

‘A charter of human rights and responsibilities for Tasmania’

A submission on the Directions Paper of the Department of Justice of Tasmania

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This submission will address the consultation points outlined in the Directions Paper and go beyond these points where necessary.

At the outset, the enactment of a comprehensive human rights instrument for Tasmania is supported. This submission offers commentary intended to produce a coherent instrument which incorporates the lessons – both positive and negative – from relevant comparative jurisdictions, particularly those of the United Kingdom, the Australian Capital Territory, and Victoria.

CONSULTATION POINT 1: Are the rights recommended by the Institute appropriate to Tasmania, and are they sufficient?

Subject to commentary on consultation points 19 to 22, the rights recommended by the Institute, as set out in Table 3, are appropriate to Tasmania.

I do note, however, that the grounds of discrimination outlined in paragraph 8.1.4.1 of the Directions Paper¹ are not inclusive grounds. It is recommended that the grounds for discrimination are amended by either making that definition inclusive or including the ground of “other status”. This injects flexibility into the provision outlining the grounds of discrimination, and allows for the future development of those grounds without requiring parliamentary amendment to the Tasmanian Charter of Rights and Responsibilities (the ‘Tasmanian Charter’).

CONSULTATION POINT 2: What rights from the international human rights treaties, not listed, would you like to see included, if any?

Subject to commentary on consultation points 19 to 22, the list of rights reflects those rights contained in the *International Covenant on Civil and Political Rights* (1966) (‘ICCPR’) and most of the rights contained in the *International Covenant on Economic, Social and Cultural Rights* (1966)

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¹ ‘A charter of human rights and responsibilities for Tasmania’, Directions Paper by the Department of Justice, Tasmania, 2010, 40 (‘Directions Paper’).

(‘ICESCR’). Given the jurisdictional constraints of Tasmania within the federation of the Commonwealth of Australia,² the rights protected are adequate.

CONSULTATION POINT 3: Is there a need to specify human responsibilities in detail, or is it sufficient to have an overview statement that the rights and freedoms impose responsibilities?

It is sufficient to recognise that rights also come with responsibilities through the title of the enactment and a perambulatory paragraph to the Tasmanian Charter, as is the case under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Victorian Charter’).

Although not specifically referred to as “responsibilities”, the ability to balance rights against responsibilities is recognised through the capacity to impose reasonable and justifiable limitations to most rights. Most rights may be balanced against each other, and against other valuable but non-protected principles, interests and communal needs, which together sufficiently capture the notion of responsibilities within human rights law.

CONSULTATION POINT 4: Is having only a general limitation clause that applies to all but a small number of rights appropriate?

It is appropriate to provide the capacity to balance rights against other rights, and other valuable but non-protected principles, interests and communal needs, through a general external limitations provision that applies to all but a small number of rights.

I refer to Appendix 2, and article I have written on limitation and override provisions.³ In terms of background to consultation point 4, in this article I explore the different mechanisms for limiting rights (Appendix 2, pp 424-427) and the main reasons linked to institutional design for justifying limitation to rights, namely the preservation of parliamentary sovereignty and the creation of an institutional dialogue about rights and their justifiable limits (Appendix 2, pp 427-432).

There are two aspects to consultation point 4, which I will address in turn. In terms of whether internal or external limitations provisions are preferable, there is no theoretical difference between them. Both internal and external limitations achieve the same outcome. Moreover, the tests for both internal and external limitations consider very similar (if not identical) elements: both require first, prescription by law; secondly, the achievement of a legitimate legislative objective (as listed within the article itself in internal limits or not restricted under general limitations provisions); and thirdly, necessity in a democratic society, which tends to require a combination of reasonableness (that is, demonstration of a pressing social need) and proportionality (being made up of rationality, minimum impairment and proportionality).⁴

² For example, the right to social security and social insurance under art 9 of *ICESCR* is omitted which is, presumably, because social security falls outside the jurisdiction of Tasmania. Moreover, the rights relating to marriage under art 23 of the *ICCPR* and art 10 of *ICESCR* are not included under the right to the protection of the family and children listed in Table 3 presumably because of the jurisdictional restraints of Tasmania.

³ Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*’ (2008) 32 *Melbourne University Law Review* 422-469 (‘Balancing Rights’).

⁴ Debeljak, *Balancing Rights*, above n 3, 425.

A strength of the internal limitations provision is that the legislative objectives that justify a limitation can be listed in relation to each right. However, this advantage is of little practical assistance because the objectives of most laws can readily be classified within the legislative objectives that tend to be listed as legitimate in internal limitation provisions.⁵

A strength of the external limitations provision is that a consistent approach to assessing the justifiability of limitations is developed, which has many positive effects, including contributing to certainty and consistency of the law, helping to de-mystify human rights law, and encouraging mainstreaming of human rights within government because of simplicity. On balance, an external limitations clause should be preferred.

In terms of whether a small number of rights ought to be excluded from the external limitations provision, I refer to my article where this issue is directly addressed (Appendix 2, pp 433-435). In brief, to apply a general external limitation provision to all protected rights violates international human rights law to the extent that it applies to so-called “absolute rights”.

Under international human rights law, absolute rights cannot be derogated from (or overridden) and no circumstance justifies a qualification or limitation of such rights.⁶ Absolute rights in the *ICCPR*⁷ 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

⁵ For example, art 22(2) of the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) states that:

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

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

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

⁶ 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.

⁷ 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*.

(elements of arts 2(1) and 26).⁸ To apply a general external limitation provision to all protected rights violates international human rights law to the extent that it applies to so-called “absolute rights”. For example, to the extent that s 7(2) of the *Victorian Charter* applies to so-called absolute rights, it does not conform to international human rights law.⁹

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

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. Accordingly, as the Directions Paper indicates, a small number of rights, reflecting those rights at international law that are “absolute rights”, ought to be excluded from the external limitations provision.

CONSULTATION POINT 5: Should the Tasmanian Parliament have the right to pass an overriding declaration where the Parliament disagrees with a declaration of incompatibility?

Is there a need for an override provision?

The view of the Tasmanian Law Reform Institute that ‘there is no necessity for a Parliament to have an override power in a typical statutory human rights model’¹⁰ is correct and should be reflected in the Tasmanian Charter by omitting an override provision. To further explore the reasoning behind this position, I refer to my articles in Appendix 1 (pp 34-35)¹¹ and Appendix 2 (especially pp 436-453).¹²

⁸ See American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987) vol 2, 161; Oscar Schachter, *International Law in Theory and Practice* (1991) 85, extracted in Henry Steiner and Philip Alston, *International Human Rights in Context* (2nd edition, Clarendon Press, Oxford, 2000) 230-231; Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (2nd edition, Oxford University Press, 2004) [1.66], [25.75]. The Human Rights Committee describes the prohibitions against the taking of hostages, abductions and unacknowledged detention as non-derogable. ‘The absolute nature of these prohibitions, even in times of emergency, is justified by status as norms of general international law’: Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, UN Doc No CCPR/C/21/Rev.1/Add.11 (31 August 2001) [13] (‘*General Comment No 29*’).

