

**SUBMISSION TO THE TASMANIAN HUMAN RIGHTS COMMUNITY  
CONSULTATION COMMITTEE ON  
'HOW HUMAN RIGHTS ARE CURRENTLY PROTECTED IN TASMANIA  
AND WHETHER THE PROTECTION OF HUMAN RIGHTS CAN BE  
ENHANCED OR EXTENDED?'**

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**INTRODUCTION**

This submission is in two parts: (a) the first part addresses the substance of the questions posed by the Human Rights Community Consultation Committee (the 'Committee') and (b) the second part is a list of my past research and publications that more fully explores the issues. The first part is intended as an overview of the relevant matters. For further detail and discussion, the Committee should refer to the references in the second part (note: for ease of reference, in the first part I direct the Committee to specific page references in the second part).

**QUESTION 1: ARE HUMAN RIGHTS ADEQUATELY PROTECTED IN TASMANIA?**

Being from Victoria and having no intimate knowledge of the Tasmanian legal system, I am unable to comment on this question. I do, however, comment on general matters about jurisdictions without domestic rights protection under question 2.

**QUESTION 2: IS CHANGE NEEDED TO BETTER PROTECT HUMAN RIGHTS?**

In any jurisdiction that does not have comprehensive, domestic rights protection I argue that change is needed to better protect human rights. Basically, under the domestic law of Tasmania (and, for that matter, Australia), the representative arms of government have an effective monopoly over the protection and promotion of human rights. The judiciary has a limited role in protecting and promoting rights.

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

- 1) The paucity of constitutionally protected human rights guarantees: The *Tasmanian Constitution* does not comprehensively guarantee human rights.

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

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

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

See further pages 12 to 16 of Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australian from Canada and the United Kingdom*, PhD Thesis, Monash University, 2004 ('*Human Rights and Institutional Dialogue*').

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

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

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

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

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

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

- a) there are rules of statutory interpretation that favour interpretations of domestic laws that are consistent with our international human rights obligations;
- b) our international human rights obligations influence the development of the common law;

- c) international human rights obligations impact on the executive insofar as the ratification of an international treaty alone, without incorporation, gives rise to a legitimate expectation that an administrative decision-maker will act in accordance with the treaty, *unless* there is an executive or legislative indication to the contrary (*Teoh* decision).

Basically, Australia's international human rights obligations offer very little protection within the domestic system, whether one is considering the Commonwealth or Tasmanian jurisdictions. In particular, the rules of statutory interpretation are weak, especially because clear legislative intent can negate them. Moreover, reliance on the common law is insufficient, especially given that judges can only protect human rights via the common law when cases come before them, which means that protection will be incomplete. The common law can also be overturned by statute. Furthermore, the decision of *Teoh* offers only procedural (not substantive) protection, and its effectiveness and status is in doubt – the Commonwealth legislature is poised to override it by legislation and a majority of judges on the High Court have recently questioned its correctness (see pages 26 to 27 of *Human Rights and Institutional Dialogue*).

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

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

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

### **QUESTION 3: IF CHANGE IS NEEDED TO BETTER PROTECT HUMAN RIGHTS IN TASMANIA, HOW SHOULD THE LAW BE CHANGED TO ACHIEVE THIS?**

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

<sup>2</sup> The domestic fora have limited rights jurisdictions only and are vulnerable to change; the international fora are non-binding and increasingly ignored.

The law in Tasmania needs to be changed to address the lack of effective human rights protections. Ideally, a comprehensive statement of rights should be inserted into the *Tasmanian Constitution* and entrenched. If the constitutional route is to be taken, it should be modelled on the *Canadian Charter of Rights and Freedoms* (1982) (the ‘*Canadian Charter*’). Despite being a constitutional document, the *Canadian Charter* has mechanisms that protect the sovereignty of parliament, thus addressing the need to preserve the sovereignty of parliament that concerns most representative arms of government. The reasons for this will be discussed below in Questions 13 to 17.

If constitutional protection is not supported, the next best alternative would be to protect and promote human rights via an ordinary statute. If the statutory protection route is taken, it should be modelled on the *Human Rights Act 1998* (UK) (the ‘*UK HRA*’). This model, by and large, has been adopted in Victoria under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The reasons for this will be discussed below in Question 13 to 17.

The *Bill of Rights 1990* (NZ) does not offer adequate protection. This model offers little more protection than the current common law of Tasmania and Australia. The *Human Rights Act 2004* (ACT) (the ‘*ACT-HRA*’) does not go as far as the *UK HRA*, in that it does not apply to ‘public authorities’ in the same way as the *UK HRA*. Under ss 6 to 9 of the *UK HRA*, it is unlawful for a public authority to exercise its powers under compatible legislation in a manner that is incompatible with rights. This gives rise to various causes of actions against the public authorities, without which the *UK HRA* would be less effective. This is further discussed below in Question 20 and 21.

#### **QUESTION 4: WOULD A CHARTER OF HUMAN RIGHTS ENHANCE HUMAN RIGHTS PROTECTION IN TASMANIA**

In short, the answer is yes, a Charter of Human Rights would enhance the protection of human rights in Tasmania. The extent of enhancement, however, depends on the type of Charter adopted. A constitutional document modelled on the *Canadian Charter* provides greater protection to human rights than a statutory document modelled on the *UK HRA*.

The reasons for supporting this conclusion will be elaborated on in the remainder of this Submission, particularly in Questions 13 to 17.

#### **QUESTION 5: IF A CHARTER OF HUMAN RIGHTS WERE TO BE ENACTED IN TASMANIA, WHAT RIGHTS SHOULD IT INCLUDE?**

Any Tasmanian Charter of Human Rights should protect all human rights and should have some recognition of the special rights of Indigenous Australians. All civil, political, economic, social, cultural, developmental, environmental, indigenous peoples and other group rights are indivisible, interdependent and inter-related.<sup>3</sup>: Any human rights package must comprehensively protect and promote all categories of human rights for it to be effective.<sup>4</sup>

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

<sup>4</sup> Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000), especially ch 3, ch 4, 110, 116; K D Ewing, ‘The Charter and Labour: The Limits of Constitutional Rights’, in Gavin W Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press Ltd, Great Britain, 1999) 75; K D Ewing, ‘Human Rights, Social Democracy and Constitutional Reform’, in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights*, (Mansell Publishing Ltd, London, 1996) 40; Dianne Otto, ‘Addressing Homelessness: Does

Two arguments are often rehearsed in the context of economic, social and cultural rights. Indeed, the Victorian Government, in its *Statement of Intent*, rehearsed both arguments in order to preclude consideration of economic, social and cultural rights. The Tasmanian Government and the Human Rights Community Consultation Committee is to be applauded for not pre-judging this issue. 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.

These arguments are basically about justiciability – civil and political rights have historically been considered to be justiciable, whereas economic, social and cultural rights have not been regarded to be justiciable. This has been based on the absence or presence of certain qualities. What qualities must a right, and its correlative duties, possess in order for the right to be justiciable? To be justiciable, a right is to be stated in the negative, cost-free, immediate and precise. A non-justiciable right imposes positive obligations, is costly, is to be progressively realised and 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. These are artificial distinctions. All rights have positive and negative aspects, have cost-free and costly components, are certain of meaning with vagueness around the edges, and so on.<sup>5</sup>

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

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

Furthermore, the experience of South Africa highlights that economic, social and cultural rights are justiciable. The South African Constitutional Court has and is enforcing economic, social and cultural rights. The Constitutional Court's decisions highlight that enforcement of economic, social and cultural rights is about the *rationality* and *reasonableness* of decision making; that is, the State

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Australia's Indirect Implementation of Human Rights Comply with its International Obligations?' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) 281; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, Toronto, 1997).

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

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

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.<sup>7</sup> This type of judicial supervision is well known to the Tasmanian and Australian legal systems, being no more and no less than what we require of administrative decision makers. For this reason, economic, social and cultural rights ought to be included in the Tasmanian Charter of Human Rights. Other modes of successfully incorporating economic, social and cultural rights can be found in India and Italy.

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

#### **QUESTION 6: THE INTERNATIONAL COVENANTS?**

Both the *International Covenant on Civil and Political Rights (1966)* (“*ICCPR*”) and the *International Covenant on Economic, Social and Cultural Rights (1966)* (“*ICESCR*”) should be included in a Tasmanian Charter of Human Rights. The reasoning for this is covered in Question 5.

