the judiciary on the interpretation of legislation in light of the protected rights. However, the interpretative provision is not that dissimilar to the current common law position, there is no formal mechanism for the judiciary to give feedback to the executive and parliament on the rights-compatibility of laws, and there are no obligations on public authorities to act and decide compatibly with the protected rights – all reasons to avoid the New Zealand model.

## **HUMAN RIGHTS AND LEGISLATION**

### **The Institutional Roles and Interactions of Parliament, the Executive and the Judiciary**

When contemplating formal and comprehensive human rights protection within a domestic setting, we must consider the institutional model to be adopted as a whole. One issue dominates the institutional design question: can a formal guarantee of human rights be reconciled with democracy? In particular, it is often argued that judicial enforcement of human rights against the representative arms of government may produce anti-democratic tendencies.

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<sup>54</sup> For a discussion of the viability of this model under the terms of the Australian Constitution, see George Winterton, “Can the Commonwealth Parliament Enact ‘Manner and Form’ Legislation?” (1980) 11 *Federal Law Review* 167, espec 182-89, 190-91. See also Michael McHugh AC QC, ‘A Human Rights Act, the Courts and the Constitution’, presentation at the Australian Human Rights Commission, 5 March 2009, 19, available via <[http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc)>; Jeremy Webber, ‘A Modest (but Robust) Defence of Statutory Bills of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 263, espec 269-70; Greg Taylor, *The Constitution of Victoria* (Federation Press, NSW).

*Traditional Approaches to the Role and Interactions 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 these institutional debates.

1) Australia:

In Australia, as discussed above in Question 2, 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 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 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 law-making and 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 delegitimise 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.

2) Human Rights vs Democracy

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.

These arguments assume 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, that a judicially enforceable human rights instrument replaces parliamentary supremacy with judicial supremacy.

3) United States of America:

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*'),<sup>55</sup> 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.<sup>56</sup> 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

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<sup>55</sup> *United States Constitution* (1787) ('*US Constitution*').

<sup>56</sup> *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* (2<sup>nd</sup> 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.

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, 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: (a) transfers supremacy from the elected arms of government to 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.

At this stage, proponents of human rights guarantees 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, a discussion to which we now turn.

### *Modern Approaches to the Role and Interactions 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 an instrument that supports a representative monopoly or a judicial monopoly over human rights, I propose Australia pursues a model that promotes an inter-institutional dialogue about human rights. This brings us to the *Canadian Charter* and the *UK 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 Australia, and the judicial monologue that exists under the *US Constitution*.

Before considering the *Canadian Charter* and the *UK HRA* in detail, we ought to think a little more about human rights and democracy.

#### 1) Human Rights and Democracy – reconcilable?

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.<sup>57</sup> In other words, human rights and democracy are not – and are not intended to be – subjects of consensus.<sup>58</sup>

Given these features, allowing many and 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:

- 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, 297-302
- 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, 138-48
- Julie Debeljak, *Human Rights and Institutional Dialogue*, pp 59-69.

### The Canadian Charter

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

The *Canadian Charter* is contained within the *Canadian Constitution*.<sup>59</sup> Section 1 guarantees a variety of essentially civil and political rights;<sup>60</sup> however, under s 1,

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<sup>57</sup> 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.

<sup>58</sup> Janet L Hiebert, ‘A Relational Approach to Constitutional Interpretation: Shared Legislative Responsibilities and Judicial Responsibilities’ (2001) 35 *Journal of Canadian Studies* 161, 170.

<sup>59</sup> *Canadian Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

<sup>60</sup> Such as fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, official language rights, and minority language educational rights: see *Canadian Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 2–23.

limits may justifiably be imposed on the protected rights. The judiciary is empowered to invalidate legislation that offends a *Canadian Charter* right and which cannot be justified under s 1.<sup>61</sup> The *Canadian Charter* also contains an ‘override clause’. Section 33(1) allows the parliament to enact legislation notwithstanding the provisions of the *Canadian Charter*. Thus, if the judiciary invalidate a law, parliament can respond by re-enacting the law notwithstanding the *Canadian Charter*.

Under my second preferred option of entrenching human rights in Australian domestic law, there are only two differences between the model Australia should adopt and the *Canadian Charter*. First, the document would be adopted via a manner and form provision similar to s 2 of the *Canadian BoR*, rather than by constitutional amendment under s 128 of the *Australian Constitution*. Secondly, and consequently, the judiciary would not be empowered to invalidate a legislative provision that is incompatible with protected rights and which cannot be justified under a general limitations clause (as is currently the case under ss 51-52 of the *Canadian Constitution*);<sup>62</sup> rather, the judiciary would only be empowered to declare such a legislative provision inoperative.

All other aspects of the second preferred option should mimic the *Canadian Charter*, including the guarantee of human rights, the inclusion of a general limitations power (which accounts for non-derogable rights, see below) and the inclusion of an override provision (modelled on derogation under the *ICCPR*, see below).

### The UK HRA

The *UK 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 *UK HRA*. The first of the two relates to the institutional question currently being considered. The second aspect relates to the enforceability of the *UK HRA* against public authorities which will be discussed in detail below.

In relation to the institutional question, s 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.<sup>63</sup> 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.

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<sup>61</sup> *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 51–52.

<sup>62</sup> *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 51–52.

<sup>63</sup> Human Rights Act 1998 (UK) c 42, s 3. See also United Kingdom, Rights Brought Home: The Human Rights Bill (1997) [2.7].

The *ACT HRA* and the *Victorian Charter* basically mimic these provisions of the *UK HRA*: both documents incorporate rights largely based on the *ICCPR* into domestic law; impose similar interpretative obligations; and allow the judiciary to issue declarations of incompatibility.

### *The Inter-Institutional Dialogue approach*

Both the *Canadian Charter* and the *UK 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 *Canadian Charter* and the *UK 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.

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 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 interpreting legislation and adjudicating disputes, each arm articulates *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. 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*.<sup>64</sup> The Minister must certify that bills presented to Parliament have been compared with the *Canadian Charter* and any inconsistencies with the purposes or provisions of the *Canadian Charter* must be reported. To date, the Minister has *not* reported any inconsistencies with the *Canadian Charter*.

Once Cabinet agrees on a policy agenda, the Department of Justice drafts the legislation and makes an assessment of the *Canadian Charter* implications of the legislation. This involves assessing whether a *Canadian 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 *Canadian Charter* challenges.<sup>65</sup> The departmental assessments range from minimal, to significant, to serious, to unacceptable risks.<sup>66</sup> If a 'credible [*Canadian*] *Charter* argument'<sup>67</sup> can be made in support of legislation, the legislation will be pursued. Where there is a serious *Canadian 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.<sup>68</sup>

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<sup>64</sup> *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.

<sup>65</sup> See Dickson CJ in *R v Oakes* [1986] 1 SCR 103.

<sup>66</sup> 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.

<sup>67</sup> 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.

<sup>68</sup> 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 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.

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.<sup>69</sup>

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 *Canadian Charter* rights. Such assessments by the policy-driven arm of government are a vital contribution to the inter-institutional dialogue about *Canadian Charter* rights. The executive can influence the legislative and judicial understandings of particular *Canadian 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.’<sup>70</sup> This capacity to influence the inter-institutional dialogue has motivated the executive to undertake serious pre-legislative scrutiny.<sup>71</sup> 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 [*Canadian*] *Charter* challenge and to minimize disruption in attaining the policy goal.’<sup>72</sup>

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 *Canadian 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.<sup>73</sup>

However, this secrecy 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

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<sup>69</sup> 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.

<sup>70</sup> 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.

<sup>71</sup> *Ibid* 7.

<sup>72</sup> *Ibid* 10.

<sup>73</sup> 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.

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 *Canadian Charter* issues were duly considered, may be discounted by judges if viewed as perfunctory.'<sup>74</sup> The full benefit that could flow from the distinct executive contribution to the refinement and interpretation of the *Canadian 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 *Canadian Charter* rights, whether a proposed law limits the *Canadian 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 Australian instrument should consider requiring the reasoning behind pre-legislative assessments to be divulged, as does the *Victorian Charter*.

Similar problems beset the British pre-legislative scrutiny measures. Under section 19(1)(a) of the *UK HRA*, 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).<sup>75</sup> A s 19(1)(b) statement is expected to 'ensure that the human rights implications [of the bill] are debated at the earliest opportunity'<sup>76</sup> and to provoke 'intense'<sup>77</sup> parliamentary scrutiny of the bill. Ministerial statements of compatibility under s 19(1)(a) are likely to be used as evidence of parliamentary intention.<sup>78</sup>

Section 19(1) statements allow the executive to effectively contribute to the inter-institutional dialogue about the definition and scope of the Convention rights.

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<sup>74</sup> Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002) 17.

<sup>75</sup> 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).

<sup>76</sup> United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [3.3].

<sup>77</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, col 1233 (Lord Irvine, Lord Chancellor).

<sup>78</sup> This is similar to the rule in *Pepper v Hart* [1993] AC 59.

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.<sup>79</sup> 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 the test, the Home Secretary indicated that ‘the balance of argument’<sup>80</sup> 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.’<sup>81</sup>

In relation to the quality of the explanation, the *UK 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.’<sup>82</sup> During debate on the Human Rights Bill, it was suggested that the reasoning would be disclosed *only if* raised in parliamentary debate.<sup>83</sup>

After the *UK HRA* came into operation, 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.’<sup>84</sup> Rather, s 19(1) statements should only indicate which

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<sup>79</sup> 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.

<sup>80</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41 (citation omitted). See also *The UK HRA Guidance for Departments* (2<sup>nd</sup> ed, Home Office and Cabinet Office, 2000) [36] (*UK HRA Guidance* (2<sup>nd</sup> 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 *UK HRA* has been issued by the departments with responsibility for the *UK HRA* to all government departments: *The UK HRA 1998 Guidance for Departments* (1<sup>st</sup> ed, Home Office and Cabinet Office, 1998); *UK HRA Guidance* (2<sup>nd</sup> ed); *The UK HRA Guidance for Departments* (3<sup>rd</sup> ed, Lord Chancellor’s Department, 2002) (the Lord Chancellor’s Department took over responsibility for the *UK HRA* in June 2001). See David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Summer Public Law* 323, 338-9.

<sup>81</sup> 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.

<sup>82</sup> United Kingdom, *Rights Brought Home: The Human Rights Bill (1997)* [3.3].

<sup>83</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 17 December 1998, col WA186 (Lord Williams).

<sup>84</sup> 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

Convention issues were considered and ‘the thinking which led to the conclusion reflected in the statement.’<sup>85</sup> The detail of the compliance issue ‘is most suitably addressed in context, during debate on the policy and its justification.’<sup>86</sup> 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 lines of the argument.’<sup>87</sup>

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’,<sup>88</sup> even though ‘this is perhaps the most important requirement of the *UK HRA*.’<sup>89</sup>

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

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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.

<sup>85</sup> 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].

<sup>86</sup> *Ibid.*

<sup>87</sup> *UK HRA Guidance* (2<sup>nd</sup> 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.

<sup>88</sup> David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Summer Public Law* 323, 347-48. At the policy formulation and approval stage, *UK HRA Guidance* (2<sup>nd</sup> 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.

<sup>89</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 26.

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.<sup>90</sup> 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 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.<sup>91</sup>

Overall, any pre-legislative scrutiny requirement in a future Australian instrument should be drafted in such a way as to avoid these problems, and a culture of transparency within the executive ought to be fostered. Section 28 of the *Victorian Charter* has improved on the UK and Canadian models. The strength of s 28 rests in the obligation on the executive to not only state whether a Bill is compatible or incompatible with human rights, but also 'how it is compatible' or 'the nature and extent of the incompatibility.' This additional obligation requires the executive to divulge the reasoning behind the assessment of a Bill as compatible or incompatible, without which a statement is of little use. I recommend the Consultation Committee review the s 28 statements issued in Victorian to date to see the level of detailed explanation supporting the rights-assessments.

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<sup>90</sup> John Wadham, 'The *Human Rights Act*: One year On' [2001] *European Human Rights Law Review* 620, 624.

<sup>91</sup> 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.

See further:

- 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, 304-05
- 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, p 153
- 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, 26-31.
- Julie Debeljak, *Human Rights and Institutional Dialogue*, pp 151 to 155 and 212 to 218 (Canada); pp 291 to 306 (Britain)

## 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 *Canadian Charter* and *UK 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.<sup>92</sup> 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 arts 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 must be necessary in a democratic society. Consider, for example, the freedom of religion. Article 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 *Canadian Charter* is a good example of this. Section 1 of the *Canadian Charter* guarantees all the rights contained therein, subject to any reasonable limits that are prescribed by law and that can be

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<sup>92</sup> 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, 424-27.

demonstrably justified in a free and democratic society.<sup>93</sup>

I will briefly discuss the test for adjudging limits under the external limit of the *Canadian Charter*, and highlight the frequency with which each has been used by the judiciary. The test for adjudging the internal limits and internal qualifications of the *ECHR* under the *UK HRA*,<sup>94</sup> in essence, addresses the same indicia.<sup>95</sup>

First, under s 1 the limit must be reasonable. This means that the rights-limiting legislative objective must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom.’<sup>96</sup> In other words, the legislative objective must relate to concerns which are pressing and substantial in a free and democratic society. Statistics gathered from 1982-1997, a 15 year period, indicate that in 97 per cent of *Canadian Charter* cases the Supreme Court upheld the legislative objective as reasonable.<sup>97</sup> This means only 3% of rights-limiting legislation had its legislative objective impugned.