⁹ To the extent that other domestic human rights instruments have general limitations powers that do not account for absolute rights, they too do not conform to international human rights law. See eg, *Canadian Charter of Rights and Freedoms 1982*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 1 (‘*Canadian Charter*’); *NZ Bill of Rights 1990 (NZ)*, s 5.

¹⁰ Directions Paper, above n 1, 30.

¹¹ 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 (‘*Parliamentary Sovereignty and Dialogue*’).

¹² Debeljak, ‘Balancing Rights in a Democracy’, above n 3. 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)).

In brief, the only statutory human rights instrument to include an override provision is the *Victorian Charter*; yet, it is unclear why an override provision was included. Although it is vital under the *Canadian Charter of Rights and Freedoms 1982* ('*Canadian Charter*')¹³ 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 s 36 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) 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. To be sure, the *Victorian Charter* provides that overrides are temporary, by imposing a 5-year sunset clause – which, mind you, is continuously renewable. 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.

¹³ *Canadian Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 1 and 33.

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.’¹⁴ 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.

Why does it matter that an exceptional override provision is utilising factors that are usually used in an unexceptional limitations context? One answer is oversight. When the executive and parliament place a limit on a right because of public safety, security or welfare, such a decision can be challenged in court. The executive and parliament must be ready to argue why the limit is reasonable and justified in a free and democratic society, against the specific list of balancing factors under s 7(2).¹⁵ 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 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 Appendix 2, pp 436-453.

The Type of Override Provision if required

If the Tasmanian Parliament decides to include an override provision, it must more closely reflect a proper derogation provision, such as, art 4 of the *ICCPR* or s 37 of the *Constitution of the Republic*

¹⁴ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21

¹⁵ 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.

of *South Africa 1996* (RSA) (*‘South African Bill of Rights’*).¹⁶ The override provisions contained in the *Victorian Charter* and the *Canadian Charter* are inadequate in terms of recognising non-derogable rights, and in terms of conditioning the use of the override/derogation power, especially in relation to the circumstances justifying an override/derogation and regulating the effects of override/derogation. To further explore these issues, I refer you to Appendix 2 (pp 436-468).

CONSULTATION POINT 6: Is it appropriate that after the Supreme Court declares subordinate legislation and Council by-laws to be incompatible with the Charter they become invalid, unless Parliament changes the Act of Parliament to make them valid?

Yes, it is appropriate that after the Supreme Court declares subordinate legislation and Council by-laws to be incompatible with the Tasmanian Charter that they become invalid, unless Parliament changes the Act of Parliament to make them valid. This reinforces responsible government and parliamentary sovereignty, increases the accountability of both the executive and parliament, better promotes and protects human rights, and enhances the institutional dialogue between all arms of government (in that clearer messages about rights and their justifiable limitations will need to flow between the arms of government).

In terms of the judicial role in invalidation, it does not compromise the proper relationship between the parliament and the judiciary, presumably given the aim of preserving parliamentary sovereignty.

CONSULTATION POINT 7: Should the Charter expressly point the courts to international law and the judgments of foreign and international courts and tribunals?

There is a wealth of guidance on the meaning of rights, the scope of rights, and the justifiability of limitations in international law and the judgments of foreign and international courts and tribunals. Depending on the precise mechanisms that are adopted to “enforce” the protected rights (that is, the precise wording of a statutory interpretation provision, of a declaration power, and of the definition and obligations of public authorities), there will also be a wealth of guidance in international law and the judgments of foreign and international courts and tribunals in relation to the Charter “enforcement” mechanisms.

It is appropriate for all those working with the Tasmanian Charter to have access to this comparative guidance in making decisions under the Tasmanian Charter.

CONSULTATION POINT 8: The Charter requires courts and tribunals to interpret laws consistently with human rights, should that be subject to the requirement that courts and tribunals ensure an interpretation that best achieves the purpose of the legislation, as is the case in the ACT and Victoria?

The Directions Paper states: ‘Experience with the United Kingdom Act illustrates what can occur where courts do not prefer an interpretation that is consistent with legislative purpose to one that constructs legislation in terms of their own particular view of human rights compliance.’¹⁷

¹⁶ *Constitution of the Republic of South Africa 1996* (RSA), s 37 (“*South African Bill of Rights*”).

¹⁷ Directions Paper, above n 1, 31.

Reference is then made to the Tasmanian Law Reform Institute Report ('Institute Report').¹⁸ It is clear from the Institute Report that the jurisprudence about the operation of a rights-compatible statutory interpretation provision in *Ghaidan*¹⁹ and *re S*²⁰ is to be preferred to the jurisprudence in *R v A*.²¹ Putting to one side whether the representation of the decision in *R v A* is a fair representation in the Institute Report,²² the Tasmanian Parliament and Government need to be very careful about the precise wording of a rights-compatible statutory interpretation provision.

The choice being mooted is between s 3(1) of the *UK HRA* and s 32(1) of the *Victorian Charter*, which state respectively:

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

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

The similarity between s 3(1) and s 32(1) is striking, with the only relevant difference being that s 32(1) adds the words 'consistently with their purpose'. The question is what impact these additional words have: were they intended to codify the British jurisprudence on s 3(1) of the *UK HRA*, most particularly *Ghaidan*; or were they intended to enact a different sort of obligation altogether. Before the Tasmanian Government and Parliament choose between the wording of the *UK HRA* and the *Victorian Charter*, there are many serious considerations to be had.

First, a decision about the remedial strength of the rights-compatible statutory interpretation provision must be made. It appears that both the Institute Report and the Directions Paper favour the approach in *Ghaidan* and *re S* over the approach in *R v A*. Whilst I agree that the jurisprudence in *Ghaidan* and *re S* is preferable to the jurisprudence in *R v A*, this does not necessarily dictate a particular formulation of words, bringing me to my next point.

Secondly, it is not currently certain that the wording used in s 32 of the *Victorian Charter* and s 30 of the *Human Rights Act 2004* (ACT) ('*ACT HRA*') achieve a codification of the British jurisprudence in *Ghaidan* and *re S*. There were clear indications in the pre-legislative history to the *Victorian Charter* that the addition of the phrase 'consistently with their purpose' was to codify

¹⁸ Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania* (Final Report No 10, October 2007) 131-2 ('Institute Report').

¹⁹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30 ('*Ghaidan*').

²⁰ *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*').

²¹ *R v A (No 2)* [2001] UKHL 25 [38] ('*R v A*').

²² Aileen Kavanagh, 'Unlocking the *Human Rights Act*: The "Radical" Approach to Section 3(1) Revisited' (2005) 3 *European Human Rights Law Review* 259.

Ghaidan – both by referring to that jurisprudence by name²³ and lifting concepts from that jurisprudence in explaining the effect of the inserted phrase.²⁴

Despite this, the Court of Appeal in *R v Momcilovic* (*'Momcilovic'*)²⁵ held that s 32(1) 'does not create a "special" rule of interpretation [in the *Ghaidan* sense], but rather forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision in question.'²⁶ It then outlined a three-step methodology for assessing whether a provision infringes a *Victorian Charter* right, as follows (*'Momcilovic Method'*):

Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the *Charter* in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).

Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the *Charter*.

Step 3: If so, apply s 7(2) of the *Charter* to determine whether the limit imposed on the right is justified.²⁷

Tentatively,²⁸ the *Momcilovic* Court held that s 32(1) 'is a statutory directive, obliging courts ... to carry out their task of statutory interpretation in a particular way.'²⁹ Section 32(1) is part of the 'framework of interpretive rules',³⁰ which includes s 35(a) of the *ILA* and the common law rules of statutory interpretation, particularly the presumption against interference with rights (or, the principle of legality).³¹ To meet the s 32(1) obligation, a court must explore 'all "possible"

²³ Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, 82-83.

²⁴ Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, 83; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 23: 'The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.'

²⁵ *R v Momcilovic* [2010] VSCA 50 (*'Momcilovic'*).

²⁶ *Ibid* [35]. This is in contrast to Lord Walker's opinion that '[t]he words "consistently with their purpose" do not occur in s 3 of the *HRA* but they have been read in as a matter of interpretation': Robert Walker, 'A United Kingdom Perspective on Human Rights Judging' (Presented at *Courting Change: Our Evolving Court*, Supreme Court of Victoria 2007 Judges' Conference, Melbourne 9-10 August 2007) 4.

²⁷ *Momcilovic* [2010] VSCA 50 [35].

²⁸ The *Momcilovic* Court only provided its 'tentative views' because '[n]o argument was addressed to the Court on this question': *Ibid* [101]. Indeed, three of the four parties sought the adoption of the Preferred *UKHRA*-based methodology as propounded by Bell J in *Kracke* [2009] VCAT 646 [65], [67] – [235].

²⁹ *Momcilovic* [2010] VSCA 50 [102].

³⁰ *Ibid* [103]. It is merely 'part of the body of rules governing the interpretative task': [102].

³¹ For sound and persuasive arguments about why s 32(1) creates a stronger obligation than the common law presumptions, being arguments that are contrary to this conclusion of the *Momcilovic* Court, see Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, Australia, 2008) [3.11] – [3.17].

interpretations of the provision(s) in question, and adopt[] that interpretation which least infringes *Charter* rights’,³² with the concept of “possible” being bounded by the ‘framework of interpretative rules’. For the *Momcilovic* Court, the significance of s 32(1) ‘is that Parliament has embraced and affirmed [the presumption against interference with rights] in emphatic terms’, codifying it such that the presumption ‘is no longer merely a creature of the common law but is now an expression of the “collective will” of the legislature.’³³ The guaranteed rights are also codified in the *Charter*.³⁴

The Court of Appeal decision in *Momcilovic* is currently on appeal to the High Court of Australia. The hearing is set down for February 2011. Accordingly, the legal interpretation to be given to s 32(1) of the *Victorian Charter* (and s 30 of the *ACT HRA*) may not be known for some time – more particularly, the precise meaning to be given to the additional words of ‘consistently with their purpose’ may not be known for some time.

Nevertheless, a number of issues flow from this. It is by no means clear that the interpretation given to s 32(1) by the *Momcilovic* Court is correct, with the reasoning of the Court of Appeal being open to criticism. Indeed, I have a forthcoming article which critiques the decision, particularly in relation to the reasoning which rejects s 32 as a codification of *Ghaidan*: see Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have’ (2011) 22(1) *Public Law Review* (forthcoming, February 2011). I will forward a copy of the article to the Department of Justice as soon as it is available (between December 2010 and January 2011), and it will constitute Appendix 5 of this submission.

Moreover, if the intention of the Tasmanian Parliament and Government is to codify the jurisprudence in *Ghaidan* and *re S*, the safest option is to adopt the wording of s 3(1) of the *UK HRA*, and make explicit in the Explanatory Memorandum and Second Reading Speech that the interpretation given to s 3(1) in *Ghaidan* and *re S* is to be the preferred interpretation of the Tasmanian provision. As is apparent from *Momcilovic*, the insertion of the phrase ‘consistently with their purpose’, and the failure to *explicitly* state that the additional words were intended to codify *Ghaidan* in the Second Reading Speech and the Explanatory Memorandum, permitted the Court of Appeal to reject what was otherwise the apparent intention of the Victorian Parliament in enacting s 32(1). Any use of the formulation from s 32(1) of the *Victorian Charter* risks *not* achieving *Ghaidan* type analysis.

Thirdly, for a greater exploration of the meaning of s 3 of the *UK HRA* and its related jurisprudence, I refer you to Appendix 1 (pp 40-49) and Appendix 3 (pp 51-57). This more detailed discussion will illustrate why it is *not* necessary to include the phrase ‘consistently with their purpose’ in the rights-compatible statutory interpretation provision in order to achieve a measure of balance between the parliamentary intentions contained in the Tasmanian Charter and the parliamentary intentions in any law being interpreted under the Tasmanian Charter. These issues are also explored in my forthcoming article (see Appendix 5).³⁵

³² *Momcilovic* [2010] VSCA 50 [103].

³³ *Ibid* [104].

³⁴ *Ibid*.

³⁵ See Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have’ (2011) 22(1) *Public Law Review* (forthcoming) (‘Who is Sovereign Now?’).

Fourthly, for greater exploration of the reasons why s 32(1) of the *Victorian Charter* is and ought to be considered a codification of *Ghaidan*, I refer you to Appendix 1 (pp 49-56) and Appendix 3 (pp 57-60). This discussion is important as a contrast to the *Momcilovic* decision, and reinforces the need to be absolutely explicit about a parliamentary intention to codify *Ghaidan* if the wording of s 32(1) is to be adopted in the Tasmanian Charter.

Fifthly, beyond the implications from the debate about whether s 32(1) of the *Victorian Charter* codifies *Ghaidan* or not, the methodology adopted in *Momcilovic* is problematic. The *Momcilovic* Method (see above) undermines the remedial reach of the rights-compatible statutory interpretation provision. The “Preferred Method” to interpretation under a statutory human rights instrument should be modelled on the two most relevant comparative statutory rights instruments – the *UKHRA*³⁶ and the *NZBORA*.³⁷ The methodology adopted under both of these instruments is similar and, by and large, settled. This method gives the interpretation power a remedial reach and focuses on two classic “rights questions” and two “*Charter* questions”,³⁸ and can be summarised as follows (“Preferred Method”):

The “Rights Questions”

First: Does the legislative provision limit/engage any of the protected rights in ss 8 to 27?
Second: If the provision does limit/engage a right, is the limitation justifiable under the s 7(2) general limits power or under a specific limit within a right?

The “Charter Questions”

Third: If the provision imposes an unjustified limit on rights, interpreters must consider whether the provision can be “saved” through a s 32(1) interpretation; accordingly, the judge must alter the meaning of the provision in order to achieve rights-compatibility.
Fourth: The judge must then decide whether the altered rights-compatible interpretation of the provision is “possible” and “consistent[] with [statutory] purpose”.