The *Universal Declaration on Human Rights (1948)* (“*UDHR*”) need not be included. The *UDHR* is the non-enforceable declaration of all civil, political, economic, social and cultural rights agreed upon post World War II – the “soft law”. The *ICCPR* and *ICESCR* expand upon the *UDHR* obligations and create enforceable international law obligations for ratifying States – the “hard law”. To protect the *UDHR* in addition to the *ICCPR* and *ICESCR* would be duplication.

As occurred in the ACT and Victoria, some linguistic refinements and the omission of some rights because of the jurisdictional competence, is advised. I would study and be guided by the changes made in the ACT and Victoria. Unlike Victoria, however, I advise against adopting a property right. The *UDHR* contains a property right, but this is unenforceable in international law. Neither the *ICCPR* nor the *ICESCR* contain property rights. The risk of property rights being interpreted broadly and outweighing more core human rights renders it unwise to include property rights in a Tasmanian Charter on Human Rights.

As discussed above, indigenous rights ought to be included. Reference to the *UN Draft declaration on the rights of indigenous peoples* will inform the Committee. The *Draft Declaration* is the statement of an international body of experts, drafted in consultation with indigenous peoples worldwide and States, as to the range of rights necessary to promote and protect the rights of indigenous peoples. Adopting the detail of the *Draft Declaration* may not be the preference of the Committee. If this is the case, at the very least, arts 1 and 27 of the *ICCPR* must be adopted. A more preferable position in relation to art 27, in order to recognise the special importance of Indigenous Australians, would be the adoption of a specific provision for indigenous peoples by separating out the two groupings covered by art 27 – that is, Indigenous Australians on the one hand, and ethnic,

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

religious and linguistic minorities on the other.

**QUESTION 7: SHOULD SOME RIGHTS BE INCLUDED AT FIRST WITH OTHER RIGHTS BEING CONSIDERED FOR INCLUSION SUBSEQUENTLY AFTER REVIEW OF THE CHARTER?**

The answer to this is no. Human rights are inter-dependent, indivisible and mutually reinforcing. You cannot properly protect one right or one group of rights without all rights. The right to vote means very little if there is no right to education, if people are homeless and if people have no food to eat.

It is my strong recommendation that all rights be adopted immediately.

**QUESTION 8: SHOULD EXPLICIT PROVISION BE MADE FOR THE PROTECTION OF THE RIGHTS OF PARTICULAR VULNERABLE GROUPS?**

The answer to this question is not relevant to the position I have expressed in relation to Indigenous Australians which I have addressed above.

In relation to all other vulnerable groups, the *ICCPR* and *ICESCR* already protect vulnerable groups. There are numerous equality and non-discrimination provisions which protect vulnerable groups – e.g. arts 2, 3 and 26 of the *ICCPR*. These provisions identify certain categories of vulnerable groups (women, racial, religious and linguistic minorities, and social origin) in an inclusive manner, allowing new vulnerable groups to be identified in the future (see ‘other status’ category). Furthermore, the treaty monitoring body to the *ICCPR*, the Human Rights Committee, has expanded the categories of vulnerable groups to include: sexual orientation, nationality, marital status, differences between employed and unemployed persons, and distinction between natural and foster children.

I highly recommend that the Committee adopt the articles in the *ICCPR* and *ICESCR* that protect vulnerable groups. The Committee could also include in the specific listings of vulnerable groups the additional groups that the Human Rights Committee has identified to date plus other groupings of concern to the Tasmanian Government, or it could rely simply on the ‘other status’ ground to include these groups. Either way, the Committee must include a reference to ‘other status’.

**QUESTION 9: WHAT ROLE IS THERE FOR RESPONSIBILITIES IN THE CHARTER?**

Most human rights are not absolute. There are various ways to limit human rights, which reflects the notion that with rights come responsibilities. Given the power to limit rights, there is no need to include a statement of responsibilities in any Charter of Human Rights for Tasmania. This is supported by the fact that the *ICCPR*, *ICESCR*, and other comparable domestic rights instruments (the *Victorian Charter*, the *ACT HRA*, the *Canadian Charter* and the *UK HRA*) do not contain lists of responsibilities. For further discussion on responsibilities and limits, see Questions 11 and 12.

**QUESTION 10: IF TASMANIA WERE TO ENACT A CHARTER OF HUMAN RIGHTS, WHOSE RIGHTS SHOULD IT PROTECT?**

In the usual state of affairs, individuals are the beneficiaries of rights, and increasingly it is being recognised that groups may hold rights collectively, such as the right of association.<sup>8</sup> Those that bear the burden of rights guarantees tend to be bodies exercising public powers or bodies established for public purposes. Both the parliament and the executive have obligations under human rights instruments, as do statutory authorities, other bodies exercising public functions, and the courts in some respects.

It is preferable to limit the application of human rights to natural persons and it is preferable to be explicit about this in any Charter of Human Rights for Tasmania. This has occurred under the *ACT HRA* and the *Victorian Charter*. I refer the Committee to the ACT and Victorian reports on this issue.

The obvious argument for limiting the beneficiaries of rights is their link to humans, humanity, the inherent dignity and equality of humans, and so on. Another argument turns on the difficulty of extending protections of human rights to legal persons. The Canadian experience provides some useful lessons. The Canadian Supreme Court has interpreted references to “person” or “everyone” under the *Canadian Charter* to include corporations, so that corporations benefit from human rights. Corporations, having the necessary resources and the commercial incentives to exploit the Charter, have won many rights, including the right to commercial free speech<sup>9</sup> and essentially the rights to religious freedom which allow them to trade on Sundays.<sup>10</sup>

The treatment of corporations under the *Canadian Charter* should be contrasted with the treatment of unions, ‘the corporation’s organisational analogue on the labour side of business.’<sup>11</sup> Unions have not been given any separate legal status under the *Canadian Charter*. At most they can initiate litigation, but a union cannot claim constitutional rights for itself. The benefits of the *Canadian Charter* for unions are indirect – a union can only benefit from those rights that are directly held by others, for example, its individual members. The courts under the *Canadian Charter* have insisted that the rights of assembly are individual, not collective, and cannot be exercised by associations. Even further, the courts have held that the freedom of association does not include the right to strike or to bargain collectively, as this would confer more extensive rights on associations than those possessed by individuals.<sup>12</sup> Hutchinson argues that unions are excluded:

... by doctrinal sleight of hand: the courts could easily treat labour organisations as individuals and endorse such rights for them. The fact that they have effectively done this for corporations serves to underlie the courts’ inconsistency and partiality.<sup>13</sup>

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<sup>8</sup> It has been recognised that communities are greater than the sum of their individual parts. In order to protect this, various collective rights have been recognised in human rights treaties and human rights jurisprudence.

<sup>9</sup> *RJR-MacDonald Inc. v Canada (Attorney General)* (1995) 3 SCR 199

<sup>10</sup> *R v Big M Drug Mart Ltd* [1985] 1 SCR 295

<sup>11</sup> Allan C. Hutchinson, “Supreme Court Inc: The Business of Democracy and Rights”, in Gavin W. Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press Ltd, Great Britain, 1999) 33, 38.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

Thus, in Canada corporations have rights under the *Canadian Charter*, but have no obligations, and this is so despite the fact that corporations are powerful and influential. Hutchinson warns that the implications of recognising rights for corporations and not unions are enormous:

It ignores the exercise of power by corporations over citizens and, in denying workers counter-balancing constitutional rights, fails to provide any effective means by which citizens can constitutionally challenge that power in the name of democratic justice. Moreover, while corporations can and do challenge government attempts at democratic regulation, they are immune from a *Charter* challenge to their own exercise of power.... [T]he courts have placed private bodies outside the *Charter's* [obligatory] domain.<sup>14</sup>

The extent of corporate protection under the *Canadian Charter* can be illustrated by the case of *RJR-MacDonald Inc. v Canada*.<sup>15</sup> The *Canadian Tobacco Products Control Act* prohibited the advertising, promotion and sale of all tobacco products unless their packaging included prescribed unattributed health warnings and a list of toxic materials. The legislation also prescribed that the packaging could not display any other writing except the name of the product, the brand name and the trademark. A tobacco company challenged this legislation. The Supreme Court of Canada held unanimously that the legislation infringed the freedom of expression. There were two bases for this: first, this freedom included the right to say nothing, the obligation to include unattributed health warnings infringing this; and secondly, prescribing exactly what could be included on the packaging infringed freedom of expression.