Secondly, under s 1 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 rights-limiting legislative objective must be rational, in that the legislative means must achieve the legislative objective.<sup>98</sup> A substantial majority of limitations are found to be rational by the Supreme Court of Canada. Between 1982 and 1997, 86 per cent of legislation that violated the *Canadian Charter* possessed a rational connection to the legislative objective.<sup>99</sup>

The second component is a minimum impairment test. The legislative means chosen by the legislature must impair the right in question as little as is reasonably

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<sup>93</sup> 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.

<sup>94</sup> For discussion of the test for assessing limits under the *UK HRA*, see: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69; and *Huang v Secretary of State for Home Department; Kashmiri v Secretary of State for Home Department* [2007] UKHL 11.

<sup>95</sup> Another component for adjudging limits under the *Canadian Charter* and the *ECHR* is whether the limit is prescribed by law. This is not usually difficult, particularly when legislation is involved

<sup>96</sup> *R v Oakes* [1986] 1 SCR 103, 138.

<sup>97</sup> 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.

<sup>98</sup> The ‘measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations’: *R v Oakes* [1986] 1 SCR 103, 139.

<sup>99</sup> 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.

possible.<sup>100</sup> It is this component which most rights-limiting legislation falls foul of. Of the 50 (out of 87) infringements of *Canadian Charter* that have failed the s 1 limits test, 86 per cent (43 infringements) failed the minimum impairment test.<sup>101</sup>

The third component is the need for proportionality between the negative effects of the rights-limiting legislation, and the legislative objective identified as being of sufficient importance.<sup>102</sup> 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.<sup>103</sup>

The test as described is based on the judgment of Dickson CJ in *R v Oakes*.<sup>104</sup> It should be noted that the Supreme Court of Canada, in the *Hislop* case,<sup>105</sup> recently approved of this test, and noted that ‘the *Oakes* test may be formulated as two main tests with subtests under the second branch, but it may be easier to think of it in terms of four independent tests’,<sup>106</sup> with the tests being:

- a) Is the objective of the rights-limiting legislation pressing and substantial?
- b) Is there a rational connection between the rights-limiting legislation and its objectives?
- c) Does the rights-limiting legislation minimally impair the impugned right?
- d) Is the deleterious effect of the violation of rights outweighed by the salutary effect of the rights-limiting legislation?<sup>107</sup>

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<sup>100</sup> Dickson CJ initially opined that the means chosen by the legislature must ‘impair “as little as possible” the right in question’: *R v Oakes* [1986] 1 SCR 103, 139. Later, Dickson CJ in *R v Edwards Books and Art* [1986] 2 SCR 713, refined the test such that the means chosen by the legislature must ‘impair “as little as is reasonably possible” the right in question’ (at 772) (emphasis added).

<sup>101</sup> 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.

<sup>102</sup> More recently, the Supreme Court of Canada also required there to be proportionality between the negative and salutary effects of the rights-limiting legislation: *Canadian Broadcasting Corporation v Dagenais* [1994] 3 SCR 835, 889.

<sup>103</sup> 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.

<sup>104</sup> *R v Oakes* [1986] 1 SCR 103. This is as refined by *Canadian Broadcasting Corporation v Dagenais* [1994] 3 SCR 835 – see above n 102.

<sup>105</sup> *Canada (Attorney-General) v Hislop* [2007] 1 SCR 429.

<sup>106</sup> *Canada (Attorney-General) v Hislop* [2007] 1 SCR 429 [44].

<sup>107</sup> *Canada (Attorney-General) v Hislop* [2007] 1 SCR 429 [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 *UK HRA* and the *Canadian 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.<sup>108</sup>

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 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 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 external limit test 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 proportionality 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 test usually comes down to minimum impairment assessment: does the legislative measure impair the right more than is necessary to accomplish the legislative objective?<sup>109</sup>

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

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<sup>108</sup> 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.

<sup>109</sup> 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.

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.<sup>110</sup>

At this juncture, it is important to note that any general limitations provision included in any federal human rights instrument ought to be consistent with the international human rights law on the non-derogability of certain rights. This issue will be explored in detail below. The discussion above pertaining to general limitations provisions is subject to this rider.

See further:

- 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, 305-16
- 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, 153-54
- 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) *Monash University Law Review* (2007) 33 *Monash University Law Review* 9, 26-31.
- 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, 424 – 436.

### 3) Remedial powers and representative response mechanisms:

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 *Canadian Charter*, judges are empowered to invalidate legislation that they consider unjustifiably limit rights guaranteed under the *Canadian Charter*.<sup>111</sup>

<sup>110</sup> 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.

<sup>111</sup> *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 51–52.

This reflects the constitutional nature of the *Canadian 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. This usually requires the legislature to focus on minimally impairing the affected rights, but may also require the legislature to focus on the rationality of the link between the legislative objective and the legislative means chosen to achieve those objects, or the proportionality between the violation of the right and the importance of the rights-limiting legislative objective.

*Thirdly*, the legislature can re-enact the invalidated legislation *notwithstanding* the *Canadian Charter* under s 33. The legislature can override the operation of the *Canadian 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. Legislative use of the override indicates that the legislature disagrees with the judicial interpretation of the *Canadian Charter* or simply finds it unacceptable according to majoritarian sensibilities.

Use of the override provision is only *needed* when the judiciary takes issue with the legislative objectives pursued. Under the *Canadian Charter*, from 1982-97, this has happened in only 3% of *Charter* cases.<sup>112</sup> Of course, the override may also be used to secure a legislative objective by a particular legislative means found to be an unjustified limitation on rights (i.e. in the situation where the legislative means have failed the proportionality test). Presumably this would only occur when parliament was particularly wedded to the legislative means, because the less confrontational way around proportionality issues is to tweak the legislative means under the second response mechanism.

One 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

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<sup>112</sup> Leon E Trakman, William Cole-Hamilton and Sean Gatién, 'R v Oakes 1986 - 1997: Back to the Drawing Board' (1998) 36 *Osgoode Hall Law Journal* 83, 95.

commentators admit.<sup>113</sup> 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 *Canadian Charter*.<sup>114</sup> 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 *Canadian Charter*.<sup>115</sup> However, 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.<sup>116</sup> Only two of the 17 legislative attempts to utilise an override clause never came into force: once in the Yukon and once in Alberta.<sup>117</sup> Four of the 17 notwithstanding provisions have been repealed or expired without re-enactment, covering three Quebec uses and the Saskatchewan

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<sup>113</sup> 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.’

<sup>114</sup> 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.

<sup>115</sup> 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 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.

<sup>116</sup> 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.

<sup>117</sup> 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.

use.<sup>118</sup> 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 many commentators portray it to be. To be sure, there has been 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.'<sup>119</sup> In Quebec, four English-speaking Ministers of Premier Bourassa's Government resigned. Prime Minister Mulroney declared that the Canadian Constitution was 'not worth the paper it was written on.'<sup>120</sup> 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.<sup>121</sup>

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 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.<sup>122</sup> This

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<sup>118</sup> 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.

<sup>119</sup> 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.

<sup>120</sup> 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.

<sup>121</sup> 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.

<sup>122</sup> 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

suggests that '[s]ection 33 is not politically fatal.'<sup>123</sup>

At this juncture, it is important to note that any override provision included in any federal human rights instrument ought to be modelled on and consistent with the international human rights law on derogation (that is, with art 4 of the *ICCPR*). This issue will be explored in detail below. The discussion above is subject to this rider.

Under the *UK 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.<sup>124</sup> 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 *UK 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 judicial interpretation. Parliament may take this course in response to a s 4 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.<sup>125</sup> 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.

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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.

<sup>123</sup> Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001) 192.

<sup>124</sup> *Human Rights Act 1998* (UK) c 42, s 4.

<sup>125</sup> Dominic McGoldrick, 'The United Kingdom's *Human Rights Act 1998* in Theory and Practice' (2001) 50 *International and Comparative Law Quarterly* 901, 924.

Moreover, Parliament may take this course in response to a s 3 judicial 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 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 *UK 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 *UK 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;<sup>126</sup> 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 *Canadian Charter* (although it contains much greater safeguards, is consistent with international human rights law, and is accordingly the preferred model for override/derogation provisions). 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 *UK HRA* (as opposed to the Convention rights guaranteed therein). Domestically, derogation may be used 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.<sup>127</sup>

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<sup>126</sup> *Human Rights Act 1998* (UK) c 42, s 10 and sch 2.

<sup>127</sup> 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.

Thus, the judicial remedies and response mechanisms under the *UK HRA* and the *Canadian 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 *Canadian Charter* and the *UK HRA* conceive of democracy and 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 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 concerns at its core. And, of course, mainstreaming rights in our public institutions is an important step toward a broader cultural change.

See further:

- 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, 316-24

- 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, 154-56
- 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, 31-39.
- 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 – 457.

### Which Model: The Canadian Charter or the UK HRA?

In conclusion, this submission recommends that Australia 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.

In terms of a preference between the two dialogic models discussed, it helps to focus on two problems with the current system of rights protection in Australia – the under-enforcement of human rights in Australia, and the perception that the judiciary is too activist or illegitimately law-making when it contributes to the protection of human rights. These issues are better addressed under the *Canadian Charter*. The *UK 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 *Canadian Charter* as the preferred model of adoption.<sup>128</sup>

#### 1) Under-Enforcement of Rights:

The biggest problem with the *UK HRA* is its potential tendency to under-enforce human rights due to the effects of legislative inertia.<sup>129</sup> Under the *Canadian Charter*, when the judiciary assesses legislation as unjustifiably violating *Canadian Charter* rights, the individual victim gets the benefit of legislative inertia; the law is invalidated and the representative arms must take a *positive* step to re-instate the law – either by using s 1 if they wish to re-enact the same

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<sup>128</sup> The *ICCPR* is modelled more like the *UK 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 subject to non-derogability rules with respect to international human rights law, 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].

<sup>129</sup> Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001) 63.

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 *UK 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 prefer to ensure rights-compatibility of the law, and this is where legislative inertia may set in.<sup>130</sup> Legislative inertia may occur for many reasons, including the timing of an election, the unpopularity of a decision to amend the law to be rights-compatible, or an already full legislative program.

Accordingly, relying on the representative arms to undertake a positive step to secure rights-compatibility 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.

The legislative inertia scenario under the *UK HRA* model will also play out differently in Britain compared with Australia, making it an even less desirable model in Australia. Given Britain's retention of the right of individuals to petition the European Court of Human Rights, and the obligation on Britain to implement decisions of the European Court of Human Rights,<sup>131</sup> legislative inertia may not prove too problematic in Britain. However, legislative inertia remains a problem in Australia, given the lack of enforceability of the views of the human rights treaty-monitoring bodies and the distancing of Australia from the international human rights regime under the Howard era.<sup>132</sup>

The difficulty of legislative inertia is not an insurmountable bar to Australia adopting the British model. Rather, legislative inertia is an issue to be aware of and improve upon if Australia adopts an instrument based on the *UK HRA*. 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

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<sup>130</sup> The remedial order procedure under the *UK HRA* (the third response mechanism) only alleviates some causes of legislative inertia and is not a mandatory response to a declaration of incompatibility, so does not fully answer the criticism.

<sup>131</sup> *ECHR*, opened for signature 4 November 1950, 213 UNTS 221, art 46 (entered into force 3 September 1953). Under art 46, a State party must respond to an adverse decision of the European Court of Human Rights by fixing the human rights violation. The 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.

<sup>132</sup> 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; Sarah Joseph, 'The Howard Government's Record of Engagement with the International Human Rights System' (2008) 27 *Australian Yearbook of International Law* 45

incompatibility issued.<sup>133</sup> Another solution would be to adopt the preferred model – the *Canadian Charter*.

2) Judicial Activism and Judicial Law-Making:

As ironic as it may seem, the *Canadian Charter* may, in fact, preserve parliamentary sovereignty to a greater extent than the *UK HRA*, despite the fact that it is a fully entrenched constitutional document that allows for judicial invalidation of legislation. This argument relies on an exploration of the difficult task asked of judges, which is to re-interpret legislation without becoming judicial legislators under s 3 of the *UK HRA*; and the power differentials between judicial interpretation, judicial declarations of incompatibility and judicial invalidation of rights-incompatible legislation.

a) Re-interpretation:

In considering the s 3 re-interpretation issue, we need to first explore the judicial task in more detail. Under the *UK HRA*, the judicial task can be split between the classic ‘rights questions’ and the unique ‘*UK HRA* questions’ according to Woolf CJ in the *Donoghue* case.<sup>134</sup> There are two ‘rights questions’. First, the judiciary must decide whether the legislation limits the right in question.<sup>135</sup> Secondly, if so, the judiciary must assess whether the legislation is nonetheless a justifiable limitation on the right. If the legislation is an unjustifiable limit on the right, the judiciary needs to ask whether the legislation can nevertheless be saved by the s 3 interpretation power.

This brings us to the ‘*UK HRA* questions’. First, the court must alter the meaning of the legislative words, but the alteration is limited to ‘that which is necessary to achieve compatibility.’<sup>136</sup> Secondly, the court must decide whether the altered legislative interpretation is ‘possible’. In so deciding, the court’s ‘task is still one of interpretation.’<sup>137</sup> If the court must

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<sup>133</sup> See *Victorian Charter* (2006), s 37; *ACT HRA* (2004), s 33; ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003, [4.36] – [4.38]

<sup>134</sup> This structure is taken from the judgment of Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 (*Donoghue*). This approach has been explicitly and implicitly approved and followed in later cases, such as, *R v A* [2001] UKHL 25 [58]. I have modified Woolf CJ’s approach in that I have unpacked his initial question (the court must decide whether, regardless of the interpretative obligation, the legislation unjustifiably limits a right) into its component parts ((a) whether legislation limits a right, and (b) if so, whether the limit is justified).