The Conclusion...

Section 32(1): If the s 32(1) rights-compatible interpretation is “possible” and “consistent[] with [statutory] purpose”, this is a complete remedy to the human rights issue.
Section 36(2): If the s 32(1) rights-compatible interpretation is not “possible” and not “consistent[] with [statutory] purpose”, the only option is a non-enforceable declaration of inconsistent interpretation under s 36(2).

Given the decision in *Momcilovic*, the Tasmanian Parliament and Government must give serious consideration to the need for a strong remedial reach in the rights-compatible statutory interpretation provision; and to reflect such a remedial reach, as embodied in the Preferred Method,

³⁶ *UKHRA* (UK) c 42. The methodology under the *UKHRA* was first outlined in *Donoghue* [2001] EWCA Civ 595 [75], and has been approved and followed as the preferred method in later cases, such as, *R v A* [2001] UKHL 25 [58]; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158[149]; *Ghaidan* [2004] UKHL 30 [24].

³⁷ *Bill of Rights Act 1990* (NZ) (“*NZBORA*”). The current methodology under the *NZBORA* was outlined by the majority of judges in *R v Hansen* [2007] NZSC 7 (‘*Hansen*’). This method is in contra-distinction to an earlier method proposed in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (NZCA) (known as “*Moonen No 1*”).

³⁸ Debeljak, ‘Parliamentary Sovereignty and Dialogue’, above n 11, 28 and 32.

in the Tasmanian Charter and by way of parliamentary intention in the extrinsic materials thereto. This issue of methodology is more fully discussed in my forthcoming article (see Appendix 5).³⁹

CONSULTATION POINT 9: Is it appropriate to limit the power to make a declaration of incompatibility to the Supreme Court and only the Supreme Court?

Given the serious nature of a declaration of incompatibility, it is appropriate to give the power to make such declarations to the Supreme Court only.

CONSULTATION POINT 10 and 11: Individual cause of action? A role for the Human Rights Commission in pursuing individual causes of action?

The Directions Paper is not at all clear about how individual causes of action are going to be regulated. It appears that there are going to be two ways for an individual to seek redress against a public authority that acts or decides unlawfully: first, there will be an equivalent to s 39 of the *Victorian Charter*, which allows a *Victorian Charter* unlawfulness to supply the ground for unlawfulness for a pre-existing cause of action, relief or remedy; and, secondly, that an independent cause of action, being breach of a statutory duty under the Tasmanian Charter, will be allowed, but that such freestanding causes of action must be “cleared” by the Human Rights Commission and taken to Supreme Court by way of a representative action run by the Human Rights Commission.

From the outset, it must be acknowledged that any movement towards a freestanding cause of action is to be supported. If political reality is such that a freestanding remedy will *only* be supported if it operates through the Human Rights Commission, than this is an improvement on the *Victorian Charter*. However, it is preferable to provide for an unconstrained freestanding cause of action and to avoid the s 39 device under the *Victorian Charter*. The preferable situation is to adopt the *UK HRA* position (see below).

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 freestanding remedy for individuals when public authorities act unlawfully; nor does it entitle any person to an award of damages because of a breach of the *Victorian Charter*. In other words, a victim of an act of unlawfulness committed by a public authority is not able to independently and solely claim for a breach of statutory duty, with the statute being the *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*

³⁹ Debeljak, ‘Who is Sovereign Now?’, above n 35.

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.

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 (for example, an injunction, a stay of proceedings, or the exclusion of evidence). The precise meaning of this section is yet to be fully clarified by the Victorian courts.

Section 39(3) clearly indicates that no independent right to damages will arise merely because of a breach of the *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 in Tasmania. First, it is not clear that the Tasmanian government is reluctant to embrace effective remedies for human rights violations. This being so, the most effective remedies mechanisms are embodied in the *UK HRA* (see below).

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

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

The British and, more recently, the ACT models offer a much better solution to remedies under a Tasmanian Charter.⁴⁰ In Britain, ss 6 to 9 of the *UK HRA* make it unlawful for a public authority to exercise its powers under compatible legislation in a manner that is incompatible with rights. The definition of "public authority" includes a court or tribunal. Such unlawful action gives rise to three means of redress: (a) a new freestanding cause for breach of statutory duty, with the *UK HRA* itself being the statute breached; (b) a new ground of illegality under administrative law;⁴¹ 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

⁴⁰ 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.

⁴¹ 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.

appropriate, which includes an award of damages in certain circumstances if the court is satisfied that the award is necessary to afford just satisfaction.⁴² The British experience of damages awards for human rights breaches is influenced by the *ECHR*. Under the *ECHR*, a victim of a violation of a human right is entitled to an effective remedy, which may include compensation. Compensation payments made by the European Court of Human Rights under the *ECHR* have always been modest,⁴³ and this has filtered down to compensation payments in the United Kingdom. Given that international and comparative jurisprudence ought to inform any interpretation of the Tasmanian Charter, one could expect the Tasmanian 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 Tasmanian Charter.

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

The failure to create an unconstrained separate cause of action and remedy under any Tasmanian human rights instrument 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 New Zealand experience is instructive. Although the statutory *Bill of Rights Act 1990* (NZ) does not expressly provide for remedies, the judiciary developed two remedies for violations of rights – first, a judicial discretion to exclude evidence obtained in violation of rights; and, secondly, a right to compensation if rights are violated.⁴⁴ This may be the ultimate fate of the Tasmanian experiment. It is eminently more sensible for the Tasmanian Parliament and Government 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 freestanding remedy, see Appendix 4 (pp 12-20).

CONSULTATION POINT 15: Should all parts of government have to comply with the Charter obligations?

All parts of government should have to comply with Charter obligations under any Tasmanian Charter. I specifically address the issue of core/wholly and hybrid/function public authorities' compliance with Charter obligations under consultation point 17 below. However one point about the definition of "public authorities" will be made here. The definition of public authorities in

⁴² 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].

⁴³ It would be rare for a victim of a human rights violation to be awarded an amount in excess of GBP 20,000.

⁴⁴ ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [3.22] – [3.23].

para 8.3.1.1 of the Directions Paper⁴⁵ is appropriately inclusive, with various examples being included. One category of public authority that ought to be explicitly listed in the Tasmanian Charter is those entities declared to be, or declared not to be, by regulation. This provision could be modelled on s 4(1)(k) of the *Victorian Charter*, which states ‘an entity declared by the regulations not to be a public authority for the purposes of this *Charter*.’ However, the Tasmanian Charter ought to improve on the *Victorian Charter* by explicitly acknowledging the power to declare an entity to be a public authority, in addition to declaring an entity not to be a public authority.