Under section 1 of the *Canadian Charter*, rights can be subject to reasonable limits prescribed by law that are demonstrably justified in a free and democratic society. In other words, rights may be infringed if so justified. To satisfy section 1, the government has to prove that the legislation addresses a pressing and substantial objective, that there is proportionality between the objective and the seriousness of the infringement, and that the legislation is the least intrusive means available to achieve the objective. The Supreme Court was split 5:4 on this issue. The majority held that the means chosen were not the least intrusive method available to the government to achieve its objectives. The government had adduced no evidence that something less than an outright ban on advertising, promotion and sales of tobacco was necessary to achieve its objectives, and that attributed health warnings would not be as effective as unattributed warnings on tobacco products.

The minority held that there was a gap in understanding of the link between the health effects of tobacco and the causes of tobacco consumption. However, they held that it would be unjustified and unrealistic to limit Parliament's legislative power to make social policy legislation until definitive social science conclusions were available. On balance, the objective of reducing the number of direct inducements to consume tobacco products outweighed the limitation placed on tobacco companies to advertise inherently dangerous products for profit. The minority distinguished between different types of expression:

In cases, where the expression in question is farther from the 'core' of freedom of expression values, this court has applied a lower standard of justification... The harm engendered by tobacco and the profit motive underlying its promotion place this form of expression as far from the 'core' of freedom of expression values as prostitution, hate-mongering and pornography... Its sole purpose is to promote the use of a product that is harmful and often fatal to the consumers who use it... The large sums these companies spend on advertising allow them to employ the most advanced advertising and social psychology techniques to convince potential buyers to buy their products... An attenuated level of s. 1 justification is appropriate.<sup>16</sup>

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<sup>14</sup> Id 39.

<sup>15</sup> *RJR-MacDonald Inc. v Canada (Attorney General)* (1995) 3 SCR 199.

<sup>16</sup> *RJR-MacDonald Inc. v Canada (Attorney General)* (1995) 3 SCR 199, 281-4 (La Forest J).

The decision of the majority can be criticised for many reasons. Hutchinson offers the following:

Although the Supreme Court struck down the legislation for want of compelling evidence on the causal connection between advertising and consumption, the Court itself refused to allow the admission of such up-to-date and available evidence... Only a few years ago, the Supreme Court upheld a criminal ban on advertising of prostitution (a legal activity, less harmful than smoking). It did so without requiring the government to prove definitively that there was a causal link between advertising and consumption (as it insisted on in this decision) and on the basis that solicitation was a nuisance (a far cry from the death and ill health caused by tobacco). Finally, the implications of this decision are as massive as they are frightening – does it now mean that advertising restrictions on liquor, prescription drugs, firearms and the like are vulnerable to constitutional challenge? Or that warning labels cannot be mandated on household products?<sup>17</sup>

Hutchinson concludes by highlighting the perverse way in which instruments, which are aimed at protecting the rights of individuals, can often be used to their detriment:

The solicitude for corporate speech over the need to protect threats to people's health from addictive products is an insult to the *Charter's* claim to enhance ordinary Canadians' rights and freedoms... When the Supreme Court places the value of private advertising to sell deadly products above that of public regulation to preserve people's health, the constitutional die has been perversely cast. Contrary to the majority's opinion, commercial speech is more about commerce than speech and more about profits than people: a country's health is not something to be traded for the corporate freedom to seduce more addicts... The crucial issue is who is to regulate and monitor such activity – the citizenry and consumers at large, through various legislative measures and regulative agencies, or the commercial sector of the economy in the name of the market?<sup>18</sup>

This case study should illustrate not the futility of instruments that protect and promote human rights and freedoms. Rather, it serves to illustrate that any such instrument should be as clear as possible in relation to who has rights and who has obligations under it, and what the scope of each individual right includes. I reiterate that it is my strong advice that the beneficiaries are limited to natural persons, and that this is made explicit in any Charter of Human Rights for Tasmania.

### **QUESTION 11 AND 12: LIMITATIONS ON RIGHTS?**

As mentioned in Question 9 and further discussed in Questions 13 to 18, any Charter of Human Rights for Tasmania should enable limits to be placed on certain rights, and this should be done by a generally stated limitations clause that applies to *specified rights*. The wording of the general limitations clause should be modelled on the *Canadian Charter* general limitations clause, as was adopted in Victoria.<sup>19</sup>

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<sup>17</sup> Allan C. Hutchinson, "Supreme Court Inc: The Business of Democracy and Rights", in Gavin W. Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press Ltd, Great Britain, 1999) 33, 41-42.

<sup>18</sup> Id 42-43.

<sup>19</sup> The general limitations clause in s 7 of the *Victorian Charter* is based on the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 1 ('*Canadian Charter*'). Oddly, the Explanatory Memorandum notes that the limitations clause is based on the *Bill of Rights 1990* (NZ): Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006

I propose that a generally stated limitations clause should apply only to ‘specified rights’ in order to achieve compatibility with international human rights obligations. Let us consider s 7 of the *Victorian Charter* which contains the following general limitations clause: rights protected under the *Victorian Charter* may be subject ‘to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.’ I have no difficulty with the wording; however, I do have difficulty with the application of this limitations clause to all of the protected rights. The all-encompassing nature of s 7 (even moreso when read with the override provision in s 31) is problematic from an international human rights perspective. Some rights are absolute, such as, the prohibition on genocide, torture, and slavery, and the right to life, to freedom from racial discrimination, and to be free from punishment without law. Such rights cannot be derogated from and no circumstance justifies a qualification or limitation of such rights under international law. Thus, a generally worded limitations clause should be used, but certain rights must be excluded from its operation.

Please see the response to questions 13 to 18 for a more complete explanation of why limitations clauses are necessary, how they operate, and how they contribute to an inter-institutional dialogue about human rights and their limitations.

### **QUESTIONS 13 TO 17: WHAT SHOULD BE THE ROLE OF OUR INSTITUTIONS OF GOVERNMENT IN PROTECTING HUMAN RIGHTS?**

I will briefly answer each of the “Individual Questions” posed in the Committee’s “Key Questions”. I will then move on to discuss the general interactions of the parliament, executive and judiciary under the “General Response”. I think you cannot get a proper feel for the operation of human rights instruments solely by answering separately these intimately linked issues.

#### **INDIVIDUAL QUESTIONS**

Question 13: Parliament should retain its roles of scrutineer and law-maker, but ensure that human rights become part of its decision-making matrix. A Parliamentary Committee with the responsibility for scrutinising draft legislation for compliance with human rights standards is vital. The experience of the UK Joint Parliamentary Committee on Human Rights is a great example of the benefits that flow (see further pages 304 to 312 of *Human Rights and Institutional Dialogue*).

Question 14: It should *not* be assumed that a parliamentary override provision be included in any Charter of Human Rights for Tasmania. If Tasmania adopts the *Canadian Charter* model, an override provision is necessary in order to preserve parliamentary sovereignty and promote an inter-institutional dialogue amongst the arms of government on human rights and their limitations (discussed further under the General Response below).

However, if Tasmania adopts the *UK HRA* model, an override provision is not necessary. The author is aware that Victoria adopted the *UK HRA* model and an override provision, but this is a curiosity. It is unclear why an override provision was included in the *Victorian Charter*. Although it is vital in the *Canadian Charter* to preserve parliamentary sovereignty, it is not necessary in Victoria because of the circumscribed judicial powers. Under the *Victorian Charter*, use of the override provision will *never be necessary* because judicially-assessed s 36 incompatible legislation

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(Vic), 9. However, it is more honest to acknowledge the influence of the *Canadian Charter*, which predates the NZ legislation by eight years and upon which the NZ legislation was based. The specific list of factors is borrowed from the *Constitution of the Republic of South Africa 1996* (RSA), s 36.

cannot be invalidated, and unwanted or undesirable s 32 judicial re-interpretations can be altered by ordinary legislation. An override may be used to avoid the controversy of ignoring a judicial declaration which impugns legislative objectives or means; however, surely use of the override itself would cause equal, if not more, controversy than the Parliament simply ignoring the declaration.

Another problem with the override power in the *Victorian Charter* 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. Accordingly, the power to derogate is carefully circumscribed. First, in the human rights context, some rights are non-derogable, including the right to life, freedom from torture, and slavery (see the discussion above under Questions 11 and 12). Second, most treaties allow for derogation, but place conditions/limits upon its exercise. The power to derogate is (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. Sure, the *Victorian Charter* provides that overrides are temporary, by imposing a 5 year sunset clause – which, mind you, is continuously renewable in any event. However, it fails in three important respects. First, the override provision can operate in relation to all rights. There is no category of non-derogable rights, an outcome that contravenes international human rights obligations.