<sup>135</sup> This involves determining the nature and scope of the right, the nature and scope of the impugned legislation, and comparing the two.

<sup>136</sup> *Donoghue* [2002] QB 48 [75].

<sup>137</sup> *Donoghue* [2002] QB 48 [75]. For case examples on this distinction, see *Adan v Newham London Borough Council and Anor* [2001] EWCA Civ 1916 [42] (*Adan*); *Roth* [2002] EWCA Civ 158 [156].

‘radically alter the effect of the legislation’ to secure compatibility, ‘this will be an indication that more than interpretation is involved.’<sup>138</sup>

When answering the ‘*UK HRA* questions’, a great deal depends on getting the distinction between judicial interpretation and judicial legislation correct – including the preservation of parliamentary sovereignty, the reputation of the judiciary, the establishment of an inter-institutional dialogue, and the effectiveness of rights protection.

In contrast, under the *Canadian Charter*, the judiciary is only asked to answer the classic ‘rights questions’. If the judiciary decide a law is an unjustifiable limitation on a protected right, the judiciary is empowered to invalidate the law. The Canadian judiciary is *not* then required to answer the very contentious and imprecise ‘*UK HRA* questions’. Canadian judges are not asked to perform the invidious task of re-interpreting rights-incompatible legislation without acting as legislators.<sup>139</sup> Rather, once legislation is invalidated, legislative power passes back to the representative arms to create a new, alternative law, or to re-enact the impugned law notwithstanding the protected rights.

This is a major advantage of the *Canadian Charter*, given the difficulties that may arise under the British model if adopted in Australia with perceived illegitimate judicial activism, perceived illegitimate judicial law-making, and the constitutional guarantee of separation of powers under the *Australian Constitution*. In short, the perceived difficulties with the British amount to an undermining of parliamentary sovereignty by stealth. At least with Canadian model, the tasks of judging and legislating are clearly allocated to the judiciary and legislature respectively.

b) Power Differentials

Turning to the power differentials, under the *UK HRA* we must first consider the power differential between judicial interpretation and judicial declarations. The power of judicial interpretation is more potent than judicial declaration, because the judiciary achieves particular legislative outcomes with interpretation which it cannot achieve through

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<sup>138</sup> *Donoghue* [2002] QB 48 [76].

<sup>139</sup> The remedy of “reading in” words to save legislation that would otherwise be an unjustifiable limitation on rights is available under the Canadian Charter. However, ‘in contrast to judicial nullification, ... “reading in” is a rarely used ... remedy’: see Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed, Oxford University Press, Canada, 2001, 3. Cases where it has been used are few and far between, including *Schachter v Canada* [1992] 2 SCR 679; *R v Feeney* [1997] 2 SCR 13; *Vriend v Alberta* [1998] 1 SCR 493. Moreover, “reading in” is highly circumscribed remedy: see Justice Frank Iacobucci, ‘Judicial Review by the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms: The First Ten Years’ in David Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (Martinus Nijhoff, Dordrecht, 1994) 93, 122-3; Justice Antonio Lamer, ‘Canada’s Legal Revolution: Judging in the Age of the Charter of Rights’ (1994) 28 *Israel Law Review* 579, 587-8.

declaration.<sup>140</sup> Through judicial interpretation, a law could operate in a manner different from that enacted (and possibly even intended) by the representative arms, whereas a declaration does not impact on the validity, operation and enforcement of the law.<sup>141</sup>

This may influence where the judiciary draws the line when answering the second ‘*UK HRA* question’; that is, the line between legitimate judicial interpretation under s 3 to save rights-incompatible legislation and the need to use s 4 declaration to avoid an act of judicial legislation to save rights-incompatible legislation. Where the line between legitimate judicial interpretation under s 3 and the need to resort to s 4 declarations is drawn potentially encroaches on parliamentary sovereignty. The more often s 3 is the chosen remedy rather than s 4, the more often judges are toying with the legislation rather than parliament.

Now this, in and of itself, is not a problem – indeed, s 3 was intended to be the primary remedial clause.<sup>142</sup> It becomes a problem, however, if s 3 is used beyond its legitimate scope. If a judge must choose between producing rights-respecting outcomes for litigants in particular cases through a strained s 3 interpretation, or enforcing incompatible laws in the case at hand coupled with a s 4 declaration, a judge’s preference for interpretation to resolve the case at hand may be understandable. However, any tendency to over-use judicial interpretation and under-use judicial declaration will undermine parliamentary sovereignty.<sup>143</sup> *Over-using* judicial interpretation may indicate a judge has strayed into judicial legislating territory, and *over-using* the interpretation power at the expense of the declaration mechanism means that decisions on how to recast rights-incompatible laws are being taken by the judiciary not the legislature – with “overusing” here being the operative word.

This situation must be contrasted with the *Canadian Charter*. Just as there is more power in judicial re-interpretation than in judicial *declaration*, similarly there is more power in judicial re-interpretation than judicial *invalidation* for the same reasons. However, the Canadian judges are only empowered to invalidate rights-incompatible laws; they are *not required*

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<sup>140</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 48.

<sup>141</sup> See generally Lord Woolf, ‘Human Rights: Have the Public Benefited?’ (Paper presented at the Thank-Offering to Britain Fund Lecture, The British Academy, London, 15 October 2002) 7.

<sup>142</sup> The Home Secretary expected ‘that, in almost all cases, the courts will be able to interpret legislation compatibly with the Convention. However, we need to provide for the *rare* cases where that cannot be done’: United Kingdom, *Parliamentary Debates*, House of Commons, 16 February 1998, col 778 (Mr Jack Straw MP, Secretary of State for the Home Department) (emphasis added). See also *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [39], [41], [46], [49]; *Sheldrake v DPP* [2005] 1 AC 264 [28].

<sup>143</sup> This will also hinder the representative arm’s ability to contribute to the institutional dialogue because one of the dialogue-inducing tools, the s 4 declaration, is being under-used.

to re-interpret them.<sup>144</sup> Judicial invalidation passes the power back to the representative arms to create a new, alternative law, or to re-enact the impugned law notwithstanding the protected rights.

Thus, the argument that, in order to retain parliamentary sovereignty, judicial powers should be limited to interpretation rather than invalidation does not hold true. In Canada, parliamentary sovereignty is preserved by the use of general limitations powers and the s 33 override power, even though judges can invalidate legislation. In Britain (and now in the ACT and Victoria), instead, we must angst over “proper” judicial interpretation versus “improper” judicial law-making, the meaning of “possibility”, deciphering when a re-interpretation is “possible” or when a declaration is required, and balancing the legislative intention behind the rights instrument against the legislative intention behind rights-incompatible legislation – in addition to the limits and override questions.

To be sure, the *Canadian Charter* is not without controversy, but the *UK HRA* interpretation and declaration mechanisms add an additional layer of controversy about the preservation of parliamentary sovereignty which, frankly, the human rights project could do without.

For a complete exploration of this argument, see Julie Debeljak, ‘Mission Impossible: “Possible” Interpretations under the *Victorian Charter* and Their Impact on Parliamentary Sovereignty and Dialogue’ in Marius Smith (ed), *Human Rights 2006: The Year in Review* (Castan Centre for Human Rights Law, Melbourne, 2007) 169-89, <<http://ecommerce.law.monash.edu.au/categories.asp?cID=2&c=215031>>

For further discussion of:

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

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<sup>144</sup> The Canadian judiciary has re-interpreted, or read in words, to save legislation that would be otherwise invalid under the *Canadian Charter*. However, cases where ‘reading in’ and bold use of interpretation has been used are few and far between, including *Schachter v Canada* [1992] 2 SCR 679; *R v Feeney* [1997] 2 SCR 13; *Vriend v Alberta* [1998] 1 SCR 493; *R v Sharpe* [2001] 1 SCR 45; *Canadian Foundation for Children, Youth and the Law v Canada (AG)* [2004] 1 SCR 76. Moreover, these decisions caused much controversy as ‘reading in’ to save legislation is *not* considered to be core to the judicial function under the *Canadian Charter*: See eg, F L Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Broadview Press Ltd, Ontario, 2000) 164-6; Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed, Oxford University Press, Canada, 2001) 3, 5, 134, 165

- The operation of the *UK HRA*, see Julie Debeljak, *Human Rights and Institutional Dialogue*, ch 5.

### **Specific Issues in the Australian Context**

We now need to consider specific issues that arise in the Australian context. These include issues arising from the *Australian Constitution*, from the operation of human rights instruments in Victoria and the ACT, and from the proposed human rights instruments in other jurisdictions (particularly Western Australia).

#### *The Australian Constitution and the Dialogue Models*

Much debate during the consultation process has centred on the constitutionality in Australia of the British model. I assume the focus has been on the British model because the government clearly stated in the Terms of Reference to the Consultation Committee that any options identified should not include a constitutionally entrenched bill of rights.<sup>145</sup>

I repeat again that my preferred model is a constitutional bill of rights modelled on the *Canadian Charter* and, failing that, the adoption of an instrument modelled on the *Canadian Charter* which is entrenched by a manner and form provision based on s 2 of the *Canadian BoR*. If the only politically viable option is my third preference – an instrument modelled on the *UK HRA* – one must resolve the constitutional issues that have arisen. This is what I now turn to.

#### 1) *Ghaidan* arguments

Former High Court judge Michael McHugh has recently expressed his view that the UK interpretative clause is not apparently constrained by the purpose of the legislation, and that such interpretation would be unconstitutional in Australia as a breach of the separation of judicial powers doctrine, as it would amount to a judicial rewriting of legislation.<sup>146</sup> With respect, I disagree with McHugh's interpretation of *Ghaidan v Godin-Mendoza*,<sup>147</sup> its differentiation from the equivalent interpretative provision in the *Victorian Charter*, and the potential influence *Ghaidan* would have in any federal human rights instrument.

##### a) The Decision in *Ghaidan*

The decision in *Ghaidan* cannot be considered in isolation. Rather, *Ghaidan* is the culmination of years of parliamentary and judicial efforts

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<sup>145</sup> National Human Rights Consultation Secretariat (Attorney-General's Department), *National Human Rights Consultation Background Paper* (2009) 16.

<sup>146</sup> Michael McHugh AC QC, 'A Human Rights Act, the Courts and the Constitution', presentation at the Australian Human Rights Commission, 5 March 2009, 23-27, available via <[http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc)>

<sup>147</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

to clarify the scope of the s 3 interpretative power. This historical and contextual background is discussed at length in 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, especially pp 40-49, and I implore the Consultation Committee to consider this. I will briefly consider this issue.

Section 3 of the *UK HRA* makes it clear that the power of judicial interpretation is not absolute. The power to re-interpret rights-incompatible laws is explicitly bounded by what is "possible" under s 3 of the *UK HRA*. A s 3 rights-compatible interpretation that was *not* possible would, in truth, be an act of judicial law-making which is not permitted; in this situation, a s 4 declaration of incompatibility ought to be made. Moreover, through jurisprudential development of the meaning of the word "possible", the judicial power to re-interpret is also influenced by the purposes of the rights-incompatible statute (a boundary which has been made explicit in s 32 of the *Victorian Charter* and s 30 of the *ACT HRA*).

The representative arms of parliament clarified the operation of s 3 during its passage through Parliament. In relation to the interaction between s 3 and s 4, the British parliamentary debates indicate that judicial interpretation and declaration are to operate in tandem, with a preference for rights-compatible interpretations, rather than frequent declarations.<sup>148</sup> The Lord Chancellor stated that the courts should 'strive to find an *interpretation* of legislation which is consistent with Convention rights *so far as the language of the legislation allows*, and only in the last resort to conclude that the legislation is simply incompatible with them.'<sup>149</sup> The Home Secretary expected 'that, in almost all cases, the courts will be able to *interpret* legislation compatibly with the Convention. However, we need to provide for the *rare cases where that cannot be done*.'<sup>150</sup> These statements clearly contemplate an interpretative role only for the judiciary, a role that is bounded by the language of the legislation being interpreted, and an acknowledgement that declarations will be required where more than interpretation is needed to "fix" legislation.

Focussing on the interpretative obligation alone, the Lord Chancellor stated during debate on the Human Rights Bill that, 'while significantly changing the nature of the interpretative process', s 3 does not allow the

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<sup>148</sup> This is evident in United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) Cm 3782, [2.13]. It was also confirmed in debate: United Kingdom, *Parliamentary Debates*, House of Lords, 19 January 1998, col 1294 (Lord Irvine, Lord Chancellor).

<sup>149</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 18 November 1997, col 535 (Lord Irvine, Lord Chancellor) (emphasis added). See also United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, col 1240 (Lord Lester).

<sup>150</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 16 February 1998, col 778 (Mr Jack Straw MP, Secretary of State for the Home Department) (emphasis added).

courts ‘to construe legislation in a way which is so radical and strained that it arrogates to the judges a power completely to rewrite existing law: that is a task for the Parliament and the executive.’<sup>151</sup> The Home Secretary stated that ‘it is not our intention that the courts, in applying [s 3], should contort the meaning of words to produce implausible or incredible meanings.’<sup>152</sup> Rather, s 3 is supposed to enable ‘the courts to find an interpretation of legislation that is consistent with Convention rights, *so far as the plain words of the legislation allow*.’<sup>153</sup> Again, these statements clearly contemplate an interpretative role only for the judiciary and clearly exclude a legislative role.