The main focus of discussion here will be about courts and tribunals. Another issue for the Tasmanian Parliament and Government to resolve is whether to include courts and tribunals in the definition of “public authority” and thus subject them to Charter obligations. In the United Kingdom, courts and tribunals are core/wholly public authorities. This means that courts and tribunals have a positive obligation to interpret and develop the common law 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.⁴⁶

Under the *Victorian Charter*, in contrast, courts and tribunals were excluded from the definition of public authority. The Human Rights Consultation Committee report indicates that the exclusion of courts was to ensure that the courts are not obliged to develop the common law in a manner that is compatible with human rights. This is linked to the fact that Australia has a unified common law.⁴⁷

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

Moreover, the decision to exclude courts and tribunals from the obligations of public authorities in part necessitated the precise drafting of the “application” provision in s 6. Section 6(2)(b), which sets out which Parts of the *Victorian Charter* apply to courts and tribunals, has caused much confusion, particularly in relation to which rights apply to courts and tribunals. In *Kracke*, Justice Bell held that only rights apposite to the functions of courts and tribunals should apply to courts and tribunals, rather than the entire suite of human rights.⁴⁸ This is in contrast to the *UK HRA*, which does not contain an “application” provision. In Britain, there has not been a debate about what rights apply to courts and tribunals when undertaking their functions, and the full suite of human rights apply. The British position is preferable to the Victorian position.

⁴⁵ Directions Paper, above n 1, 43.

⁴⁶ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

⁴⁷ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, para 135.

⁴⁸ *Kracke v Mental Health Review Board And Ors (General)* [2009] VCAT 646 [236] – [254].

For further discussion on which public authorities should attract human rights obligations, see Appendix 4 (pp 2-12).⁴⁹

CONSULTATION POINT 16: Should State and Council owned companies only have to comply with the Charter obligations if and when their competitors are subject to similar obligations or should they be treated as any other part of government?

The latter position is preferable. Human Rights obligations have traditionally fallen on States, and it is unacceptable to exempt State and Council owned companies from traditional human rights obligations because their competitors may not equally be affected. Public entities operate under different conditions to private entities under many areas of the law, and human rights regulation should not be treated any differently.

CONSULTATION POINT 17: Should non-government service providers who provide services funded or controlled by government have to comply with the Charter obligations?

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 Tasmanian 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.⁵⁰ 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 human rights instrument would enable core/wholly 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/wholly 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 human rights instrument.

⁴⁹ Julie Debeljak, ‘Human Rights Responsibilities of Public Authorities Under the Charter of Rights’ (Presented at *The Law Institute of Victoria Charter of Rights Conference*, Melbourne, 18 May 2007) 2-12 (‘Public Authorities’).

⁵⁰ 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).

Secondly, if the Tasmanian 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 that 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.

Thirdly, we should also consider the benefits that flow from imposing human rights obligations on core/wholly and hybrid/functional public authorities, and labelling certain behaviours as “unlawful”. 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.

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

Further, such a change in culture in both the core/wholly and hybrid/functional public authority arenas is especially vital when you consider that ‘[o]nly a fraction of legislative initiatives will ever be subject to ... litigation’⁵¹ under any Tasmanian 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.

“Services funded or controlled by government”

Having made out the case for imposing Charter obligations on non-government service providers, consideration must be given to which hybrid/functional public authorities will be included. The Directions Paper indicates that the imposition of Charter obligations on non-government service providers ‘who provide services funded or controlled by Government’⁵² is welcome, but insufficient. The Tasmanian Charter must go beyond those non-government service providers that are funded or controlled by the State. There are many non-government entities that provide services of a public nature and services that the public would consider to be public services, but that would not come within such a narrow definition.

In order to provide the necessary breadth of coverage of non-government entities and to provide flexibility in the instrument to respond to future situations, regulation of non-government service providers should be modelled on s 4(1)(c) of the *Victorian Charter*. Section 4(1)(c) imposes obligations on an ‘entity whose functions are or include functions of a public nature when exercising those functions on behalf of the State or a public authority, whether under contract or otherwise.’ The legislation then contains an inclusive list of factors that are relevant to determining

⁵¹ 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*’).

⁵² Directions Paper, above n 1, 36.

whether a function is of a public nature in s 4(2). The factors are whether (a) the function is given by or under statute (e.g. the powers of arrest under the *Transport Act 1983*); (b) the function is connected to or generally identified with functions of government (e.g. providing correctional services, by way of managing a prison, under the *Corrections Act 1986*); (c) the function is regulatory in nature; (d) the entity is publicly funded to perform the function; and (e) the entity is a company whose shares are held by or on behalf of the State (e.g. companies responsible for retail supply of water within Melbourne). The Victorian provisions are modelled on s 6(3)(b) of the *UK HRA* and relevant jurisprudence.

CONSULTATION POINT 19 AND 21: Should a right to an adequate standard of living and environmental sustainability be include in a Tasmanian Charter? Is the detail provided for these two categories adequate for Tasmania?

In short, a right to an adequate standard of living and environmental sustainability should be included in a Tasmanian Charter. The detail provided for the adequate standard of living in the Directions Paper is adequate. I do not have the technical expertise to comment on whether the detail provided for environmental sustainability is adequate.

I wish to more broadly comment on the inclusion of economic, social and cultural rights in order to support my recommendation for their inclusion. 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.⁵³

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.⁵⁴

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.⁵⁵ Let us consider some examples.

⁵³ 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.

⁵⁴ 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.

⁵⁵ 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.

The right to life – a classic civil and political right – is a right in point. Assessing this right in line with the Maastricht principles,⁵⁶ 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 measures taken by the government to protect the right to adequate housing were reasonable.⁵⁷ 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

⁵⁶ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

⁵⁷ 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).

Tasmania. 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),⁵⁸ 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),⁵⁹ 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),⁶⁰ HIV/AIDS treatment was in issue. In particular, the case concerned the provision of a drug to reduce the transmission of HIV from mother to child during birth. The World Health Organisation had recommended a drug to use in this situation, called nevirapine. The manufacturers of the drug offered it free of charge to governments for five years. The South African Government restricted access to this drug, arguing it had to consider and assess the outcomes of a pilot program testing the drug. The Government made the drug available in the public sector at only a small number of research and training sites.

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

⁵⁸ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC).

⁵⁹ *Government of the Republic South Africa & Ors v Grootboom and Ors* 2000 (11) BCLR 1169 (CC).

⁶⁰ *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).

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.⁶¹

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.⁶²

Moreover, the clarity of economic, social and cultural rights is being improved by the United Nations Committee on Economic, Social and Cultural Rights⁶³ currently through its concluding observations to the periodic reports of States' Parties⁶⁴ 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),⁶⁵ 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 Tasmania 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

⁶¹ *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 [80].

⁶² See generally Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008).

⁶³ 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)).

⁶⁴ *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, arts 16 and 17 (entered into force 3 January 1976).

⁶⁵ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008) UN Doc No A/RES/63/117 (on 10 December 2008).

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.⁶⁶ It essentially 'imposes an obligation to move *as expeditiously and effectively as possible* towards'⁶⁷ the goal of eventual full realisation. This is not too much to expect of Tasmania.

CONSULTATION POINT 20: Should a right to an adequate standard of living and environmental sustainability be included now or be delayed until they are also included in other Australian States or Territories?