Secondly, the conditions placed upon its exercise do not reach the high standard set by international human rights law. The circumstances justifying an override in Victoria – “exceptional circumstances” which include ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria’<sup>20</sup> – 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 average limitation on rights. If you consider the types of legislative objectives that justify limitations under the *ICCPR* and the *European Convention on Human Rights*, public safety, security and welfare rate highly.

So why does this matter – why does it matter that an override provision is utilizing factors that are usually used in a limitations context? One answer is oversight. When the executive and parliament place a limit on a right because of public safety, security or welfare, such a decision can be challenged in court. The executive and parliament must be ready to argue why the limit is reasonable and justified in a free and democratic society, against the specific list of balancing factors under s 7.<sup>21</sup> The executive and parliament must be accountable for limiting rights and provide convincing justifications for such action. The judiciary then has the opportunity to contribute its opinion as to 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 override to achieve what ought to be achieved via a simple

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<sup>20</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21

<sup>21</sup> Section 7(2) of the *Victorian Charter* outlines factors that must be balanced in assessing a limit, as follows: (a) the nature of the right; (b) the importance of the purpose of the right; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purposes; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve – a minimum impairment test.

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 overrides compared to limitation. 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.

Thirdly, another condition placed upon the exercise of derogations is non-existent under the *Victorian Charter* – those of effects of the derogating or overriding measure. The *Victorian Charter* does not limit the effect of override provisions. There is no measure of proportionality between the exigencies of the situation and the override measure, and nothing preventing the Victorian Parliament utilizing the override power in a way that unjustifiably violates other international law norms, such as, discrimination.

Question 15: Compatibility statements when proposing legislation before Parliament certainly have a role to play in both encouraging the executive to consider human rights in the policy development process and to take a position on human rights, as well as providing information for the parliament, judiciary and community to enable there to be an open dialogue about the meaning of rights and their limits.

However, the devil is in the detail. Under similar provisions in Britain, Canada, NZ, and the ACT, these statements tend to be a one-line assessment and tend to always be statements of compatibility. This hampers the educational dialogue because without the reasoning behind the assessment, parliament, the judiciary and the community are none the wiser about the executive’s views on rights. For example, to be useful, a statement should include information on what rights were considered, what rights were thought to be engaged and limited, and why the limits are justified. This issue is further discussed under the General Response.

Question 16: This question is fully explored in the General Response. Here I simply wish to challenge the assumption implicit in the question. There is an assumption in the question that there are only two roles for the court: an interpretative role and a power to issue non-enforceable declarations. There is no acknowledgement that the courts could be empowered to invalidate legislation. This is disappointing – in fact, unsatisfactory – because it appears that the decision on the role of the courts has been pre-judged, as it was in the Victorian Community Consultation.

As discussed in the General Response, there are models of domestic rights protection that empower judges to invalidate laws, and yet which preserve parliamentary sovereignty and create an educative dialogue amongst the arms of government about human rights. Precluding debate about these models undermines the authority of the Tasmanian Human Rights Community Consultation.

Question 17: Were the Committee to decide that the *UK HRA* model is preferable to the *Canadian Charter* (an issue I hope is not already pre-determined), I strongly advise that the executive be required to respond to declarations of incompatibility. This is a procedural improvement to the declaration mechanism introduced in the *ACT HRA* and adopted in the *Victorian Charter*. However, it must be recognised that this is merely a procedural obligation. The substance of the response is not to be dictated – that is, although the executive must respond, the response can be total inaction which means that the incompatible law remains valid and enforceable. This is further discussed in the General Response.

## GENERAL RESPONSE: THE INTERACTIONS OF PARLIAMENT, THE EXECUTIVE AND THE JUDICIARY

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

### *Traditional Approaches to the Role of the Institutions of Government*

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

#### 1) Australia:

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

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

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

One way to move beyond the effective representative monopoly about human rights is by the adoption of a comprehensive human rights instrument which requires governmental actions to be justified against minimum human rights standards, and gives each arm of government a role in the refinement and enforcement of the guaranteed human rights. This is not, however, without controversy. We return to the debate over institutional design. Human rights and democracy are often characterised as irreconcilable concepts – the protection of the rights of the

minority is supposedly inconsistent with democratic will formation by the process of majority rule. In particular, judicial review of the decisions of the representative arms against human rights standards is often characterised as anti-democratic – allowing the unelected judiciary to review and invalidate the decisions of the elected arms supposedly undermines democracy. It is assumed that a judicially enforceable human rights instrument replaces a representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); or, more simply, replaces parliamentary supremacy with judicial supremacy.

## 2) United States:

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

If the legislature or executive disagree with the judicial vision of the scope of a right or its applicability to the impugned action, their choices for reaction are limited. The representative arms can attempt to limit human rights by changing the *US Constitution*, an onerous task that requires a Congressional proposal for amendment which must be ratified by the legislatures of three-quarters of the States of the Federation.<sup>22</sup> Alternatively, the representative arms can attempt to limit human rights by controlling the judiciary. This can be attempted through court-stacking and/or court-bashing. Court-stacking and/or court-bashing are inadvisable tactics, given the potential to undermine the independence of the judiciary, the independent administration of justice, and the rule of law – all fundamental features of modern democratic nation States.

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

### Modern Approaches to the Role of the Institutions of Government

The traditional models discussed either support a representative monopoly (Australian) or a judicial monopoly (American), both of which pose problems. Rather than adopting a representative or judicial monopoly over human rights, I propose Tasmania pursue a model that promotes an inter-institutional dialogue about human rights. This brings us to the *Canadian Charter* and the *UK HRA*. These modern human rights instruments establish an inter-institutional dialogue between the arms of government about the definition, scope and limits of democracy and human rights. Each of the

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<sup>22</sup> *US Constitution* (1787), art V. An alternative method of constitutional amendment begins with a convention; however, this method is yet to be used. See further Lawrence M Friedman, *American Law: An Introduction* (2<sup>nd</sup> edition, W W Norton & Company Ltd, New York, 1998). The Australian and Canadian Constitutions similarly employ restrictive legislative procedures for amendment: see respectively *Constitution 1900* (Imp) 63&64 Vict, c 12, s 128; *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 38.

three arms of government has a legitimate and beneficial role to play in interpreting and enforcing human rights. Neither the judiciary, nor the representative arms have a monopoly over the rights project. This dialogue is in contrast to both the representative monologue that we have in Australia (and Tasmania for that matter), and the judicial monologue that exists under the US Bill of Rights.

1) Human Rights and Democracy – reconcilable?

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

2) Features of Human Rights and Democracy?

Secondly, when we seek to define grand notions, such as democracy and human rights, we must remember that democracy and human rights are (a) indeterminate concepts, (b) subject to persistent disagreement, (c) continually evolving, and (d) should be used as tools to critique governmental action.<sup>23</sup> In other words, human rights and democracy are not subjects of consensus.

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

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

The Canadian Charter

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

The *Canadian Charter* is contained within the Canadian Constitution. Section 1 guarantees a variety of essentially civil and political rights;<sup>24</sup> however, under s 1, limits may justifiably be imposed on the protected rights. The judiciary is empowered to invalidate legislation that offends a *Canadian Charter* right and which cannot be justified under s 1.<sup>25</sup> The *Canadian Charter* also

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<sup>23</sup> See generally James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204; Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000); Susan Marks, 'International Law, Democracy and the End of History' in Fox, G H and Roth, B R (eds), *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000) 532.

<sup>24</sup> Such as fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, official language rights, and minority language educational rights: see *Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 2–23.

<sup>25</sup> *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 51–52.

contains an 'override clause'. Section 33(1) allows the parliament to enact legislation notwithstanding the provisions of the *Canadian Charter*. Thus, if the judiciary invalidate a law, parliament can respond by re-enacting the law notwithstanding the *Canadian Charter*.

### The UK HRA

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

In relation to the institutional question, s 3 imposes an interpretative obligation on the judiciary. The judiciary must interpret primary legislation, so far as it is possible to do so, in a way that is compatible with the incorporated Convention rights.<sup>26</sup> However, under s 4, the judiciary is *not* empowered to invalidate legislation that cannot be read compatibly with Convention rights. Rather, primary incompatible legislation stands and must be enforced. All the judiciary can do is issue a 'declaration of incompatibility'. A declaration is supposed to be the warning bell to parliament and the executive that something is wrong. It is up to the parliament or executive to then act. The ACT-HRA basically mimics these provisions of the *UK HRA*: it incorporates the *ICCPR* into ACT law; it imposes similar interpretative obligations; and it allows the judiciary to issue declarations of incompatibility.