Judicial interpretations of s 3 have elaborated on the interpretative boundary imposed by the word “possible”. The decision of *Ghaidan* built upon the decisions of such cases as *Donoghue*,<sup>154</sup> *R v A*,<sup>155</sup> *Lambert*,<sup>156</sup> *re S*,<sup>157</sup> *Bellinger v Bellinger*,<sup>158</sup> and *Anderson*<sup>159</sup> (as discussed in my article from pp 40-44).

In *Ghaidan*,<sup>160</sup> a provision of the *Rents Act 1997*,<sup>161</sup> which secured a statutory tenancy by succession for survivors in heterosexual relationships, whether married or unmarried, was held to violate the rights of cohabiting homosexual couples – in particular, the right to respect for home under art 8 when read with non-discrimination rights under art 14 of the *ECHR*. The rights-incompatible provision was the definition of

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<sup>151</sup> Lord Irvine, ‘Activism and Restraint: Human Rights and the Interpretative Process’ (Paper presented at the *Paul Sieghart Memorial Lecture*, London, 20 April 1999) [4.1]. Judicial interpretation cannot ‘stretch legislative language – beyond breaking point’: at [4.1].

<sup>152</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 3 June 1998, col 421 (Mr Jack Straw MP, Secretary of State for the Home Department).

<sup>153</sup> *Ibid*, col 421-423.

<sup>154</sup> *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595

<sup>155</sup> *R v A (No 2)* [2001] UKHL 25. For further analysis of the *R v A* decision, 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, 46-49; Aileen Kavanagh, ‘Unlocking the *Human Rights Act*: The “Radical” Approach to Section 3(1) Revisited’ [2005] 3 *European Human Rights Law Review* 259.

<sup>156</sup> *R v Lambert* [2001] UKHL 37.

<sup>157</sup> *In re S (Minors) (Care Order: Implementation of Care Plan); In re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10 (‘*re S*’).

<sup>158</sup> *Bellinger v Bellinger* [2003] UKHL 21.

<sup>159</sup> *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46.

<sup>160</sup> *Ghaidan* [2004] UKHL 30.

<sup>161</sup> *Rents Act 1977* (UK).

“spouse”: ‘a person who was living with the original tenant as his or her wife of husband.’<sup>162</sup> The House of Lords, in upholding the Court of Appeal, saved this provision through s 3 interpretation by reading in three words, so the definition became ‘... as *if they were* his or her wife of husband...’.<sup>163</sup>

Lord Nicholls delivered the leading judgment in *Ghaidan*. McHugh quotes the most relevant tracts of his Lordship’s decision,<sup>164</sup> with this being the part of Lord Nicholls decision upon which I will comment.

In contemplating the reach of s 3, Lord Nicholls admits that ‘... section 3 itself is not free from ambiguity’<sup>165</sup> 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.’<sup>166</sup> 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.’<sup>167</sup> Lord Nicholls then states that:

the 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 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.<sup>168</sup>

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<sup>162</sup> *Rents Act 1977* (UK), Sch 1, para 2(2).

<sup>163</sup> *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 approach to s 3 interpretation [69], but did not agree that the particular s 3 interpretation that was necessary to save the provision was ‘possible’: see espec [57], [78]. [81], [82], [96], [99], [101].

<sup>164</sup> Michael McHugh AC QC, ‘A Human Rights Act, the Courts and the Constitution’, presentation at the Australian Human Rights Commission, 5 March 2009, 22-23, available via <[http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc).

<sup>165</sup> *Ghaidan* [2004] UKHL 30 [27].

<sup>166</sup> *Ghaidan* [2004] UKHL 30 [27].

<sup>167</sup> *Ghaidan* [2004] UKHL 30 [27]. Note that His Lordship rejected the notion that resolving the ambiguity ought to be the standard, as being too narrow an interpretation: [28] – [29].

<sup>168</sup> *Ghaidan* [2004] UKHL 30 [30].

This passage needs to be approached with caution, particularly Lord Nicholls comments about departing from parliamentary intention. It is not at all clear that Lord Nicholls instructs courts to go against the will of parliament; especially given that Lord Nicholls then goes on to articulate a set of guidelines about what s 3 does and does not allow. This set of guidelines includes instructions that s 3 does not allow an interpretation that goes against fundamental features of legislation. 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 the impugned legislation.

Lord Nicholls' set of guidelines pertaining to the reach of s 3 are illuminating. Section 3 enables '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"'.<sup>169</sup> 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."<sup>170</sup>

Focusing first on the set of guidelines given for s 3 interpretations, nothing in this list is unusual for the regular judicial interpretative tool box. Judges regularly interpret legislation expansively and restrictively, read in words, or modify meaning to avoid injustices and absurdities. These exercises of judicial interpretation are within or incidental to the normal range of judicial powers.

Focusing on departures from parliamentary intention, *Ghaidan* and *Sheldrake*<sup>171</sup> 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. It is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation would not support a rights incompatible parliamentary intention, and thus leave

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<sup>169</sup> *Ghaidan* [2004] UKHL 30 [32].

<sup>170</sup> *Ghaidan* [2004] UKHL 30 [33]. 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.'

<sup>171</sup> *Sheldrake v DPP* [2005] 1 AC 264 [28].

legislation open to judicial re-write.<sup>172</sup> These are all boundaries on the judicial interpretation power (and are discussed further in the next section) and indicate that s 3 does not sanction the exercise of non-judicial power – being acts of judicial legislation – by the judiciary.

In my opinion, it is dangerous to latch onto the words used by judges to describe what “possible” allows under s 3. To say that parliamentary intention may be departed from, but then to say that judges cannot undermine the fundamental features, go against the grain or interpret incompatibly with the underlying thrust of legislation is tautological. Is not parliamentary intention derived from fundamental features, underlying thrusts, and grains of legislation? Perhaps the constitutional concerns arising under the *Australian Constitution* is nothing more than semantics, and if we look beyond the words (such as, parliamentary intention and re-writing legislation) and consider what judges are actually doing to legislation, we may realise that s 3 does not sanction judicial acts of legislation.<sup>173</sup> Indeed, as Lord Bingham states in *Sheldrake*, after giving a similar exposition on s 3 to that of Lord Nicholls:

All of these expressions, as I respectfully think, yield valuable insights, 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...”.<sup>174</sup>

Similar sentiment was earlier expressed by Woolf CJ in *Donoghue*, when he stated that Woolf CJ 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.’<sup>175</sup> Perhaps the lesson for Australia is not to angst too much in the abstract about the meaning of s 3, and to simply understand it through its applications in particular cases.

Finally, one needs to keep in mind the competing parliamentary intentions that Lord Nicholls acknowledged: the parliamentary intentions in the *UK HRA* (rights-compatibility) and the impugned legislation (rights-incompatibility), as discussed further in the next section. In enacting the *UK HRA*, Parliament acknowledged that democracy and parliamentary supremacy must be tempered by rights that are partly interpreted by judges.

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<sup>172</sup> In my opinion, *R v A (No 2)* [2001] UKHL 25 (*‘R v A’*) is not even an instance of this. See below n 182. 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.

<sup>173</sup> See above n 172.

<sup>174</sup> *Sheldrake v DPP* [2005] 1 AC 264 [28].

<sup>175</sup> *Donoghue* [2001] EWCA Civ 595 [76].

In conclusion, I am not being a myopic apologist for s 3 of the *UK HRA*. The main thrust of the article in which this analysis appears is to highlight ways in which the statutory British model of human rights instruments could usurp parliamentary sovereignty if not approached in certain ways and interpreted in certain ways. Indeed, my preferred model for Australia is the *Canadian Charter*. The fact remains, however, that *Ghaidan* is bounded and s 3 does not allow for judicial acts of legislation.

b) *Ghaidan and the Victorian Charter*

McHugh states that the *UK HRA* ‘gives the courts a far more radical power of interpretation than is found in the Victorian and ACT legislation.’<sup>176</sup>

It thus falls to be resolved whether the additional phrase “consistently with [statutory] purpose” under s 32 of the *Victorian Charter* is an additional, unique proviso placed on the s 32 judicial interpretative power, or simply a codification of the British jurisprudence pertaining to s 3 of the *UK HRA*. The weight of authority is clear that the phraseology used under s 32 is and was intended to be a codification of the *Ghaidan* test. Given this, I respectfully disagree with McHugh’s stance.

The arguments are canvassed in great detail in 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, 49-56, and I implore the Consultation Committee to read this extract. In brief, the arguments are as follows.

First, the Explanatory Memorandum to the *Victorian Charter* states that the reference to statutory purpose is to ensure ‘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.’<sup>177</sup> This is no more than a *codification* of the British jurisprudence to date culminating in *Ghaidan*, which categorises displacement of parliamentary purposes and displacement of legislative objectives as examples of *impossible* interpretations.

Indeed, the HRC Committee recommended the inclusion of “consistently with [statutory] purpose” and it expressly acknowledged that the inclusion of this phrase was ‘consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was

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<sup>176</sup> Michael McHugh AC QC, ‘A Human Rights Act, the Courts and the Constitution’, presentation at the Australian Human Rights Commission, 5 March 2009, 20, available via <[http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc).

<sup>177</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 23. The parliamentary debate was silent on the matter.

favoured.’<sup>178</sup> The HRC Committee expressly cited the case of *Ghaidan*, particularly Lord Nicholls’ opinion that s 3 interpretation ‘must be compatible with the underlying thrust of the legislation being construed’ and Lord Rodger’s opinion that s 3 ‘does not allow the courts to change the substance of a 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.’<sup>179</sup> This has now been confirmed by Bell J in one of the leading Victorian Charter cases of *Kracke v Mental Health Review Board and Ors*.<sup>180</sup>

Secondly, beyond *Ghaidan*, many British cases support “consistently with [statutory] purpose” as an example of *impossible* interpretations. In relation to the concern evident in the Explanatory Memorandum to preserve parliamentary intention, there is growing British jurisprudence that a displacement of parliamentary intention would not constitute a possible interpretation. Indeed, even in the ‘high water mark’<sup>181</sup> judgment of Lord Steyn in *R v A*,<sup>182</sup> his Lordship recognised the need to ensure the viability of the essence of the legislative intention of the legislation being construed under s 3.<sup>183</sup> Lord Hope in *R v A* emphasised that a s 3 interpretation is not possible if it contradicted express or necessarily implicit provisions in the impugned legislation because express legislative language or necessary implications thereto are the ‘means of identifying the plain intention of Parliament.’<sup>184</sup> His Lordship further highlighted in *Lambert* that interpretation involves giving ‘effect to the presumed intention’<sup>185</sup> of the enacting parliament. Lord Nicholls in *re S* identified a clear parliamentary intent to give the courts threshold jurisdiction over

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<sup>178</sup> Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, 83. See also Human Rights Law Resource Centre, ‘The Victorian Charter of Human Rights and Responsibilities’, *Human Rights Law Resource Manual* (2006), ch 5, 46.

<sup>179</sup> *Ghaidan* [2004] UKHL 30 [33] (Lord Nicholls), [100] (Lord Rodger). Pamela Tate SC, the Solicitor-General, further explains that the focus on the *Ghaidan* decision and the more purposive approach to interpretation was to avoid judicial interpretations, such as, *R v A* [2001] UKHL 25: Pamela Tate, ‘The *Charter of Human Rights and Responsibilities*’ (Paper presented at the Australian Institute of Administrative Law (Victorian Chapter), Melbourne) 19-20; Pamela Tate, ‘Some Reflections on Victoria’s *Charter of Human Rights and Responsibilities*’ (2007) 52 *Australian Institute of Administrative Law Forum* 18, 28. See also George Williams, ‘The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope’ (2007) 30 *Melbourne University Law Review* 880, 902.

<sup>180</sup> *Kracke v Mental Health Review Board and Ors* (General) [2009] VCAT 646 [214] – [217].

<sup>181</sup> John Wadham, ‘The *Human Rights Act*: One Year On’ [2001] *European Human Rights Law Review* 620, 638.

<sup>182</sup> *R v A* [2001] UKHL 25.

<sup>183</sup> *R v A* [2001] UKHL 25 [44] – [45].

<sup>184</sup> *Ibid* [108] (Lord Hope).

<sup>185</sup> *Lambert* [2001] UKHL 37 [81].

care orders with no continuing supervisory role, which the s 3 interpretation of the Court of Appeal improperly displaced.

In relation to the concern evident in the Explanatory Memorandum to preserve legislative objects, the British jurisprudence has held that s 3 interpretation will not allow displacement of the fundamental features of legislation. This is clear in *Ghaidan, re S* and in *R v Anderson*.<sup>186</sup> Overall, the additional phrase “consistent with [statutory] purpose” in the *Victorian Charter* simply codifies the British jurisprudence, such that the main operative limit on the s 3/s 32 judicial interpretation power is that an interpretation must be “possible”, with an interpretation that is inconsistent with statutory purpose being an example of an impossible interpretation.

Thirdly, it is important to canvas another aspect of *Ghaidan* that was not mentioned in the HRC Committee report, the Explanatory Memorandum to the *Victorian Charter* or the parliamentary debate on the Bill.<sup>187</sup> Recall that Lord Nicholls in *Ghaidan* acknowledges the potential for a clash of intentions – the parliamentary intention in enacting the *HRA* (rights-compatibility) and a parliamentary intention evident in rights-incompatible legislation (rights-incompatibility). His Lordship did *not* hold that one parliamentary intention would *automatically* prevail over the other. Rather, his Lordship set out the circumstances when the *UK HRA* intention would prevail (such as, reading legislation expansively or restrictively, reading-in words, modifying the meaning of words and the like) and when the impugned legislative intention would prevail (such as, when a fundamental feature is displaced).