Tasmania should move immediately on recognising economic, social and cultural rights. Economic, social and cultural rights are interdependent with, indivisible from, and mutually reinforcing of civil and political rights. To embrace one set of rights without the other undermines full and effective protection and promotion of human rights.

Moreover, Tasmania should not fear "going it alone". Although no other Australian jurisdiction has adopted economic, social and cultural rights to date, there is much guidance from the UN treaty system and comparative jurisdictions about implementing such rights. The increasing clarity and certainty about economic, social and cultural rights removes much of the traditional apprehension about formally recognising these rights.

CONSULTATION POINT 22: Are the rights listed in the paper for persons living with a disability necessary and, if so, are there any other rights you would include?

The rights of persons with a disability are now formally recognised in the *United Convention on the Rights of Persons with a Disability* (2006), which has been ratified by Australia. This places the rights of persons with disability alongside the other seven major international human rights treaties.

Given that the rights of persons with a disability are not explicitly protected in either the *ICCPR* or *ICESCR*, and thus will not be explicitly picked up under the Tasmanian Charter by simply adopting the *ICCPR* and *ICESCR* rights, it is appropriate that separate recognition be given to the rights of persons with disabilities.

MISCELLANEOUS COMMENTS

Executive Statements of Compatibility [8.4.2]

Although the introduction of statements of compatibility is generally supported, certain issues must be addressed if such a mechanism is going to improve the promotion and protection of human rights in Australia, establish a rigorous dialogue about human rights between the arms of government, and

⁶⁶ 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).

⁶⁷ 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].

improve the transparency and accountability of the representative arms of government when making decisions about human rights and justifiable limitations to human rights.

There are numerous advantages to pre-legislative human rights scrutiny. Many of these strengths can be gleaned from a comparative analysis of pre-legislative scrutiny mechanisms in force in comparative jurisdictions, such as, Canada, the United Kingdom and Victoria. It is also through an analysis of these comparative jurisdictions that weaknesses in pre-legislative scrutiny are revealed.

Canada

In Canada, the executive duty to issue a statement about the compatibility of a law with human rights is not contained in the *Charter of Human Rights and Freedoms 1982* (Can) ('*Canadian Charter*'). Rather, the Minister for Justice has a statutory reporting requirement to Parliament under the *Department of Justice Act*.⁶⁸ 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.

The process that precedes this certification is of interest. Once Cabinet agrees on a policy agenda, the Department of Justice drafts the legislation and makes an assessment of the implications of the proposed legislation under the *Canadian Charter*. This involves assessing whether a right is limited by the proposed legislation and, if so, the level of difficulty associated with justifying the limitation. This departmental inquiry is based on the Canadian Supreme Court's two-step approach to justifying limitations placed on rights, which is known as the *Oakes* test.⁶⁹ The departmental assessments range from minimal, to significant, to serious, to unacceptable risks.⁷⁰ If a 'credible [*Canadian*] *Charter* argument'⁷¹ 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 rights-risky legislative means to achieve the policy objective will be identified and pursued, or a political decision will be made about whether to proceed with the legislation as drafted.⁷²

⁶⁸ *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.

⁶⁹ See Dickson CJ in *R v Oakes* [1986] 1 SCR 103.

⁷⁰ 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.

⁷¹ 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.

⁷² 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

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.⁷³

The Canadian ministerial reporting requirement is an important part of the 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 and articulating justifications for any limits thereto. Such assessments by the policy-driven arm of government are a vital contribution to the dialogue about rights. The executive can influence the legislative understandings of *Canadian Charter* issues with the information and analysis contained in the pre-legislative record, particularly if the pre-legislative record contains ‘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.’⁷⁴ This capacity to influence the dialogue has motivated the Canadian executive to undertake serious pre-legislative scrutiny.⁷⁵ 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.’⁷⁶

The greatest weakness with Canadian executive pre-legislative scrutiny is its secretive character. Understandably, the Department of Justice is reluctant to divulge precise details about rights-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.⁷⁷ However, this secrecy hinders a robust dialogue about rights between the executive and parliament, and undermines the transparency of and accountability for human rights decision-making. The legislature does not fully benefit from the executive assessments of policies and their

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.

⁷³ 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.

⁷⁴ 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.

⁷⁵ Ibid 7.

⁷⁶ Ibid 10.

⁷⁷ 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.

legislative translations. The legislature only has access to the parliamentary report of the Minister which discloses the *outcome* of the executive pre-legislative scrutiny, not the *reasons* for such assessments. The legislature's only access to pre-legislative deliberations is via evidence given by departmental lawyers during parliamentary committee scrutiny of proposed legislation.

The Tasmanian Parliament and Government should take note that the value of pre-legislative scrutiny comes from disclosure of the *reasoning* behind the rights-(in)compatibility assessment of proposed legislation. It is this *reasoning* that discloses the executive's perspective on the definition and scope of rights, whether proposed legislation limits the rights so conceived, and the justifications for such limitations. Without knowledge of the reasoning, the legislature does not benefit from the executive's analysis and its distinct perspective.

United Kingdom

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).⁷⁸ A s 19(1)(b) statement is expected to 'ensure that the human rights implications [of the bill] are debated at the earliest opportunity'⁷⁹ and to provoke 'intense'⁸⁰ parliamentary scrutiny of the bill. Ministerial statements of compatibility under s 19(1)(a) are likely to be used as evidence of parliamentary intention.⁸¹

Section 19(1) statements allow the executive to effectively contribute to the dialogue about the definition and scope of the rights, as well as justified limitations thereto. Statements of compatibility allow the executive to assert *its* understanding of the rights in the context of policy formation and legislative drafting.⁸² However, the effectiveness of the contribution depends on many factors, including the test used by the executive to assess the compatibility of proposed legislation and the quality of the explanation given for such assessments.

⁷⁸ 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).

⁷⁹ United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [3.3].

⁸⁰ United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, col 1233 (Lord Irvine, Lord Chancellor).

⁸¹ This is similar to the rule in *Pepper v Hart* [1993] AC 59.

⁸² 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.

In relation to the test, the Home Secretary has indicated that ‘the balance of argument’⁸³ must support compatibility – that is, 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.’⁸⁴

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.’⁸⁵ During debate on the Human Rights Bill, it was suggested that the reasoning would be disclosed *only if* raised in parliamentary debate.⁸⁶ After the *UK HRA* came into operation, the Home Office indicated that a Minister ‘is generally not in a position to disclose detailed legal advice, nor should it be necessary to do so.’⁸⁷ Rather, s 19(1) statements should only indicate which Convention issues were considered and ‘the thinking which led to the conclusion reflected in the statement.’⁸⁸ The detail of the compliance issue ‘is most suitably addressed in context, during debate on the policy and its justification.’⁸⁹ 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

⁸³ 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* (2nd ed, Home Office and Cabinet Office, 2000) [36] (*UK HRA Guidance* (2nd ed)), as referred to by David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] Summer *Public Law* 323, 338; Lord Anthony Lester, ‘Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998’ [2002] *European Human Rights Law Review* 432, 435. Periodic “guidance” about the implementation of the *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* (1st ed, Home Office and Cabinet Office, 1998); *UK HRA Guidance* (2nd ed); *The UK HRA Guidance for Departments* (3rd 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.