### The Inter-Institutional Dialogue approach

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

#### 1) Specification of Human Rights

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

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

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

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<sup>26</sup> *Human Rights Act 1998* (UK) c 42, s 3. See also United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [2.7].

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

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

In Canada, the Minister for Justice has a statutory reporting requirement to Parliament under the *Department of Justice Act*.<sup>27</sup> The Minister must certify that bills presented to Parliament have been compared with the *Canadian Charter* and any inconsistencies with the purposes or provisions of the *Canadian Charter* must be reported. To date, the Minister has *not* reported any inconsistencies with the *Canadian Charter*.

Once Cabinet agrees on a policy agenda, the Department of Justice drafts the legislation and makes an assessment of the *Canadian Charter* implications of the legislation. This involves assessing whether a *Canadian Charter* right is limited and, if so, the level of difficulty associated with justifying the limitation. This departmental inquiry is based on the Supreme Court's two-step approach to *Canadian Charter* challenges. The departmental assessments range from minimal, to significant, to serious, to unacceptable risks.<sup>28</sup> If a 'credible [*Canadian Charter* argument]'<sup>29</sup> can be made in support of legislation, the legislation will be pursued. Where there is a serious *Canadian Charter* risk, two options exist: either a less risky means to achieve the policy objective will be sought, or a political decision will be made about whether to proceed with the legislation as drafted.<sup>30</sup>

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<sup>27</sup> *Department of Justice Act*, RSC 1985, c J-2, s 4. These obligations also apply to regulations under the *Statutory Instruments Act*, RSC 1985m c S-22: see Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 597-8.

<sup>28</sup> Janet L Hiebert, 'Wrestling With Rights: Judges, Parliaments and the Making of Social Policy' (1999) 5(3) *Choices* 7. See also Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 597-8; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 12.

<sup>29</sup> Janet L Hiebert, 'Wrestling With Rights: Judges, Parliaments and the Making of Social Policy' (1999) 5(3) *Choices*, 8; Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002), 10.

<sup>30</sup> Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 12. For a detailed analysis of the policy-making changes introduced federally and within a select number of provinces post-*Charter*, see Patrick J Monahan and Marie Finkelstein, 'The *Charter* of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501. For further analysis of the pre-legislative scrutiny process, see Spencer M Zifcak, 'The *Charter* as a Dialogue: An Analysis of Canada's Experience with the Constitutional *Charter of Rights and Freedoms*' (1988) 6 *Law in Context* 62, 66-7; Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 595-600; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 3-6. For an analysis of the government's approach to *Charter* litigation and its influence over policy review, see Elizabeth J Shilton, 'Charter Litigation and the Policy Processes of Government: A Public Interest Perspective' [1992] 30 *Osgoode Hall Law Journal* 653; Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice'

According to a departmental employee:

The *Charter* has had a salutary effect on the policy-development process. Certainly, it has complicated the responsibilities of the policy planner. However, the need to identify evidence, rationales, and alternatives, when assessing policies for *Charter* purposes, has enhanced the rationality of the policy-development process.<sup>31</sup>

The Canadian ministerial reporting requirement is an important part of the inter-institutional dialogue about democracy and human rights. Pre-legislative scrutiny ensures that the executive is actively engaged in the process of interpreting and refining the scope of the broadly-stated *Canadian Charter* rights. Such assessments by the policy-driven arm of government are a vital contribution to the inter-institutional dialogue about *Canadian Charter* rights. The executive can influence the legislative and judicial understandings of particular *Canadian Charter* issues with the information and analysis contained in the pre-legislative record, particularly if it contained 'policy objectives, consultations with interested groups, social-science data, the experiences of other jurisdictions with similar legislative initiatives, and testimony before parliamentary committees by experts and interest groups.'<sup>32</sup> This capacity to influence the inter-institutional dialogue has motivated the executive to undertake serious pre-legislative scrutiny.<sup>33</sup> Consistent and thorough pre-legislative scrutiny also ensures that the legislative drafters 'identify ways of accomplishing legislative objectives in a manner that is more likely both to survive a [*Canadian*] *Charter* challenge and to minimize disruption in attaining the policy goal.'<sup>34</sup>

From an inter-institutional dialogic perspective, however, the biggest problem with Canadian executive pre-legislative scrutiny is its secretive character. Understandably, the Department of Justice is reluctant to divulge precise details about *Canadian Charter*-problematic policy objectives, assessments given by the Department of Justice, and the departmental and political responses to those assessments. In addition, cabinet deliberations are secret.<sup>35</sup>

However, this hinders the inter-institutional dialogue. The legislature does not fully benefit from the executive assessments of policies and their legislative translations. The legislature only has access to the parliamentary report of the Minister which discloses the *outcome* of the executive pre-legislative scrutiny, not the reasons for such assessments. The legislature's only access to pre-legislative deliberations is via evidence given by departmental lawyers during parliamentary committee scrutiny of proposed legislation. The culture of secrecy also hampers the inter-

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[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.

<sup>31</sup> Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 603.

<sup>32</sup> Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002), 10. The pre-scrutiny legislative record can be used 'to anticipate possible *Charter* challenges and consciously develop a legislative record for addressing judicial concerns': at 10.

<sup>33</sup> *Ibid* 7.

<sup>34</sup> *Ibid* 10.

<sup>35</sup> Patrick J Monahan and Marie Finkelstein, 'The *Charter* of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501, 503; Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002) 8.

institutional dialogue with the judiciary. Any attempt by the executive to construct a pre-legislative scrutiny record after legislation has been challenged ‘to support the government’s claim that *Canadian Charter* issues were duly considered, may be discounted by judges if viewed as perfunctory.’<sup>36</sup> The full benefit that could flow from the distinct executive contribution to the refinement and interpretation of the *Canadian Charter* rights is not realised.

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

Similar problems face the British pre-legislative scrutiny measures. Under section 19(1)(a), the minister responsible for a bill before parliament must make a statement that the provisions of the bill are compatible with the Convention rights. If such a statement cannot be made, the responsible minister must make a statement that the government wants parliament to proceed with the bill regardless of the inability to make a statement of compatibility, under s 19(1)(b).<sup>37</sup> A s 19(1)(b) statement is expected to ‘ensure that the human rights implications [of the bill] are debated at the earliest opportunity’<sup>38</sup> and to provoke ‘intense’<sup>39</sup> parliamentary scrutiny of the bill. Ministerial statements of compatibility are likely to be used as evidence of parliamentary intention.<sup>40</sup>

Section 19(1) statements allow the executive to effectively contribute to the inter-institutional dialogue about the definition and scope of the Convention rights. Statements of compatibility allow the executive to assert *its* understanding of the open-textured Convention rights in the context of policy formation and legislative drafting.<sup>41</sup> However, the effectiveness of the contribution depends on many factors, including the test used to assess the compatibility of proposed legislation and the quality of the explanation given for such assessments. In relation to the test, the Home Secretary indicated that ‘the balance of argument’<sup>42</sup> must support

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<sup>36</sup> Janet L Hiebert, *Charter Conflicts: What is Parliament’s Role?* (McGill-Queen’s University Press, Montreal and Kingston, 2002) 17.

<sup>37</sup> In general, s 19(1)(a) and (b) statements are to be made before the second reading speech. Either statement must be made in writing and published in such manner as the Minister making it considers appropriate: s 19(2).

<sup>38</sup> United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [3.3].

<sup>39</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, col 1233 (Lord Irvine, Lord Chancellor).

<sup>40</sup> This is similar to the rule in *Pepper v Hart* [1993] AC 59.

<sup>41</sup> Section 19(1) statements ensure ‘that someone has thought about human rights issues during the process of drafting a Bill’: David Feldman, ‘Whitehall, Westminster and Human Rights’ (2001) 23(3) *Public Money and Management* 19, 22.