Fourthly, if the Victorian courts were to reject that the inclusion of “consistently with [statutory] purpose” is a codification of the British jurisprudence and particularly the *Ghaidan* authority, numerous problems and anomalies arise, which are discussed in detail in 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*

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<sup>186</sup> *Ghaidan* [2004] UKHL 30 and *re S* [2002] UKHL 10 are discussed above. In *Anderson* [2002] UKHL 46, the imposition of a sentence, which includes the tariff period, was held to be part of the trial such that the involvement of the Home Secretary in tariff setting violated the convicted murderers’ art 6(1) right ([20] – [29] (Lord Bingham), [49], [54] – [57] (Lord Steyn), [67], [78] (Lord Hutton)). The House of Lords then concluded that the legislative provision on tariff setting could not be interpreted compatibly with Convention rights under s 3 of the *HRA*. Under legislation ‘the decision on how long the convicted murderer should remain in prison for punitive purposes is [the Home Secretary’s] alone’ (at [30] (Lord Bingham), [80] (Lord Hutton)). To interpret the legislation ‘as precluding participation by the Home Secretary ... would not be judicial interpretation but judicial vandalism’ (at [30] (Lord Bingham), giving the provision a different effect from that intended by Parliament. See also [59] (Lord Steyn), [81] (Lord Hutton). The House of Lords issued a declaration of incompatibility.

<sup>187</sup> See also Simon Evans and Carolyn Evans, ‘Legal Redress Under the *Charter of Human Rights and Responsibilities*’ (2006) 17 *Public Law Review* 264, 268.

*Law Review* 9, 52-55.

In brief, is it open for the Victorian judiciary to hold that “consistently with [statutory] purpose” requires the judiciary to *automatically* favour the statutory purposes of the impugned legislation over the purposes of the *Charter* when interpreting under s 32? If yes, this significantly reduces the impact of an already relatively weak human rights instrument.<sup>188</sup> This would undermine s 32 as the primary remedial mechanism in the *Charter*.<sup>189</sup> Further, can the purpose of impugned legislation be properly assessed without any reference to the purpose of the *Victorian Charter* in protecting and promoting rights? Surely the commitment to the rights in the *Victorian Charter* must have some weight when assessing the purposes behind post-*Victorian Charter* legislation, and most definitely when considering pre-*Victorian Charter* legislation, particularly given the fact that such legislation could not have been enacted with avoidance of protected rights in mind? Furthermore, how would such a restricted reading of s 32 interact with statements of compatibility? Would a statement of compatibility that was contradictory with an incompatible statutory purpose simply be ignored, rendering s 28 farcical and one dialogue tool unreliable?

Finally, reference to the *ICCPR* may help to clarify the meaning of “consistently with [statutory] purpose”. Article 2(3) of the *ICCPR* imposes an obligation on States parties to provide effective remedies for violations of rights. The narrower the s 32 judicial power of interpretation, the less likely Victorians will be provided with effective remedies. Internationally, this risks a violation of international human rights law and undermines the international rule of law.

c) *Ghaidan and a federal human rights instrument*

The above analysis of the meaning of s 3 under the *UK HRA* and the reach of the *Victorian Charter* clarify the reach of interpretative provisions based on the British model of human rights instruments.

In my opinion, such interpretative provisions do not permit judges to legislate in order to achieve a rights-compatible interpretation of legislation that, at first glance, is rights-incompatible. Two clear riders prevent this from happening: (a) the fact that the interpretative obligation is bounded by what is “possible”; and (b) the fact that a re-interpretation must be consistent with statutory purpose (whether developed via the British jurisprudence or explicit in the *Victorian Charter* and *ACT HRA*).

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<sup>188</sup> Given that s 38 and 39 do not confer a free-standing, independent remedy for unlawfulness (see below), s 32 is the primary remedy under the *Victorian Charter*.

<sup>189</sup> Human Rights Law Resource Centre, above n 178, ch 5, 46. This is true of the *UK HRA*, see above n 142.

Given this, the adoption of s 3 of the *UK HRA* or s 32 of the *Victorian Charter* or s 30 of the *ACT HRA*, in my opinion, poses no challenge to the separation of powers doctrine implied into the *Australian Constitution*.<sup>190</sup> Indeed, McHugh admits that the High Court of Australia would be likely to give an interpretative provision worded identically to s 3 of the *UK HRA*<sup>191</sup> the same meaning as the s 32 of the *Victorian Charter* and s 30 of the *ACT HRA*: the High Court ‘would hold that, on its proper construction, [s 3] required legislation to be interpreted in a way that is compatible with human rights only when such an interpretation was consistent with the purpose of the legislation.’<sup>192</sup> In my opinion, this is correct because the *Victorian Charter* codifies the British jurisprudence. In McHugh’s opinion, this is because the *Victoria Charter* somehow circumscribes the radical nature of s 3 of the *UK HRA*. On either reading, it appears that an interpretative provision that contains the two riders which prevent judicial acts of legislation is on safe constitutional ground.

Finally, I would like to reiterate the interaction between the *ICCPR* and the meaning of “consistently with [statutory] purpose”. Article 2(3) of the *ICCPR* imposes an obligation on States parties to provide effective remedies for violations of rights. The narrower the s 32 judicial power of interpretation, the less likely those in the jurisdiction of Victoria, and Australia if this model is adopted, will be provided with effective remedies. Internationally, this risks a violation of international human rights law and undermines the international rule of law. Federally, it may render any attempt at domesticating human rights unconstitutional for lack of a head of power. The failure to provide an effective remedy for violations of human rights may undermine a treaty obligation, and therefore fail to come within the external affairs power under s 51(29) of

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<sup>190</sup> *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) and *R v Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 CLR 194 establish that only judicial power, or powers ancillary or incidental thereto, can be exercised by the judiciary under Chapter III. *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 and *Hilton v Wells* (1985) 157 CLR 57 establish that non-judicial power can be lawfully conferred on a judge of a Chapter III courts acting *persona designata*. *Grollo v Palmer* (1995) 184 CLR 348 and *Wilson v Minister for Aboriginal Affairs* (1996) 189 CLR 1 establish the incompatibility doctrine, which has been extended to apply to State Courts exercising federal jurisdiction (see *Kable v DPP (NSW)* (1996) 189 CLR 51). See Joseph and Castan, above n 32, 121-46; Cheryl Saunders, ‘Judicial Independence in Its Political and Constitutional Context (Presented at the *Judicial Conference of Australian Symposium: Judicial Independence and the Rule of Law at the Turn of the Century*, Canberra, 2 November 1996) 8-13 (‘Judicial Independence’); Kristen Walker, ‘*Persona Designata, Incompatibility and the Separation of Powers*’ (1997) 8 *Public Law Review* 153; Cheryl Saunders, ‘The Separation of Powers’, in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, Melbourne, 2000) 3.

<sup>191</sup> That is, s 49(1) of the *New Matilda Bill*.

<sup>192</sup> Michael McHugh AC QC, ‘A Human Rights Act, the Courts and the Constitution’, presentation at the Australian Human Rights Commission, 5 March 2009, 29, available via <[http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc)>

the *Australian Constitution*. In addition, a failure to provide an effective remedy may indicate that the law incorporating the treaty is not appropriate and adapted, and thus fall outside the external affairs power.

2) Declarations of Incompatibility/Inconsistent Interpretation:

A controversy has arisen in relation to the declaration of incompatibility (s 4 of the *UK HRA*)/declaration of inconsistent interpretation (s 36 of the *Victorian Charter*) in the Australian context. Some commentators have queried whether conferring such a power on the judiciary would fall foul of the implied separation of powers principle under the *Australian Constitution*.<sup>193</sup> According to the argument, to invest a power to issue declarations of incompatibility, which arguably have no legal consequence, in the federal judiciary is to invest the federal judicial arm with a non-judicial power in violation of the principle of separation of powers. It is also argued that such declarations may, in truth, be advisory opinions which the federal judiciary have no power to issue.<sup>194</sup> The arguments in favour of the constitutionality of such clauses,<sup>195</sup> and against such constitutionality,<sup>196</sup> are canvassed in considerable detail elsewhere.

In terms of the assessment and resolution of these arguments, I endorse the submission of the Castan Centre, as follows, in brief:

- a) I do not believe that investing the power to issue declarations of incompatibility in federal judges is so obviously unconstitutional as to render its enactment unwise. Nor do I believe that any human rights instrument proposed by the Consultation Committee must be “constitutionally watertight”. This standard is not required of other

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<sup>193</sup> *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) and *R v Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 CLR 194 establish that only judicial power, or powers ancillary or incidental thereto, can be exercised by the judiciary under Chapter III. *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 and *Hilton v Wells* (1985) 157 CLR 57 establish that non-judicial power can be lawfully conferred on a judge of a Chapter III courts acting persona designata. *Grollo v Palmer* (1995) 184 CLR 348 and *Wilson v Minister for Aboriginal Affairs* (1996) 189 CLR 1 establish the incompatibility doctrine, which has been extended to apply to State Courts exercising federal jurisdiction (see *Kable v DPP (NSW)* (1996) 189 CLR 51). See Joseph and Castan, above n 32, 121-46; Cheryl Saunders, ‘Judicial Independence in Its Political and Constitutional Context (Presented at the *Judicial Conference of Australian Symposium: Judicial Independence and the Rule of Law at the Turn of the Century*, Canberra, 2 November 1996) 8-13 (‘Judicial Independence’); Kristen Walker, ‘Persona Designata, Incompatibility and the Separation of Powers’ (1997) 8 *Public Law Review* 153; Cheryl Saunders, ‘The Separation of Powers’, in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, Melbourne, 2000) 3.

<sup>194</sup> See *Re Judiciary and Navigation Acts (Advisory Opinions Case)* (1921) 29 CLR 257.

<sup>195</sup> Dominique Dalla-Pozza and George Williams, ‘The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights’ (2006) 12 *Deakin Law Review* 1

<sup>196</sup> Hon Michael McHugh AC, QC, ‘A Human Rights Act, the Courts and the Constitution’ (Presentation given at the Australian Human Rights Commission, 5 March 2009).

legislation enacted by federal parliaments, and it equally should not be required in this instance.

- b) I support the argument that the power to issue declarations of incompatibility is likely to be characterised as incidental to the exercise of judicial power, namely the judicial power of interpreting laws (in this instance, the judicial power of interpreting laws in accordance with human rights).<sup>197</sup> If a judge *de jure* finds that a law is simply incapable of being interpreted in a way that is compatible with human rights, the judge is *de facto* finding that the law is incompatible with human rights. The statutory based ‘declaration’ mechanism simply formalizes that process and may be justified under the incidental power.

This conclusion in the Castan Centre submission is further supported by the fact that the interpretative provision is the major remedial provision in statutory human right instruments based on the British model.<sup>198</sup> The provision of remedies is a core judicial function, with the declaration mechanism either forming part of that function or being incidental to that function.

- c) I support the alternative process suggested in the Castan Centre submission if the declaration mechanism is found to be unconstitutional for conferring a non-judicial power on federal judges and not incidental to the exercise of judicial power.

The alternative proposal to a judicial declaration mechanism proposed by the Australian Human Rights Commission is also viable.<sup>199</sup>

Finally, it should be noted that without some way in which to notify the representative arms of the judiciary’s view on the rights-incompatibility of legislation, a dialogue model cannot be created. Notifying the representative arms of the judicial opinion is an essential element to developing a dialogue

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<sup>197</sup> *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) and *R v Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 CLR 194 establish that only judicial power, or powers ancillary or incidental thereto, can be exercised by the judiciary under Chapter III.

<sup>198</sup> I refer you the Home Secretary during parliamentary debate on the Human Rights Bill, where expected ‘that, in almost all cases, the courts will be able to interpret legislation compatibly with the Convention. However, we need to provide for the *rare* cases where that cannot be done’: United Kingdom, *Parliamentary Debates*, House of Commons, 16 February 1998, col 778 (Mr Jack Straw MP, Secretary of State for the Home Department) (emphasis added). I also refer you to Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [39], [41], [49]. See further 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.

<sup>199</sup> Australian Human Rights Commission, *Constitutional Validity of an Australian Human Rights Act*, 22 April 2009 [6].

between the arms of government. It also ensures that the judicially-assessed human rights costs of representative action are clearly identified, with the representative arms taking responsibility for them.

3) Conclusion:

To conclude the discussion about constitutionality, it ought to be repeated that adoption of a constitutionally entrenched dialogue model based on the *Canadian Charter* avoids the constitutional arguments and uncertainty associated with British dialogue model; so too would the adoption of an instrument modelled on the *Canadian Charter* which is entrenched by a manner and form provision based on s 2 of the *Canadian BoR*.

*The Wording of a Rights-Compatible Interpretation Provision*

If the Consultation Committee is to prefer a statutory model of rights protection modelled on the *UK HRA*, the precise wording of the interpretative provision becomes an issue. As stated above, I prefer the wording of s 32 of the *Victorian Charter*, which is a codification of the jurisprudence developed under the *UK HRA* and which has since been adopted under the *ACT HRA*.<sup>200</sup>

The wording of an interpretative provision that was proposed during the Western Australian Consultation Process and endorsed in a Draft Bill in the Committee's final report<sup>201</sup> should not be adopted. Draft cl 34(3) reads:

If the meaning of a provision of a written law, as conveyed by the ordinary meaning of its text and taking into account its context in the written law and the purpose or object underlying the written law —

- (a) is ambiguous or obscure; or
- (b) leads to a result that is manifestly absurd or is unreasonable,

the provision must be interpreted —

- (c) in a way that is compatible with human rights in so far as it possible to do so consistently with the purpose or object underlying the written law; and
- (d) taking into account the extent to which Part 6<sup>202</sup> requires persons to act compatibly with human rights.