⁸⁴ 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.

⁸⁵ United Kingdom, Rights Brought Home: The Human Rights Bill (1997) [3.3].

⁸⁶ United Kingdom, *Parliamentary Debates*, House of Lords, 17 December 1998, col WA186 (Lord Williams).

⁸⁷ Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [14]. See United Kingdom, *Parliamentary Debates*, House of Lords, 28 June 2000, Col WA80 (Lord Bassam of Brighton):

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

⁸⁸ 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].

⁸⁹ *Ibid.*

Minister must ‘at least identify the Convention points considered and the broad lines of the argument.’⁹⁰

The test for s 19(1) assessments, and the lack of disclosure of the reasoning behind the assessment, raise problems both in terms of producing a robust dialogue about human rights and justifiable limits thereto, and for the transparency and accountability of public decision-making impacting on human rights.

The first problem relates to policy formation. Human 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 rights, whether proposed legislation limits the rights, and the justification of those limits. The executive’s understanding of the rights and justifiable limits thereto sets the parameters of the debate and thereby has the capacity to influence the legislature’s analysis of the issue. However, commentators have noted that it is not clear that ‘rights are being fully taken into account at the ... stage of formulating proposals and instructing counsel to draft legislation’,⁹¹ even though ‘this is perhaps the most important requirement of the *UK HRA*.’⁹²

This not only potentially undermines the protection and promotion of the human rights; it also means the executive is not making as complete a contribution to the human rights debate as possible. If the human rights implications of policy are not comprehensively and consistently addressed within the executive at all stages of policy and law formulation, the executive will waste an important opportunity to educate parliament about *its* understanding of the meaning and scope of rights, and the justifiability of limitations thereto.

The second problem is that s 19(1) assessments too readily assume compatibility. This appears to be due in part to the low threshold for assessing proposed legislation as compatible, and in part to political considerations. This approach to s 19(1) is unsatisfactory. Over-generous use of s 19(1)(a) statements fails to alert parliament to proposed legislation that ought to be closely scrutinised. Moreover, over-generous statements of compatibility fail to inspire a full and frank debate between the executive and parliament about protected rights. In the end, human rights protection and promotion are compromised, there is a weakening of the dialogue about rights and justifiable limits,⁹³ and the transparency of and accountability for public decision-making is undermined.

The third problem is the lack of disclosure of the reasoning behind the executive’s s 19(1) assessment. It is the reasoning supporting the s 19(1) assessment that is most important, as the

⁹⁰ *UK HRA Guidance* (2nd ed) [39], as cited by David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Summer Public Law* 323, 338-9. See also Lord Anthony Lester, ‘Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998’ [2002] *European Human Rights Law Review* 432, 435.

⁹¹ 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* (2nd ed) requires ‘a general assessment ... , not necessarily as a free-standing document, to alert Ministers to substantive Convention issues’: Lord Anthony Lester, ‘Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998’ [2002] *European Human Rights Law Review* 432, 435. The formal process of s 19(1) assessment occurs only once the proposed policy is transformed into a Bill.

⁹² Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 26.

⁹³ John Wadham, ‘The *Human Rights Act*: One year On’ [2001] *European Human Rights Law Review* 620, 624.

reasoning reveals the executive's views about the definition and scope of the rights, its preferred resolution of conflicts between rights and other non-protected values, any consequential limits the proposed legislation may impose on rights, and the executive's justification for such limits. Parliament – when scrutinising proposed legislation and passing legislation – does *not* benefit from the perspectives of the executive.⁹⁴

Tasmania

Any provision in the Tasmanian Charter that requires pre-legislative human rights scrutiny must be drafted in such a way as to avoid these problems. In particular, any such provision must include an obligation on the executive to divulge the reasoning behind pre-legislative assessments, including an identification of the rights considered, identification of the rights considered to be limited, and the reasoning behind any justification for such limitations. Any such provision should also explicitly acknowledge the possibility of a statement of incompatibility, as well as compatibility.

The model legislation addressing these concerns is s 28(3) of the *Charter of Human Rights and Freedoms 2006* (Vic) ('*Victorian Charter*'). Section 28(3) explicitly acknowledges the possibility that a proposed law may be considered incompatible by requiring the executive to state whether a Bill is compatible or incompatible with human rights. Section 28(3) also imposes an obligation on the executive to state 'how [a Bill] is compatible' or 'the nature and extent of the incompatibility.' The latter 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 Tasmanian Government and Parliament review the s 28 statements issued in Victorian to date to see the level of detailed explanation supporting the rights-(in)compatible assessments, and that they adopt the wording of s 28 in any Tasmanian Charter. Moreover, any Tasmanian Charter must address the issue of amendments to proposed legislation as a bill passes through the legislative process in both Houses of Parliament. I recommend that an additional obligation be placed on the responsible Minister to review and, if necessary, draft a new statement of (in)compatibility for all proposed legislation subject to amendments through the legislative process. Finally, a culture of transparency and accountability for human rights decision-making within the executive must be fostered.

For further elaboration of this discussion, see Appendix 1 (pp 26-31).

Parliamentary Human Rights Scrutiny Committee

Although the establishment and operation of a human rights specific parliamentary committee is generally supported, certain factors need to be addressed if such a mechanism is going to improve the promotion and protection of human rights in Tasmania, establish a rigorous dialogue about human rights between the executive, the parliament and judiciary, and improve the transparency and accountability of the representative arms of government when making decisions about human rights and justifiable limitations to human rights. In particular, the effectiveness of a parliamentary human rights scrutiny committee depends on whether its powers are adequate, and whether its

⁹⁴ 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.

processes and procedures support robust human rights scrutiny. Again, a comparative analysis of such human rights scrutiny committees is of assistance.

United Kingdom

In the United Kingdom, there is a Joint Parliamentary Committee on Human Rights (the 'UK 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.'⁹⁵ The UK Committee has prioritised the scrutiny of proposed legislation for human rights implications.⁹⁶ In furtherance of this, it empowered its Chair to write to responsible Ministers 'raising questions or concerns in the area of human rights'⁹⁷ for the purpose of collecting information. The UK Committee also 'considers itself to be responsible ... for assessing whether ... "s 19 statements" have been properly made', with this being 'a key duty.'⁹⁸

The UK 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 circumstances.⁹⁹ The UK Committee adopts the European Court of Human Rights' approach to assessing the compatibility of legislation.¹⁰⁰ It also relies on legal advice that is independent of the Government¹⁰¹ and is currently constituted in a non-partisan manner.

The UK Committee has made a significant difference to the level of debate and scrutiny of legislation within the Parliament, although it has not necessarily resulted in major changes to legislative proposals.¹⁰² Reports of the UK Committee are 'often relied on extensively in debate on

⁹⁵ 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>.