<sup>42</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41 (citation omitted). See also *The UK HRA Guidance for Departments* (2<sup>nd</sup> ed, Home Office and Cabinet Office, 2000) [36] (*UK HRA Guidance* (2<sup>nd</sup> ed)), as referred to by David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] Summer *Public Law* 323, 338; Lord Anthony Lester, ‘Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998’ [2002] *European Human Rights Law Review* 432, 435. Periodic “guidance” about the implementation of the *UK HRA* has been issued by the departments with responsibility for the *UK HRA* to all government departments: *The UK HRA 1998 Guidance*

compatibility – is it ‘more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the European Court.’<sup>43</sup>

In relation to the quality of the explanation, the *UK HRA* does *not* impose an obligation on the responsible minister to explain their reasoning as to compatibility. The White Paper did, however, indicate that where a s 19(1)(b) statement was made, ‘Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the bill.’<sup>44</sup> During debate on the Human Rights Bill, it was suggested that the reasoning would be disclosed *only if* raised in parliamentary debate.<sup>45</sup> The Home Office has indicated that a minister ‘is generally not in a position to disclose detailed legal advice, nor should it be necessary to do so.’<sup>46</sup> 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.’<sup>47</sup> The detail of the compliance issue ‘is most suitably addressed in context, during debate on the policy and its justification.’<sup>48</sup> During debate, the ‘Minister should be ready to give a general outline of the arguments which led him or her to the conclusion reflected in the [s 19] statement’; in particular, the Minister must ‘at least identify the Convention points considered and the broad lines of the argument.’<sup>49</sup>

The test for s 19(1) assessments and the lack of disclosure of the reasoning behind the assessment are problematic from an inter-institutional dialogic perspective. The first problem relates to policy formation. Convention rights are relevant at the policy formation stage. When forming policy, the executive either explicitly or implicitly makes assessments of the definition

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*for Departments* (1<sup>st</sup> ed, Home Office and Cabinet Office, 1998); *UK HRA Guidance* (2<sup>nd</sup> ed); *The UK HRA Guidance for Departments* (3<sup>rd</sup> ed, Lord Chancellor’s Department, 2002) (the Lord Chancellor’s Department took over responsibility for the *UK HRA* in June 2001). See David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Summer Public Law* 323, 338-9.

<sup>43</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41 (citation omitted). The Home Office describes the test as ‘whether, on the balance of probabilities, the provisions of the Bill would be found compatible with the Convention rights if challenged in court’: Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [15]. Outside of government, this has become known as the ‘51 per cent rule’: Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 41.

<sup>44</sup> United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [3.3].

<sup>45</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 17 December 1998, col WA186 (Lord Williams).

<sup>46</sup> Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [14]. See United Kingdom, *Parliamentary Debates*, House of Lords, 28 June 2000, Col WA80 (Lord Bassam of Brighton):

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

<sup>47</sup> Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001, [14].

<sup>48</sup> *Ibid.*

<sup>49</sup> *UK HRA Guidance* (2<sup>nd</sup> ed) [39], as cited by David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Summer Public Law* 323, 338-9. See also Lord Anthony Lester, ‘Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998’ [2002] *European Human Rights Law Review* 432, 435.

and scope of Convention rights. The executive's understanding of the Convention rights sets the parameters of the debate and thereby has the capacity to influence the legislature's and judiciary's analysis of the issue. However, there is no clear indication that Convention 'rights are being fully taken into account at the ... stage of formulating proposals and instructing counsel to draft legislation',<sup>50</sup> even though 'this is perhaps the most important requirement of the *UK HRA*.'<sup>51</sup>

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

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

The third problem is the ineffective contribution s 19(1) statements make to the inter-institutional dialogue about the refinement, interpretation and application of the Convention rights.<sup>52</sup> Section 19(1) assessments too readily assume compatibility. This approach to s 19(1) is unsatisfactory for a few reasons. First, over-generous use of s 19(1)(a) statements fail to alert parliament to proposed legislation that ought to be closely scrutinised. Secondly, over-generous statements of compatibility fail to inspire a full and frank debate between the executive and parliament about Convention rights. Thirdly, over-generous assessments of compatibility fail to generate a constructive dialogue between the executive and the judiciary.

The fourth problem is the lack of disclosure of the reasoning behind the executive's s 19(1) classification. It is the reasoning supporting the s 19(1) classification that is most important, as the reasoning reveals the executive's views about the definition and scope of the Convention rights, its preferred resolution of conflicts between Convention rights and other non-protected values, any consequential limits the proposed legislation may impose on Convention rights, and the executive's justification for such limits. Parliament – when scrutinising proposed legislation and passing legislation – and the judiciary – when judicially reviewing challenged legislation – do *not* benefit from the perspectives of the executive.<sup>53</sup>

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<sup>50</sup> David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] *Summer Public Law* 323, 347-48. At the policy formulation and approval stage, *UK HRA Guidance* (2<sup>nd</sup> ed) requires 'a general assessment ..., not necessarily as a free-standing document, to alert Ministers to substantive Convention issues': Lord Anthony Lester, 'Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998' [2002] *European Human Rights Law Review* 432, 435. The formal process of s 19(1) assessment occurs only once the proposed policy is transformed into a Bill.

<sup>51</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 26.

<sup>52</sup> John Wadham, 'The *Human Rights Act*: One year On' [2001] *European Human Rights Law Review* 620, 624.

<sup>53</sup> This is a double-edged sword. If the reasoning behind the statement is not disclosed, the executive retain the element of surprise in any subsequent litigation involving the legislation. Conversely, non-disclosure precludes the reasoning of the executive from influencing the views of parliament and the judiciary.

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

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

## 2) Limitations on rights:

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

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

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

Finally, rights can be *externally limited*. The *Canadian Charter* is a good example of this. Section 1 of the *Canadian Charter* guarantees all the rights contained therein, subject to any reasonable limits that are prescribed by law and that can be demonstrably justified in a free and democratic society.<sup>54</sup>

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

Secondly, the limit must be reasonable. This means that the legislative objective must be sufficiently important to override the protected right. Statistics gathered from 1982-1997, a 15 year period, indicate that in 97 per cent of *Canadian Charter* cases the Supreme Court upheld the legislative objective as reasonable.<sup>55</sup> This means only 3% of legislation has had its objective impugned.

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<sup>54</sup> The main difference, for current purposes, between the second and third form of limitation is that the latter does not specify the circumstances that justify an interference or limitation. Moreover, the main difference between a qualification and a justified limitation is that the former does not involve any violation of the human right, whereas the latter entails a justified violation of a human right.

<sup>55</sup> Leon E Trakman, William Cole-Hamilton and Sean Gatién, ‘*R v Oakes* 1986 - 1997: Back to the Drawing Board’ (1998) 36 *Osgoode Hall Law Journal* 83, 95.

Thirdly, the limitation must be necessary in a free and democratic society. This is verified by a three-step proportionality test. The first component is a rationality test. The legislative objective must be rational, in that the legislative means must achieve the legislative objective. A substantial majority of limitations are found to be rational by the Supreme Court. Between 1982 and 1997, 86 per cent of legislation that violated the *Canadian Charter* possessed a rational connection to the legislative objective.<sup>56</sup>

The second component is a minimum impairment test. The means chosen by the legislature must impair as little as possible the rights. It is this component which most legislation falls foul of. Of the 50 (out of 87) infringements of *Canadian Charter* rights that have failed the s 1 limits test, 86 per cent (43 infringements) failed the minimum impairment test.<sup>57</sup>

The third component is the need for proportionality between the negative effects of the legislation, and the objective identified as being of sufficient importance. This test is somewhat superfluous, as whenever the impugned legislation met the minimal impairment test it was also considered to be proportionate, and whenever it failed the minimum impairment test it either failed the proportionality test or was not even considered.<sup>58</sup>

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

In terms of dialogue, all arms of government can make a legitimate contribution to the debate about the justifiability of limitations to human rights. The representative arms play a significant role, particularly given the fact that a very small proportion of legislation will ever be challenged in court. The executive and legislature will presumably try to accommodate human rights in their policy and legislative objectives, and the legislative means chosen to pursue those objectives. Where it is considered necessary to limit human rights, the executive and legislature must assess the reasonableness of the legislative objectives and legislative means, and decide whether the limitation is necessary in a free and democratic society. Throughout this process, the executive and legislature bring their distinct perspectives to bear. They will be informed by: their unique role in mediating between competing interests, desires and values within society; their democratic responsibilities to their representatives; and their motivation to stay in power – all valid and proper influences on decision making.

If the legislation is challenged, the judiciary then contributes to the dialogue. The judiciary must

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<sup>56</sup> Peter W Hogg and Alison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 98.

<sup>57</sup> Peter W Hogg and Alison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 100.

<sup>58</sup> Leon E Trakman, William Cole-Hamilton and Sean Gatién, '*R v Oakes* 1986 - 1997: Back to the Drawing Board' (1998) 36 *Osgoode Hall Law Journal* 83, 103. For criticism of this, see, 102-105.

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

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

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

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

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

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

*Secondly*, the legislature may attempt to secure its legislative objective by a different legislative means. This will occur where the judiciary invalidated legislation because it failed the proportionality test. The legislature may still attempt to achieve its legislative objectives, but by more proportionate legislative means, which usually requires the legislature to focus on minimally impairing the affected rights.