The draft cl 34 contains numerous problems, both in and of itself, and when coupled with a limitations clause, as follows:

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<sup>200</sup> For further discussion of the *Victorian Charter* and *UK HRA* interpretative obligation, please 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, 49-55.

<sup>201</sup> *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act*, November 2007.

<sup>202</sup> Part 6 of the Human Rights Bill 2007 (WA) addresses the obligations of government agencies with respect to human rights.

1) Clause 34 itself:

First, the draft cl 34 of the Human Rights Bill 2007 (WA) unduly restricts the circumstances when a law can be interpreted rights-compatibly. Indeed, the current draft cl 34 appears to be little more than the current common law position about instances when international human rights law can be taken into account (see Question 2 above).

Secondly, to require ambiguity, obscurity, or a manifestly absurd or unreasonable result before the interpretative obligation operates, significantly weakens the main remedial provisions of statutory human rights instruments. Given that parliamentary sovereignty is retained, and the absence of any free-standing remedy for breach of a human right in the proposed WA model, a strong interpretative power is vital to provide human rights remedies for potential violations. From a human rights perspective, to limit the use of the interpretative power as radically as draft cl 34 does, so significantly and dramatically weakens the instrument to the extent that it brings the efficacy of the entire instrument into question.

Thirdly, although the *Human Rights for WA Discussion Paper* (*'Discussion Paper'*) indicates that it has introduced the requirements of ambiguity, obscurity, manifest absurdity or unreasonableness 'in order to avoid confusion',<sup>203</sup> these requirements will cause confusion. Whether a meaning is ambiguous, obscure, manifestly absurd or unreasonable are contentious questions, which different people (be they citizens, parliamentarians, judges, or members of the government) will have differing views. Moreover, they are tests that will invite subjective, rather than objective, assessments. To gauge the spectrum of views on ambiguity and its subjective nature, one need look no further than the decisions of the High Court of Australia – one Justice's unambiguous law is another Justice's irreparably ambiguous law. To add the requirements of ambiguity, obscurity, manifest absurdity or unreasonableness to the issues of "possible" and "consistent with statutory purpose" will only serve to increase confusion, increase litigation, and increase the complexity of the test to be applied when using the interpretative obligation.

Fourthly, it must be kept in mind that interpretative provisions under statutory models apply to any person interpreting a law – to the executive, the legislature and the judiciary. This is designed to encourage an inter-institutional dialogue about the scope and meaning of the protected rights, and the justifiability of limitations to rights. If the interpretative provision is drafted in as complicated manner as draft cl 34, one casualty may be the dialogue. Indeed, the complexity injected into draft cl 34 because of the requirements of ambiguity, obscurity, manifest absurdity or unreasonableness, may result in a judge-driven instrument, rather than a co-equal dialogue between the executive, legislature and judiciary. If the riders to the use of the interpretation provision are too complicated, controversial and subjective, the representative arms may concede the resolution of these issues to the judiciary, and then seek to "rights proof" their legislative activity. Such an outcome resemble a judicial monologue, rather

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<sup>203</sup> *Human Rights for WA Discussion Paper*, 24 (*'Discussion Paper'*).

than an inter-institutional dialogue.

Fifthly, this change to the interpretative obligation has no equivalent under any other human rights instrument. There is no guidance from comparative jurisdictions as to how this should operate. This, alone, increases the uncertainty surrounding the adoption of draft cl 34.

A much more sensible and clear approach is to adopt the wording of s 32 of the *Victorian Charter*, which in effect states that ‘all laws must be interpreted in a way that is compatible with human rights in so far as it is possible to do so consistently with the purpose of the law’. Such an over-arching obligation is simple to apply – it applies to all laws and in all situations (rather than only upon a finding of ambiguity, obscurity, manifest absurdity or unreasonableness).

Nor does such an obligation open the human rights ‘floodgates’. There is no evidence in the United Kingdom that the interpretation obligation under s 3 of the *UK HRA* has caused major interpretation problems for the courts, the parliament or the executive. Indeed, in a review by the British Government of the operation of five years of the *UK HRA*, it found that the *UK HRA* had no negative impacts on the law or the government’s policy agenda, except in one case;<sup>204</sup> rather, there had either been no significant impact at all or a beneficial impact.<sup>205</sup> This undermines any attempt by the Australian Government or Western Australian Government which seeks to weaken the primary remedial provision (the interpretation provision) in a statutory human rights instrument modelled on the *UK HRA*.

## 2) When Coupled with a Limitations Power:

Another problem with the Human Rights Bill 2007 (WA) is the location of the general limitations power (s 34(4)). It is most unusual for a general limitations power to be contained in the enforcement/remedial provisions Part of legislation, rather than in the protection of rights Part of legislation.

The power to justifiably limit protected rights is intimately connected with the right, not the remedy. Indeed, in all comparative instruments, the justifiable limitation power is connected to the statement of the rights, rather than the remedial provisions (e.g., s 1 of the *Canadian Charter*; s 36 of the *Constitution of the Republic of South Africa 1996*; s 5 of the *New Zealand Bill of Rights Act 1990*; arts 8 to 11 of the *European Convention on Human Rights*; s 7 of the *Victorian Charter*).

Moreover, the usual approach to a human rights problem (described above as the classic ‘rights questions’) is to assess: (a) whether a law engages or limits a

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<sup>204</sup> That case being not returning non-national suspected terrorists to a country where they are at risk of suffering torture.

<sup>205</sup> Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, June 2006, 1.

protected right; and (b) if so, whether the limitation is justifiable under a limitations power. It is only once an unjustifiable limitation is found that one turns to remedial provisions (described above as the ‘UK HRA questions’), such as the interpretation power.<sup>206</sup> To place the limitations power within draft cl 34(4) confuses the assessment of whether there has been an unjustifiable restriction/limitation placed on rights, with the assessment of the appropriate remedy if the former has occurred.

Moreover, many more laws will be subject to s 34(3) power of interpretation if the limitations power is located in cl 34 and effectively tied to cl 34(3), than if the limitations power were located with and tied to the rights themselves. If the limitation power is tied to the protected rights, and any limitation on rights is assessed as justifiable, cl 34(3) interpretation does not arise. In contrast, if the limitation power is tied to the remedy, any time a right is engaged (which is frequently, given the breadth of the rights), cl 34(3) interpretation will be engaged automatically to establish whether or not a limitation is justifiable.

It is my strong opinion that under the Human Rights Bill 2007 (WA), s 34(4) should be removed from Part 5 altogether and inserted in Part 2. I also recommend that any Australian instrument ties limitations provisions to the protected rights rather than the remedial provisions.

#### *The Appropriate Limitation and Override Provisions*

Thought needs to be given to the need for and appropriate reach of limitations and override provisions in any instrument proposed for Australia. I have extensively critiqued the limitation and override provisions in the *Victorian Charter*,<sup>207</sup> and I recommend the Consultation Committee read this critique which is appended to this submission.

There are four main methods of restricting rights.<sup>208</sup> First, rights may be internally qualified, such as the internal qualifications to the right to liberty and security of the person under the *ICCPR* and *ECHR*.<sup>209</sup> Secondly, rights may be internally limited, such as the internal limits placed in the freedom of religion and expression under the

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<sup>206</sup> See, for example, Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595.

<sup>207</sup> 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.

<sup>208</sup> 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, 424-26.

<sup>209</sup> See *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, arts 8, 9, 10, 14 (entered into force 23 March 1976); *ECHR*, opened for signature 4 November 1950, 213 UNTS 222, art 5 (entered into force 3 September 1953). See also *Canadian Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 7–14. The terms of most qualifications means that the assessment of the qualification usually proceeds similarly to that for limitations. Prescription by law, rationality and reasonableness are the elements that usually need to be satisfied for a qualification to be lawful.

*ICCPR* and *ECHR*.<sup>210</sup> Thirdly, rights can be externally limited, such as the general limitations power under s 1 of the *Canadian Charter*.<sup>211</sup> Fourthly, rights can be temporarily suspended in exceptional circumstances. In the international and regional setting, this is referred to as *derogation*. In the domestic setting, temporary suspension is more commonly referred to as *overriding* rights.

Under the *Victorian Charter*, which is a statutory human rights instrument modelled on the *UK HRA*, each form of limitation has been adopted. The adoption of all limitations mechanisms is excessive and the reach of the general limitations power and the override power is excessive. My arguments in relation to the limitations and override provisions in the *Victorian Charter* are found in 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. In brief, they include the following:

1) The General Limitations Provision:

Section 7(2) of the *Victorian Charter* contains the following general limitations clause: rights protected under the *Victorian Charter* may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.'

According to international human rights law, it is permissible to place qualifications and limitations on certain individual rights. Moreover, there is nothing in international human rights law to suggest that qualifications and limitations cannot be as effectively imposed by a generally-worded external limitations power, rather than specifically-worded internal qualifications or internal limitations. However, a generally-worded external limitations clause that applies to all protected rights is problematic, as not all rights may be lawfully subject to qualification, limitation, override or derogation in international human rights law because some rights are absolute.

To the extent that s 7 of the *Charter* applies to so-called absolute rights, it does

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<sup>210</sup> See *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, arts 12, 18, 19, 21, and 22 (entered into force 23 March 1976); *ECHR*, opened for signature 4 November 1950, 213 UNTS 222, art 8 – 11 (entered into force 3 September 1953). 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; and 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.'

<sup>211</sup> *Canadian Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 1. See also *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, art 4 (entered into force 3 January 1976).

not conform to international human rights law.<sup>212</sup> Under international human rights law, absolute rights cannot be derogated from (or overridden) and no circumstance justifies a qualification or limitation of such rights.<sup>213</sup> Absolute rights in the *ICCPR*<sup>214</sup> 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).<sup>215</sup>

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.

For a more complete discussion, including a refutation of the Solicitor-General (Victoria) in relation to the validity of s 7, see:

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<sup>212</sup> 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*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 1; *NZ Bill of Rights 1990* (NZ), s 5.

<sup>213</sup> 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.

<sup>214</sup> 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*. See further, above Part 3.1.

<sup>215</sup> 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* (2<sup>nd</sup> 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*, (2<sup>nd</sup> 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*').

- 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, 433-35.

## 2) The Danger of an Override Provision

The depth and complexity of the problems with the inclusion of an override provision in a statutory human rights instrument modelled on the *UK HRA* cannot be given justice in this submission. I implore the Consultation Committee to consider my critique of the override in the appended article.<sup>216</sup> The following is a very brief, attenuated analysis of the problems.

It is unclear why an override provision was included in the *Victorian Charter*. Although it is vital in the *Canadian Charter* to preserve parliamentary sovereignty, it is not necessary in Victoria because of the circumscription of judicial powers.

Under the *Victorian 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 *Victorian Charter*, use of the override provision will *never be necessary* because judicially-assessed s 36 incompatible legislation cannot be invalidated, and unwanted or undesirable s 32 judicial re-interpretations can be altered by ordinary legislation. An override may be used to avoid the controversy of ignoring a judicial declaration which impugns legislative objectives or means; however, *surely* use of the override itself would cause equal, if not more, controversy than the Parliament simply ignoring the declaration.

One might accept the inclusion of an override – even if it was superfluous – if it did not create other negative consequences. This *cannot* be said of the override provision in s 31 of the *Victorian 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 human rights that they otherwise recognise as a vital part of modern democratic polities. In international law, the override equivalent – the power to derogate – is similarly recognised as a necessity, albeit an unfortunate necessity.

In recognition of this necessary 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)

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<sup>216</sup> 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, 436-469.

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 *Victorian Charter* does not contain sufficient safeguards. Sure, the *Victorian 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, an outcome that 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 in Victoria are labelled “exceptional circumstances”. However, once you scratch the surface, it becomes apparent that “exceptional circumstances” are no more than the sorts of circumstances that justify “unexceptional limitations”, rather than the “exceptional circumstances” necessary to justify a derogation in international and regional human rights law. Let me explain.

Under the *Victorian 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.’<sup>217</sup> These fall far short of there being a public emergency that threatens the life of the nation. Indeed, the circumstances identified under the *Victorian 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 a 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.<sup>218</sup> The 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

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<sup>217</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21

<sup>218</sup> 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 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.

whether the limit is justified. If it is not, the judiciary can then exercise its s 32 power of re-interpretation where possible, 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 *Victorian 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.

The third failure of the override provision is the complete failure to regulate the effects of the derogating or overriding measure. Section 31 of the *Victorian 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.

Each of these arguments is more fully developed in the appended article 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, especially at pp 436-453. The article 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)).

3) The Place for Overrides and Derogation in a federal human rights instrument?

In conclusion, an override provision does serve a vital purpose under the Canadian model – that of preserving parliamentary sovereignty). If Australia adopts the Canadian model (whether entrenched in the Constitution or by manner and form), an override provision ought to be included, but it ought 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*.<sup>219</sup>

If Australia adopts the British model, an override provision is not necessary and should not be adopted. If inclusion of an override provision is the only politically viable option, any override provision adopted should be modelled on

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<sup>219</sup> *Constitution of the Republic of South Africa 1996 (RSA)*, s 37.

the derogation provisions under art 4 of the *ICCPR*, as is the case under s 37 of the *South African Bill of Rights*.<sup>220</sup>

Any override provision 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. I endorse the position of the Castan Centre in its Submission that any derogation clause under a federal human rights instrument not extend to economic, social and cultural rights; and that, in any event, derogation is unlikely to be necessary given that a State Parties' obligations under *ICESCR* are limited to progressive realisation to the extent of its available resources.