⁹⁶ Parliamentary Committee, House of Commons and Lords, *Scrutiny of Bills: Third Special Report: Session 2000-01* (2001) [1].

⁹⁷ *Ibid* [2].

⁹⁸ 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 83, 445-6.

⁹⁹ 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 83, 437, 441-45.

¹⁰⁰ Lester, 'Parliamentary Scrutiny of Legislation', above n 83, 438.

¹⁰¹ *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.

¹⁰² Lester, 'Parliamentary Scrutiny of Legislation', above n 83, 438-441; Feldman, 'Parliamentary Scrutiny', above n 83, 341-2, 345-8; United Kingdom, *Parliamentary Debates*, House of Commons, 28 October 2002,

the Bill to which the report relates.¹⁰³ 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.¹⁰⁴ Examples of this constructive debate are the Criminal Justice and Police Bill 2001 (UK) and the Anti-Terrorism, Crime and Security Bill.¹⁰⁵ The UK Committee ‘reports helped to generate pressure ... which yielded some gains ... in the form of additional safeguards for rights’¹⁰⁶ for both Bills.

Overall, the UK 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.’¹⁰⁷ The UK Committee enables Parliament to fulfil its constitutional roles of legislative scrutineer and law-maker, it facilitates the robust and considered parliamentary contribution to the dialogue about rights and justifiable limits on rights, and it improves the transparency and accountability of parliamentary decision-making on human rights matters. These benefits and strengths should apply equally to any committee established under a Tasmanian Charter.

Victoria

Under s 30 of the *Victorian Charter*, 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’s human rights jurisdiction has only existed since 1 January 2007, it is difficult to make an assessment of its work.

However, one point to note is the major difference between the Victorian and British models: 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.

Tasmania

I strongly support the establishment of a parliamentary human rights scrutiny committee as part of any Tasmanian Charter. The size of the task of human rights scrutiny should not be underestimated, nor should the benefits that will flow from creating a specialist focus on human rights. If

col 604 (Ms Jean Corston MP); United Kingdom, *Parliamentary Debates*, House of Commons, 28 October 2002, col 604 (Mr Simon Hughes MP).

¹⁰³ Feldman, ‘Parliamentary Scrutiny’, above n 83, 341.

¹⁰⁴ Ibid.

¹⁰⁵ 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 83, 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 83, 439-41.

¹⁰⁶ Feldman, ‘Parliamentary Scrutiny’, above n 83, 341.

¹⁰⁷ Lester, ‘Parliamentary Scrutiny of Legislation’, above n 83, 437 and 433 respectively.

the aim is to better promote and protect human rights, to create an inter-institutional dialogue about human rights, and to improve transparency and accountability about human rights decision-making, a specialist human rights scrutiny committee will be an invaluable addition to the parliamentary voice on such matters.

There are, however, two keys to an effective human rights scrutiny committee. First, one of the strengths of the British and Victorian Committees is the independent legal adviser to the Committee. The provision of independent legal advice is vital not only because Parliament and the human rights scrutiny committee will be asked to assess the compatibility of Tasmanian laws with human rights obligations, but also because an independent legal adviser will introduce an apolitical, non-majoritarian influence within the human rights scrutiny committee. I recommend that an independent legal adviser be appointed to advise any human rights scrutiny committee established under the Tasmanian Charter.

Secondly, I recommend that any human rights scrutiny committee established under a Tasmanian Charter be empowered to undertake “own motion” inquiries into any matter relating to human rights. This independence of inquiry will enhance the standing of the human rights scrutiny committee, the protection and promotion of human rights, and the transparency and accountability of human rights decision-making.

Directions Paper Paragraphs [8.4.4.2 – 8.4.4.5] (pp 44)

It is not at all clear whether the procedure described in paragraphs [8.4.4.2 – 8.4.4.5] is in addition to the “usual” way in which a rights-compatible statutory interpretation provision would operate. That is, usually the interpretation provision can be utilised by any individual interpreting a statutory provision, whether they be, say, a public servant implementing a statute, or litigants in a proceeding that are arguing about the interpretation of a statutory provision, or a judge or tribunal member interpreting a statute when applying it. If the process described in paragraphs [8.4.4.2 – 8.4.4.5] is in addition to the “usual” way of utilising a rights-compatible statutory interpretation provision, I have no issue with the process as described.

However, if the process described in paragraphs [8.4.4.2 – 8.4.4.5] replaces the “usual” way of utilising a rights-compatible statutory interpretation provision, I do not support it. It is unnecessarily restrictive and impracticable to expect all rights-based challenges to the interpretation of statutory provisions to go through the Human Rights Commission.

Directions Paper Paragraph [8.5.1]

I *disagree* that the Tasmanian Charter should exclude the payment of damages from an action based solely arising from a violation of the Tasmanian Charter. As indicated above, I think that damages for breach of a freestanding Charter cause of action should be allowed, with the awarding of damages to be based on the obligations under the *ECHR* and jurisprudence thereto, as adopted and further expanded under the *UK HRA*.

Directions Paper Paragraph [8.5.2.4]

I agree that the Tasmanian Charter should provide that if a declaration of incompatibility relates to subordinate legislation or to a by-law, then the subordinate legislation or by-law is invalid unless

the primary legislation authorising the subordinate legislation or by-law is amended by the Parliament to specifically authorise the incompatibility within 30 sitting days of the declaration.

The reasons why I support this provision include the preservation of parliamentary sovereignty, the human rights accountability of parliament, and the fullest protection and promotion of human rights.

Review of Legislation

The Tasmanian 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').¹⁰⁸ The Unit created a universal system for human rights auditing of legislation, policies and practices according to 'a "traffic light" system which graded the degree of risk according to the significance or sensitivity of an issue, its vulnerability to challenge, and the likelihood of challenge.'¹⁰⁹ 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;

¹⁰⁸ 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.

¹⁰⁹ 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.

and a green light indicated ‘little or no risk of challenge, or damage to an operationally significant area’, such that no action was required.¹¹⁰

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 within the executive post-*UK HRA*.¹¹¹

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.¹¹² A more proactive approach would have increased the influence of the executive in the process of delimiting the open-textured protected rights. The executive should have honestly and vigorously assert its understandings of the protected rights. Moreover, such a containment strategy is too judicial-centric.

Thus, any pre-audit undertaken by the Tasmania Government were it 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.

APPENDICES

- Appendix 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.
- Appendix 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.

¹¹⁰ 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.

¹¹¹ 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.

¹¹² 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.

- Appendix 3: Julie Debeljak, ‘Submission to the National Consultation on Human Rights’, submitted to the *National Consultation on Human Rights Committee*, 15 June 2009 (extracts)
- Appendix 4: Julie Debeljak, Human Rights Responsibilities of Public Authorities Under the Charter of Rights’ (Presented at *The Law Institute of Victoria Charter of Rights Conference*, Melbourne, 18 May 2007)
- Appendix 5: Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have’ (2011) 22(1) *Public Law Review* (forthcoming, February 2011). I will forward a copy of the article to the Department of Justice as soon as it is available (between December 2010 and January 2011).

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