*Thirdly*, the legislature can re-enact the invalidated legislation *notwithstanding* the *Canadian Charter* under s 33. The legislature can override the operation of the *Canadian Charter* in relation to that legislation for a period of 5 years. The judicial decision remains as a point of principle during the period of the override and revives at the expiration of the 5 years. Use of the override provision is only *needed* when the judiciary takes issue with the legislative objectives pursued. Under the Charter, from 1982-97, this has happened in only 3% of Charter

cases.<sup>59</sup> Of course, the override may also be used to secure a legislative objective by an impugned legislative means (i.e. in the situation where the legislative means have failed the proportionality test). Legislative use of the override indicates that the legislature disagrees with the judicial interpretation of the *Canadian Charter* or simply finds it unacceptable according to majoritarian sensibilities.

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

Despite the perception that the override clause is only a theoretical possibility in Canada, in reality the override has been used on numerous occasions and has not exacted such a high political price. The use of s 33 is more widespread than most commentators admit.<sup>60</sup> To be sure, the override has only been used twice as a direct response to a judicial ruling. The first such use was in Saskatchewan, where the provincial legislature used s 33 to re-enact back-to-work legislation that was invalidated by the Saskatchewan Court of Appeal for violating freedom of association under the s 2(d) of the *Canadian Charter*.<sup>61</sup> The second such use was in Quebec, where the provincial legislature used s 33 to re-enact unilingual public signs legislation invalidated by the Supreme Court for violating freedom of expression under the s 2(b) of the *Canadian Charter*.<sup>62</sup> However, s 33 has been used on sixteen occasions in total – 13 occasions in Quebec, once in the Yukon, once in Saskatchewan, and once in Alberta. On another occasion the Albertan Government tabled a Bill that included a notwithstanding clause, but it was

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<sup>59</sup> Leon E Trakman, William Cole-Hamilton and Sean Gatien, 'R v Oakes 1986 - 1997: Back to the Drawing Board' (1998) 36 *Osgoode Hall Law Journal* 83, 95.

<sup>60</sup> Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter' (2001) 44 *Canadian Public Administration* 255, 255: 'Most Canadians believe that the notwithstanding clause ... has been used only a few times in the past and that currently no legislation[] invoking s 33 is in force.'

<sup>61</sup> For the Court of Appeal decision, see *RWDSU v Saskatchewan* [1985] 19 DLR (4th) 609 (Sask CA). The law affected was *Dairy Workers (Maintenance of Operations) Act*, SS 1983-84, c D-1.1 and the override legislation was *The SGEU Dispute Settlement Act*, SS 1984-85-86, c 111. The use of the override proved to be unnecessary as, on appeal, the Supreme Court ruled the original legislation to be constitutional: *RWDSU v Saskatchewan* [1987] 1 SCR 460. See Peter W Hogg and Alison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 110; Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter' (2001) 44 *Canadian Public Administration* 255, 265, 269.

<sup>62</sup> For the Supreme Court decision, see *Ford* [1988] 2 SCR 712. The law affected was *Charter of the French Language*, RSQ 1977, c C-11 and the override legislation was *An Act to amend the Charter of the French Language*, SQ 1988, c 54. Following an individual communication to the United Nations Human Rights Committee ("HRC"), in which the HRC was of the view that the legislation violated the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'), the provincial legislature amended the legislation to allow bilingual public signs on the proviso that French was present and predominant: see *An Act to amend the Charter of the French Language*, SQ 1993, c 40. An override was not attached to the 1993 legislation. See Peter W Hogg and Alison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 85-6, 114-5; Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter' (2001) 44 *Canadian Public Administration* 255, 264, 270-1.

withdrawn before it was enacted.<sup>63</sup> Only two of the 17 legislative attempts to utilise an override clause never came into force: once in the Yukon and once in Alberta.<sup>64</sup> Four of the 17 notwithstanding provisions have been repealed or expired without re-enactment, covering three Quebec uses and the Saskatchewan use.<sup>65</sup> The ten remaining invocations of the override in Quebec have been renewed on numerous occasions.

Moreover, the use of s 33 is not as politically suicidal as most commentators portray. To be sure, there has been widespread political fallout from the use of s 33, with the unilingual public signs legislation in Quebec being the high-water mark. Quebec's re-enactment of the judicially invalidated legislation subject to a notwithstanding clause 'deepened the divide between anglophones and francophones in Quebec, and between francophones in Quebec and the rest of Canada.'<sup>66</sup> In Quebec, four English-speaking Ministers of Premier Bourassa's Government resigned. Prime Minister Mulroney declared that the Constitution was 'not worth the paper it was written on.'<sup>67</sup> The Premier of Manitoba withdrew the Meech Lake Constitutional Accord – within which Quebec was to be recognised as a 'distinct society' within Canada under the *Constitution* – from the Manitoba legislature as a direct result of this use of the override.<sup>68</sup>

However, there is counter-veiling evidence that the use of s 33 is not political suicide. Three provincial governments have been re-elected after using the override clause. The Bourassa Government in Quebec was re-elected after using the override clause to re-instate the unilingual public signs legislation despite the controversy; the Devine Government in Saskatchewan was re-elected after it used the override clause to re-instate the back-to-work legislation invalidated by the Saskatchewan Court of Appeal; and the Klein Government in Alberta was re-elected after using the override clause to prohibit homosexual marriages.<sup>69</sup> This suggests that '[s]ection 33 is

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<sup>63</sup> Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 257-9, Tables 1-5 at 260-7.

<sup>64</sup> Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 259. The Yukon government enacted legislation subject to a notwithstanding clause but the legislation never came into force, and the Alberta government withdrew from parliamentary consideration one of its two attempts to use the notwithstanding clause.

<sup>65</sup> Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 259.

<sup>66</sup> Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 270.

<sup>67</sup> Canada, *Parliamentary Debates*, House of Commons, 6 April 1989, 152-3 (Prime Minister Mulroney), as cited by Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (revised and updated ed, Wall & Thompson, Toronto, 1994) 95; *The Globe and Mail* (Toronto), 8 April 1989, as cited by Peter Russell, 'Standing Up for Notwithstanding' (1991) 29 *Alberta Law Review* 293, 303.

<sup>68</sup> See Peter Russell, 'Standing Up for Notwithstanding' (1991) 29 *Alberta Law Review* 293, 304; Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from F L Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Broadview Press Ltd, Ontario, 2000) 161-2; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed, Oxford University Press, Canada, 2001) 186. For a thorough discussion of the Meech Lake and Charlottetown Accords, see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (revised and updated ed, Wall & Thompson, Toronto, 1994) 92-126.

<sup>69</sup> Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001) 191-2. See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (revised and updated ed, Wall & Thompson, Toronto, 1994) 89 (citation omitted): 'Not only did the [Saskatchewan] government suffer no adverse consequences, it was in fact solidly re-elected in a general election held nine

not politically fatal.<sup>70</sup>

Under the *UK HRA*, the remedial powers of the judiciary have been limited. Rather than empowering the judiciary to invalidate laws that are incompatible with Convention rights, the judiciary can only make declarations of incompatibility.<sup>71</sup> A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision to which the declaration applies, nor is the declaration binding on the parties to the proceeding in which it is made. In other words, the judge must apply the incompatible law in the case at hand.

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

*Secondly*, the legislature may decide to pass ordinary legislation in response to a s 4 declaration of incompatibility or s 3 interpretation. Parliament may take this course in response to a declaration of incompatibility for many reasons. Parliament may reassess the legislation in light of the non-majoritarian, expert view of the judiciary. This is a legitimate interaction between parliament and the judiciary, recognising that both institutional perspectives can influence the accepted limits of law-making and respect for human rights.<sup>72</sup> Parliament may also change its views in response to public pressure arising from the declaration. If the judiciary's reasoning is accepted by the represented, it is quite correct for their representatives to implement this change. Finally, the threat of resort to the European Court could be the motivation for change.

Moreover, Parliament may take this course in response to a s 3 interpretation for many reasons. Parliament may seek to clarify the judicial interpretation or address an unforeseen consequence arising from the interpretation. Alternatively, parliament may take heed of the judicial perspective, but wish to emphasise a competing Convention right or other non-protected value *it* considers was inadequately accounted for by the judiciary. Conversely, parliament may disagree with the judiciary's assessment of the legislative policy or its interpretation of the legislative means and seek to re-assert its own view. The latter response is valid under the *UK HRA* dialogically conceived, provided parliament listens openly and respectfully to the judicial viewpoint, critically re-assesses its own ideas against those of the differently motivated and situation institution, and respects the culture of justification imposed by the Convention rights and the *UK HRA*, in the sense that justifications must be offered for any qualifications or limitations on rights thereby continuing the debate. The inter-institutional dialogic model *does*

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months after the law was passed, arguably with a political assist from the override.' See Graham Fraser, 'What the Framers of the *Charter* Intended' [2003] October *Policy Options* 17, 17-18, where he claims that Quebec's five year reprieve on the language issue 'meant that when Quebec did introduce new legislation that met the requirements of the Charter, it was widely accepted': at 18.