I finally wish to highlight and endorse the position in the submission of the Castan Centre, which examines the constitutional position of an override clause. I agree that an override clause in the form enacted under the *Victorian Charter* may be unconstitutional at the federal level for lack of a head of power.

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.

#### *Executive Pre-legislative Human Rights Scrutiny*

Whether a Canadian instrument (entrenched in the Constitution or by manner and form) or a British instrument creating an institutional dialogue about rights is adopted, the instrument must contain pre-legislative scrutiny requirements on the executive. In particular, as discussed above, the instrument should contain an equivalent provision to s 28 of the *Victorian Charter*, which requires each Bill before parliament to be accompanied by a statement of compatibility or incompatibility. Section 28 of the *Victorian Charter* is superior to the other provisions on offer. Its particular strength is the requirement for the statement of compatibility to explain 'how it is compatible' and the requirement for a statement of incompatibility to explain 'the nature and extent of the incompatibility.'

In terms of the weakness of the Canadian and British equivalent provisions, see the discussions above.

The *ACT HRA* compares unfavourably to the *Victorian Charter* because s 37 of the *ACT HRA* only requires reasons to be given if a bill is not consistent with protected rights. It does not require any explanation for an assessment of rights consistency. Similarly to the *ACT HRA*, the current draft cl 31 of the Human Rights Bill 2007 (WA) falls short of the *Victorian Charter* because it does not require any explanation

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<sup>220</sup> *Constitution of the Republic of South Africa 1996 (RSA)*, s 37.

of the reasons for assessing a Bill to be rights-compatible. Draft cl 31 only requires such an explanation if a Bill is considered to be incompatible.

This omission in both the *ACT HRA* and the Human Rights Bill 2007 (WA) will undermine the benefits that could flow from pre-legislative human rights scrutiny. I refer you to the discussion above critiquing both the Canadian and British executive pre-legislative human rights scrutiny processes.

### Parliamentary Pre-legislative Human Rights Scrutiny

Whether a Canadian instrument (entrenched in the Constitution or by manner and form) or a British instrument creating an institutional dialogue about rights is adopted, the instrument must contain pre-legislative scrutiny requirements on the parliament. It is also important to formally recognise the contribution to be made by parliament to the rights debate.

In the United Kingdom, there is a Joint Parliamentary Committee on Human Rights (the ‘Parliamentary Committee’) – that is, a joint committee of the House of Commons and House of Lords. Its remit is to consider ‘matters relating to human rights in the United Kingdom’ and ‘proposals for remedial orders [and] draft remedial orders.’<sup>221</sup> The Parliamentary Committee has prioritised the scrutiny of proposed legislation for human rights implications.<sup>222</sup> In furtherance of this, it empowered its Chair to write to responsible Ministers ‘raising questions or concerns in the area of human rights’<sup>223</sup> for the purpose of collecting information. The Parliamentary Committee also ‘considers itself to be responsible ... for assessing whether ... “s 19 statements” have been properly made’, with this being ‘a key duty.’<sup>224</sup>

The Parliamentary Committee follows five general principles: it is committed to examining proposed legislation as early as possible, to seeking written ministerial responses where human rights issues appear, to seeking written commentary from non-governmental sources where appropriate, to considering, pursuing and publishing with its reports the written responses, and to taking oral evidence only in exceptional

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<sup>221</sup> This expressly excludes the power to consider individual complaints of alleged violations of the *HRA 1998* (UK) c 42. See *Homepage*, Parliamentary Committee <[http://www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm)> at 2 July 2003.

<sup>222</sup> Parliamentary Committee, House of Commons and Lords, *Scrutiny of Bills: Third Special Report: Session 2000-01* (2001) [1].

<sup>223</sup> *Ibid* [2].

<sup>224</sup> Parliamentary Committee, House of Commons and Lords, *Scrutiny Report on Private Members’ Bills and Private Bills’: Fourteenth Report, Session 2001-02* (2002) [1]. In relation to Private Members’ Bills, the Parliamentary Committee will scrutinise these for compatibility, however, priority will be accorded to government legislation because of the limits of time and resources. Private Bills, which now must include a s 19(1) statement, will be considered by the Parliamentary Committee in a similar manner to Government Bills: at [4], [5], [22], and [23]. See also Lester, ‘Parliamentary Scrutiny of Legislation’, above n 80, 445-6.

circumstances.<sup>225</sup> The Parliamentary Committee adopts the European Court's approach to assessing the compatibility of legislation.<sup>226</sup> It also relies on legal advice that is independent of the Government<sup>227</sup> and is currently constituted in a non-partisan manner.

The Parliamentary Committee has made a significant difference to the level of debate and scrutiny of legislation within Parliament, although it has not necessarily resulted in major changes to legislative proposals.<sup>228</sup> Reports of the Parliamentary Committee are 'often relied on extensively in debate on the Bill to which the report relates.'<sup>229</sup> The 'responsible Minister is usually keen to draw attention to' reports that indicate compatibility; while critics 'are often quick to draw attention to' reports that question the compatibility of proposed legislation or suggest more safeguards.<sup>230</sup> Examples of this constructive debate are the Criminal Justice and Police Bill 2001 (UK) and the Anti-Terrorism, Crime and Security Bill.<sup>231</sup> The Parliamentary Committee 'reports helped to generate pressure ... which yielded some gains ... in the form of additional safeguards for rights'<sup>232</sup> for both Bills.

Overall, the Parliamentary Committee is considered 'a key component of the legislative process' which has 'strengthened the role of Parliament in scrutinising legislative proposals and administrative practices against [human rights] standards.'<sup>233</sup>

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<sup>225</sup> Parliamentary Committee, House of Commons and Lords, *Scrutiny Report on Private Members' Bills and Private Bills: Fourteenth Report, Session 2001-02* (2002) [2]. See Lester, 'Parliamentary Scrutiny of Legislation', above n 80, 437, 441-45.

<sup>226</sup> Lester, 'Parliamentary Scrutiny of Legislation', above n 80, 438.

<sup>227</sup> Ibid 447. This is in contrast to the Canadian Parliament, which must rely on the advice of governmental lawyers vis-à-vis rights under the *Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

<sup>228</sup> Lester, 'Parliamentary Scrutiny of Legislation', above n 80, 438-441; Feldman, 'Parliamentary Scrutiny', above n 80, 341-2, 345-8; United Kingdom, *Parliamentary Debates*, House of Commons, 28 October 2002, col 604 (Ms Jean Corston MP); United Kingdom, *Parliamentary Debates*, House of Commons, 28 October 2002, col 604 (Mr Simon Hughes MP).

<sup>229</sup> Feldman, 'Parliamentary Scrutiny', above n 80, 341.

<sup>230</sup> Ibid.

<sup>231</sup> With respect to the Criminal Justice and Police Bill 2001 (UK), the Parliamentary Committee's report was the basis of numerous challenges to the proposed legislation and several proposed amendments. Although no proposed amendments were successful, the responsible 'Minister did give an assurance that administrative guidance would be given to meet [the] main concerns': Lester, 'Parliamentary Scrutiny of Legislation', above n 80, 439. With respect to the Anti-Terrorism, Crime and Security Bill 2001 (UK), the Parliamentary Committee's views were also used by opponents to the proposed legislation during the debate. See Adam Tomkins, 'Legislating Against Terror: The *Anti-Terrorism, Crime and Security Act 2001*' [2002] *Summer Public Law* 205, especially 210-19; Lester, 'Parliamentary Scrutiny of Legislation', above n 80, 439-41.

<sup>232</sup> Feldman, 'Parliamentary Scrutiny', above n 80, 341.

<sup>233</sup> Lester, 'Parliamentary Scrutiny of Legislation', above n 80, 437 and 433 respectively.

This is not only vital for parliament in fulfilling its constitutional roles of legislative scrutineer and law-maker; it is also vital in terms of making robust, considered, and educative contributions to the institutional dialogue about rights and justifiable limits on rights.

In Victoria, the Scrutiny of Acts and Regulations Committee (“SARC”) is required to ‘consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights’ (s 30). Because SARC has only had its human rights jurisdiction since 1 January 2007, it is difficult to make an assessment of its work.

The major difference between the Victorian and British models is that the latter creates a free-standing human rights scrutiny committee, whilst the former subsumes human rights under a generalist scrutiny committee. Both committees do have specialist legal advisers. I strongly recommend that the federal government prefers a specialist scrutiny committee. The size of the task of human rights scrutiny should not be under-estimated, nor should the benefits that will flow from creating a specialist focus on human rights. If the aim is to create an institutional dialogue about rights, a specialist scrutiny committee will be an invaluable addition to the parliamentary voice on such matters.

### **HUMAN RIGHTS AND PUBLIC DECISION-MAKING**

Having considered the impact of a comprehensive federal human rights instrument in relation to laws, we need to turn to its impact on public decision-making. We need to consider what bodies will have obligations to abide by human rights, what those obligations ought to be, and what the consequence should be if they fail to meet those obligations.

The Consultation Committee should ensure that (a) human rights obligations fall on core/wholly public authorities and hybrid/functional public authorities; (b) that those obligations include substantive and procedural human rights considerations; and (c) that there is a free-standing right of action if a public authority fails to meet its human rights obligations; that being breach of a statutory duty, with the statutory duty being those created under the human rights instrument. In other words, any federal human rights instrument should go further than the *Victorian Charter* and adopt a free-standing remedy based on the British model.

I refer you to 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) for an in-depth discussion of how the public authority provisions operate (or fail to operate) under the *Victorian Charter*, in contrast to the operation of the equivalent provisions under the *UK HRA*. I also reiterate that the British government’s own five-year review found that the *UK HRA* did not hamper the actions of the government.

## **Which public authorities?**

### *Core/Wholly and Hybrid/Functional Public Authorities*

To only limit human rights obligations to core/wholly public authorities under a human rights instrument is too narrow and does not reflect the realities of modern government. The concept of “public authorities” in any federal human rights instrument must also include hybrid/functional public authorities. Hybrid/functional public authorities are those part-private and part-public bodies whose functions include functions of a public nature. Both the *UK HRA* and the *Victorian Charter* impose human rights obligations on hybrid/functional public authorities when acting in their public capacity.<sup>234</sup> That is, the inclusion of hybrid/functional public authorities only captures those entities that operate in the public sphere, and only when they are operating in the public sphere – hybrid/functional public authorities do *not* have human rights obligations when acting in their private capacity.

The reasons for including hybrid/functional public authorities are compelling. First, this category is vital given the reality of modern-day government. Modern-day government uses numerous ways to deliver public services. Contracting out of government services to private enterprises is highly utilised. To not include such bodies within the reach of a federal human rights instrument would enable core public authorities to avoid their human rights obligations by choosing a particular vehicle for the delivery of public services (say, outsourcing) which, if delivered by the core public authority, would be subject to human rights obligations. This is not an acceptable outcome given the workings of modern-day government. It is the substance of what is being delivered, not the vehicle chosen for the delivery, which should regulate which bodies have human rights obligations under any federal human rights instrument.

Secondly, if the federal government is concerned about “mainstreaming” a human rights culture throughout government and the community, including hybrid/functional public authorities within the meaning of “public authorities” is vital. The more individuals are required to contemplate their human rights obligations in their work, the more human rights will enter the psyche and behaviour of these individuals, and the greater the acceptance of human rights norms.

We should also consider the benefits that flow from imposing human rights obligations on core and functional public authorities, and labelling certain behaviours as “unlawful”. First, such provisions are a powerful tool in promoting human rights compliance, because they ensure that human rights are part of the public-decision making matrix. Human rights can no longer be automatically trumped by other factors, such as costs or efficiency. This is not to say that human rights will always trump, but that human rights must be considered and given appropriate weight in public decision-making.

Secondly, imposing human rights obligations on core and hybrid public authorities should ensure that human rights are considered to be a tool to enhance public

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<sup>234</sup> See respectively see *UK HRA 1997* (UK), ss 6(3)(b) and (5), and *Victorian Charter 2006* (Vic) ss 4(1)(c), (2), (4) and (5).

administration. Rather than being a separate after thought or an additional regulatory burden, human rights will become part of the operational framework for public administration,

Thirdly, such a change in culture in both the core and functional public authority arenas is especially vital when you consider that '[o]nly a fraction of legislative initiatives will ever be subject to ... litigation'<sup>235</sup> under any federal human rights instrument. In other words, the courts will only be involved in a fraction of cases. In terms of protection and promotion of human rights, the community and individuals rely on the executive and parliament to embrace a human rights culture. The wider the obligations are cast in terms of public authorities, the greater the human rights protection for individuals.

### Courts and Tribunals as Public Authorities

Another issue that arises is whether to include courts and tribunals in the definition of core "public authority". In the United Kingdom, the courts and tribunals are core public authorities. This means that courts and tribunals have a positive obligation to interpret and develop the common law 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.<sup>236</sup>

Under the *Victorian Charter*, in contrast, courts and tribunals were excluded from the definition of public authority. The HR 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.<sup>237</sup> If it was otherwise, the High Court may strike down that part of the *Victorian Charter*.

The position under the *UK HRA* is to be preferred to that under the *Victorian Charter*. The constitutional concerns that affected the decision under the *Victorian Charter* do not apply when considering a federal human rights instrument. In particular, first, a federal human rights instrument that affected the common law could not be said to be objectionable on federalist grounds, such that courts that are exercising federal jurisdiction, or that are making decisions under common law, be classified as 'public authorities' that have a duty to act compatibly with human rights and give proper consideration to relevant human rights. This is an endorsement of the submission of the Castan Centre in this regard.

Secondly, given that courts and tribunals will have human rights obligations in relation to statutory law whatever model of human rights instrument is adopted, it seems odd to not impose similar obligations on courts and tribunals in the

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<sup>235</sup> Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002) x ('*Charter Conflicts*'). *Contra* F L Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Broadview Press Ltd, Ontario, 2000) 58 ('*Charter Revolution*').

<sup>236</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

<sup>237</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, para 135.

development of the common law. Accordingly, it is much more preferable to include courts and tribunals in the definition of public authorities.

For further discussion on which public authorities should attract human rights obligations, see 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), pp 2-12.

### **Which Human Rights Obligations?**

The human rights obligations imposed on “public authorities” should mimic those obligations contained in s 38 of the *Victorian Charter*. Section 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.’ This essentially imposes two obligations on public authorities: (a) an obligation to act compatibly with the substance of the human rights; and (b) a procedural obligation, ensuring that the human rights are a relevant part of the decision-making process.

Section 38(1) of the *Victorian Charter* is modelled on s 6 of the *UK HRA*, but extends and improves it insofar as s 38 articulates the procedural obligation in addition to the substantive obligation.

There are a number of exceptions to s 38(1) unlawfulness in the *Victorian Charter* that need to be considered. First, under s 38(2), there is an exception to s 38(1) where the law dictates the unlawfulness. That is, there is an exception 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.<sup>238</sup>

From a parliamentary sovereignty perspective, this type of exception is necessary to retain parliamentary sovereignty. Parliament retains the power to enact rights-incompatible legislation, and public authorities should not be considered to be behaving unlawfully for implementing that legislation.

From a human rights perspective, that is not necessarily the end of the story. Sure, 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, a person in this situation is not necessarily without redress. An individual may be able to seek a rights-compatible interpretation of the provision which alters the statutory obligation. That is, if the law can be given a rights-compatible interpretation, the potential violation of human rights will be avoided. The

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<sup>238</sup> 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.

rights-compatible interpretation, in effect, becomes your remedy. The law is re-interpreted to be rights compatible, the public authority has obligations under s 38(1), and the s 38(2) exceptions to unlawfulness do not apply.

On balance, it seems that this type of exception is a workable compromise between the retention of parliamentary sovereignty and the protection and promotion of human rights in a domestic setting, where the retention of parliamentary sovereignty is a political imperative.

Secondly, s 38(3) of the *Victorian Charter* states that the obligations under s 38(1) do not apply to an act or decision of a private nature. This exception to the s 38(1) obligation is necessary to ensure that the private actions of hybrid/functional public authorities are not subject to the s 38(1) human rights obligations. This exception is also reasonable. The justification for extending human rights obligations to hybrid/functional public authorities is because of the provision of functions of a public nature. It makes sense to only hold them to the human rights obligations when such entities are engaging in their “public nature” activities, not their “private nature” activities.<sup>239</sup>

In terms of core/wholly public authorities, it ought to be noted that all activities of a core/wholly public authority are considered to be caught by the s 38(1) obligations. This is presumably because such public authorities are considered to be not capable of doing anything of a private nature; that because they are core/wholly public authorities, everything they do is of a public, not private, nature.<sup>240</sup>

Thirdly, s 38(4) and (5) provide an exception for religious bodies. Under s 38(4), public authorities are not required to act or decide in a way that impedes or prevents a religious body from acting in conformity with the religious doctrines, beliefs or principles, in accordance with which the religious body operates. A “religious body” is given quite a broad definition under s 38(5), including those bodies established for religious purposes; or educational and charitable religious bodies. Consideration will have to be given to whether such an exception is appropriate at the federal level.

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<sup>239</sup> See further Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 3-4, 6; Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, 56.

<sup>240</sup> This is supported by both the Explanatory Memorandum and the Victorian Consultation Committee report. The Explanatory Memorandum to the Victorian Charter states that ‘[t]his definition encompasses two types of public authorities: core public authorities, who are bound by the *Charter* generally, and functional public authorities, who are only bound when they are exercising functions of a public nature on behalf of the State or a public authority’: Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 3-4. The Victorian Consultation Committee report notes that core/wholly public authorities ‘must meet human rights standards both as institutions and as service providers’ (i.e. they have obligations in all that they do), whereas hybrid/functional public authorities: ‘they are bound ... only when performing ‘functions of a public nature’: Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, 58.

For further discussion on the human rights obligations of public authorities, see 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), pp 1-2.

### **What remedies?**

Although the *Victorian 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 free-standing 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 *Victorian Charter*. In other words, a victim of an act of unlawfulness committed by a public authority will not be able to independently and solely claim for a breach of statutory duty, with the statute being the *Victorian 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.

The provisions of the *Victorian 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. The unique and convoluted nature of this provision probably gives rise to more questions that it resolves.

Section 39(2), via a savings provision, appears to then suggest 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 (e.g. an injunction, a stay of proceedings, or the exclusion of evidence). The precise meaning of this section is yet to be tested in litigation or 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 *Victorian 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 *Victorian Charter* and undermines the enforcement of human rights in Victoria. This situation should not be replicated at the federal level. First, it is not clear that the federal government is reluctant to embrace

effective remedies for human rights violations. Indeed, it does mention the provision of ‘remedies when a violation does occur’ in its Background Paper.<sup>241</sup>

Secondly, the provisions of the *Victorian Charter* are highly technical and not well understood. Indeed, it is still not yet precisely how they will operate. It may be that the government and public authorities spend a lot more money on litigation in order to establish the boundaries of s 39, than they would have if victims were given a free-standing 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. In order to meet Australia’s obligations under art 2(3) of the *ICCPR*, all victims of an alleged human rights violation are entitled to an effective remedy. Moreover, failure to provide a remedy may bring into question the constitutional validity of a human rights instrument under s 51(29) of the *Australian Constitution*. The failure to provide an effective remedy for violations of human rights may undermine a treaty obligation, and therefore cause the human rights instrument to fall outside the external affairs power. In addition, a failure to provide an effective remedy may indicate that the law incorporating the treaty is not appropriate and adapted, and thus fall outside the external affairs power.

The British, Canadian and, more recently, the ACT models offer a much better solution to remedies under a federal human rights instrument. 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, *free-standing cause for breach of statutory duty*, with the *UK HRA* itself being the statute breached; (b) a new ground of illegality under administrative law;<sup>242</sup> 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.<sup>243</sup> 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

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<sup>241</sup> National Human Rights Consultation Secretariat (Attorney-General’s Department), *National Human Rights Consultation Background Paper* (2009) 6.

<sup>242</sup> 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.

<sup>243</sup> 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].

always been modest,<sup>244</sup> and this has filtered down to compensation payments in the United Kingdom. Given that international and comparative jurisprudence ought to inform any interpretation of a federal human rights instrument (indeed, the Victorian and ACT instruments), one could expect the federal 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 a federal human rights instrument.

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

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.

The failure to create a separate cause of action and remedy under any federal human rights instrument (like the *Victorian Charter*) will 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) 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.<sup>245</sup> This may be the ultimate fate of the Victorian experiment. It is eminently more sensible for the federal parliament to provide for the inevitable rather than to allow the judiciary to craft solutions on the run.

For further discussion on the human rights obligations of public authorities, particularly the complexity associated with *not* enacting a free-standing remedy, see 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), pp 12-20.

## **WIDER CHANGES ARISING FROM A HUMAN RIGHTS INSTRUMENT**

There are numerous additional changes that the introduction of a human rights instrument would require. Due to time constraints, I will the following: (a) enhancing

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<sup>244</sup> It would be rare for a victim of a human rights violation to be awarded an amount in excess of GBP 20,000.

<sup>245</sup> ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [3.22] – [3.23].

the powers of the Australian Human Rights Commission; (b) reviewing existing legislation in Australia for compatibility with human rights before any human rights instrument comes into force; (c) periodic reviews of human rights compliance for core/wholly public authorities, including government departments; (d) training of the judiciary; and (e) future reviews of any human rights instrument.

### **Enhancing the Powers of the Australian Human Rights Commission**

The functions of the Australian Human Rights Commission will need to be expanded. Ideas for expansion can be gleaned from the equivalent provisions under the *ACT HRA* or the *Victorian Charter*.

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

Section 41 of the *Victorian Charter* outlines the additional functions of the Victorian Equal Opportunity and Human Rights Commission. First, the Commission must submit annual reports to the Attorney-General on the operation of the *Victorian Charter* and how it interacts with statute and common law; and all declarations of inconsistent interpretation and overrides in that year. Secondly, it can undertake ad hoc reports and reviews. In particular, upon the Attorney-General's request, it may review and report on the effect of statutes and the common law on human rights; and, upon the request of a public authority, it may review and report on the authorities programs and practices for compliance with human rights obligations. Thirdly, the Commission is to assist the Attorney-General it conducting the 4- and 8-year reviews of the *Victorian Charter*. Fourthly, the Commission is to provide community education about human rights and the *Victorian Charter*. Finally, the Commission is empowered to intervene in court proceedings where proceedings involve a question of law about the application of the *Victorian Charter*, the interpretation of a statutory provision under s 32, or when a court is considering issuing a s 36 declaration of inconsistent interpretation.

The explicit enhancement of the role and functions of the Australian Human Rights Commission will only serve to enhance the protection and promotion of human rights under a federal human rights instrument. In particular, enhancing its educative role – both within government and the broader community – will facilitate the mainstreaming of a human rights culture.

### **Review of Legislation**

The federal government should undertake to audit all legislation, policy and practices before any human rights instrument 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 *UK HRA* came into force. They also undertook human rights awareness training within their departments.

The pre-*UK HRA* audit was undertaken under the auspices of the Human Rights Unit of the Home Office ('Unit').<sup>246</sup> 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 challenge.'<sup>247</sup> 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.<sup>248</sup>

The audit results served two main functions. First, the Cabinet Office used the results to identify priority areas to be dealt with before the *UK HRA* came into operation. Secondly, the results have influenced the work of specialist human rights legal teams

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<sup>246</sup> 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.

<sup>247</sup> 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.

<sup>248</sup> 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.

within the executive post-*UK HRA*.<sup>249</sup>

Unfortunately, the audit process focussed heavily on the expectation of judicial challenges to legislation, policies and practices. Rather than using the *UK 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.<sup>250</sup> A more proactive approach would have increased the influence of the executive in the process of delimiting the open-textured Convention rights. The executive should have honestly and vigorously assert its understandings of the Convention rights. Moreover, such a containment strategy is too judicial-centric.

Thus, any pre-audit undertaken by the Federal Government were Australia to adopt a human rights instrument 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.

### **Within Government?**

In order to encourage compliance and mainstream human rights, it is necessary to require Government Departments, and other core/wholly public authorities, to report their compliance with and implementation of human rights in their Annual Reports.

Such a reporting requirement will ensure that human rights become part of the public decision-making matrix. Human rights will no longer automatically be trumped by other factors, such as cost or efficiency. Moreover, to require annual reporting should also ensure that human rights become a tool to enhance public administration. Human rights, rather than being a separate add on or an additional regulatory burden, will become the (or at least part of an) operational framework for public administration, enhancing its quality, and giving expression to values that were once intuitive, but are now clearly defined.

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<sup>249</sup> 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.

<sup>250</sup> 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.

This suggestion is in addition to the initial audit of all its legislation, policy and practices that must occur before any human rights instrument comes into force at the federal level (see immediately above).

### **Training of the Judiciary:**

There will also need to be an extensive education program for the federal judiciary, federal quasi-judicial bodies (including administrative tribunals), and state courts vested with federal jurisdiction before any rights instrument comes into force.

Extensive training was undertaken for the judiciary by the British Judicial Studies Board before the *UK HRA* came into force. I have undertaken research into the training programme and am happy to share my views about this training program with the Consultation Committee upon request.

I was also a principal human rights and *Victorian Charter* trainer for the Judicial College of Victoria, which undertook a series of seminars and day-long workshops on human rights and the *Victorian Charter*. I was involved in the development and delivery of training throughout 2008. Again, with the permission of the Judicial College of Victoria, I can share insights from this experience with the Consultation Committee upon request.

### **Reviews?**

A review of the operation of any federal human rights instruments after five years of its operation is sensible.

Whether or not additional reviews will be needed is less clear. The sense that our human rights compact is open to review periodically may send the wrong message about human rights – that human rights are not *that* fundamental as to be immune from the whims of the government and majority of the day.

## **APPENDICES**

I append the following academic works which inform this submission, and which expand upon certain areas for the Consultation Committee:

1. 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
2. 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
3. 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)

[http://www.hrlrc.org.au/html/s02\\_article/article\\_view.asp?id=132&nav\\_cat\\_id=149&nav\\_top\\_id=63](http://www.hrlrc.org.au/html/s02_article/article_view.asp?id=132&nav_cat_id=149&nav_top_id=63)

4. Julie Debeljak, 'Mission Impossible: "Possible" Interpretations under the *Victorian Charter* and Their Impact on Parliamentary Sovereignty and Dialogue' in Marius Smith (ed), *Human Rights 2006: The Year in Review* (Castan Centre for Human Rights Law, Melbourne, 2007) 169-89, <<http://ecommerce.law.monash.edu.au/categories.asp?cID=2&c=215031>>
5. 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
6. 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
7. Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australian from Canada and the United Kingdom*, PhD Thesis, Monash University, 2004

## **FURTHER REFERENCES**

I refer the Consultation Committee to further academic works that I have written that elucidate the above matters.

- 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, 'Access to Civil Justice: Can a Bill of Rights Deliver?' [2001] *Torts Law Review* 32-52.

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