<sup>70</sup> Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001) 192.

<sup>71</sup> *Human Rights Act 1998* (UK) c 42, s 4.

<sup>72</sup> Dominic McGoldrick, 'The United Kingdom's *Human Rights Act 1998* in Theory and Practice' (2001) 50 *International and Comparative Law Quarterly* 901, 924.

*not envisage consensus.*

*Thirdly*, the relevant Minister is empowered to take remedial action, which allows the Minister to rectify an incompatibility by executive action;<sup>73</sup> that is, a Minister may alter primary legislation by secondary legislation (executive order) where a declaration of incompatibility has been issued. This course of action would presumably be taken in similar circumstances as the second response mechanism, but chosen for efficiency reasons.

*Fourthly*, the government may derogate from the *ECHR*, such that the right temporarily no longer applies in Britain. This is the most extreme response, and can be equated to using s 33 of the *Canadian Charter*. From an international perspective, derogation is necessary to alter Britain's international legal obligations, and may be necessary to ensure that domestic grievances do not succeed before the European Court of Human Rights. From a domestic perspective, derogation will never be *necessary* because judicially assessed incompatible legislation cannot be judicially invalidated. However, the representative arms may *choose* to derogate to secure compliance with the *UK HRA* (as opposed to the Convention rights guaranteed therein). Domestically, they may derogate to resolve an incompatibility based on the judicially assessed illegitimacy of a legislative objective. Moreover, where the judiciary considers the legislative *means* to be incompatible, derogation allows the representative arms to re-assert *their* understanding of the interaction of Convention rights and any conflicting non-protected values, as reflected in *their* chosen legislative means.<sup>74</sup>

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

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

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

This dialogue should be an educative exchange between the arms of government, with each able to express its concerns and difficulties over particular human rights issues. Such educative

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<sup>73</sup> *Human Rights Act 1998* (UK) c 42, s 10 and sch 2.

<sup>74</sup> A disagreement over legislative means may be resolved by the other response mechanisms if the impugned legislative means are not vital to the representative institutions' legislative platform.

exchanges should produce *better answers* to conflicts that arise over human rights. By 'better answers' I mean more principled, rational, reasoned answers, based on a more complete understanding of the competing rights, values, interests, concerns and aspirations at stake.

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

### Conclusion: The Canadian Charter or the UK HRA?

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

The biggest problem with the *UK HRA* is its potential tendency to under-enforce human rights due to the effects of legislative inertia.<sup>75</sup> Under the *Canadian Charter*, when the judiciary assesses legislation as unjustifiably violating *Canadian Charter* rights, the individual victim gets the benefit of legislative inertia; the law is invalidated and the representative arms must make a positive move to re-instate the law, by using s 1 if they wish to re-enact the same legislative objective using a different rights-limiting legislative means, or by using s 33 if they wish to re-enact an impugned legislative objective or the impugned legislative means.

Conversely, under the *UK HRA*, the representative arms enjoy the benefits of legislative inertia: if the judiciary issues a declaration of incompatibility, the judicially-assessed Convention-incompatible law remains valid, operative and effective, such that the representative arms need not do anything positive to maintain the status quo. However, the representative arms must pass remedial legislation if they consider it necessary, and legislative inertia may set in. This may be for many reasons, including the timing of an election, the unpopularity of a decision, or an already full legislative program. This is a weaker form of representative accountability for the human rights implications of governmental actions, and has a tendency to weaken the promotion and protection of human rights. The remedial order procedure under the *UK HRA* only alleviates some causes of legislative inertia and is not a mandatory response to a declaration of incompatibility, so does not answer the criticism. Yet, given the retention of the right of individuals to petition the European Court of Human Rights and the obligation on Britain to implement its decisions, legislative inertia may not prove too problematic in Britain. However, legislative inertia remains a problem in Tasmania and Australia, given the lack of enforceability of the views of the human rights treaty-monitoring bodies and the recent distancing of Australia from the international human rights regime.<sup>76</sup> This is not a bar to Tasmania adopting the British model; rather, it is an issue to be aware of and improve upon if Tasmania adopts it.

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<sup>75</sup> Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001) 63.

<sup>76</sup> See David Kinley and Penny Martin, 'International Human Rights Law at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466. One answer to this problem in Australia would be to

In conclusion, this submission recommends that Tasmania adopt a modern human rights instrument that establishes a robust, mutually respectful, yet not unduly deferential, inter-institutional dialogue about human rights and democracy in preference to the current representative monopoly. The human rights guaranteed should be based on the *ICCPR*,<sup>77</sup> the international instrument to which Australia is a party. As between the two models of enforcement considered, let us think about two problems of the current system – the under-enforcement of human rights in Tasmania and the perception that the judiciary is too activist or illegitimately law-making when it contributes to the protection of human rights in Tasmania. These issues are better addressed under the *Canadian Charter*. The *UK HRA* does not as effectively guard against the under-enforcement of rights and leaves the judiciary more open to allegations of improper activism and law-making. Accordingly, this submission recommends the *Canadian Charter* as the preferred model of adoption.<sup>78</sup>

For further discussion of:

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

### **QUESTION 18: WHAT SHOULD BE THE ROLE OF THE EXECUTIVE IN PROTECTING HUMAN RIGHTS?**

In order to encourage compliance and mainstream human rights, it is necessary to require Government Departments, and other wholly public authorities, to report their compliance with and implementation of human rights in their Annual Reports. Such a reporting requirement will ensure that human rights become part of the public-decision making matrix. Human rights will no longer automatically be trumped by other factors, such as cost or efficiency. Moreover, to require annual reporting should also ensure that human rights become a tool to enhance public administration. Human rights, rather than being a separate add on or an additional regulatory burden, will become the (or at least part of an) operational framework for public administration, enhancing its quality, and giving expression to values that were once intuitive, but are now clearly defined.

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include an obligation on the legislature to respond within six months to any judicial declaration of incompatibility issued: see ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003, [4.36] – [4.38].

<sup>77</sup> *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>78</sup> The *ICCPR* is modelled more like the *UK HRA* than the *Charter*, in that there is no external limitations clause applying to the rights protected, but rather limits are expressed internally with respect to specific rights. In adopting the Canadian model, Australia should adopt an external limitations clause, with the internal limits on specific *ICCPR* rights acting as specific examples of the justifiable limitations. See ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [4.44] – [4.52], especially [4.52].

As a first step, however, the executive will also need to undertake an audit of all its legislation, policy and practices before any Charter of Human Rights for Tasmania comes into force. Its approach to this audit could be modelled on the British experience. In Britain, all government departments audited their legislation, policies and practices for human rights compliance before the *UK HRA* came into force. They also undertook human rights awareness training within their departments.

The pre-*UK HRA* audit was undertaken under the auspices of the Human Rights Unit of the Home Office ('Unit').<sup>79</sup> The Unit created a universal system for human rights auditing of legislation, policies and practices according to 'a "traffic light" system which grades the degree of risk according to the significance or sensitivity of an issue, its vulnerability to challenge and the likelihood of challenge.'<sup>80</sup> A red light indicated a 'strong chance of challenge in an operationally significant or very sensitive area', which required priority action; a yellow light indicated a 'reasonable chance of challenge, which may be successful', which required action where possible; and a green light indicated 'little or no risk of challenge, or damage to an operationally significant area', such that no action was required.<sup>81</sup> The audit results served two main functions. First, the Cabinet Office used the results to identify priority areas to be dealt with before the *UK HRA* came into operation. Secondly, the results have influenced the work of specialist human rights legal teams within the executive post-*UK HRA*.<sup>82</sup>

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<sup>79</sup> The Human Rights Unit ('Unit') was established to oversee the implementation of the *UK HRA*. Its main task was ensure that all government departments were prepared for the coming into force of the *UK HRA*, which involved awareness raising and education about the *UK 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 UK HRA 1998 Guidance for Departments*, above). In December 2000, after implementation of the *UK HRA*, the Home Office transferred the ongoing responsibility for the *UK 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 *UK HRA* and to promote human rights within the community. This involved the publication of materials for government departments and public authorities, the publication of educational material for the public, assisting with training for government departments and public authorities, consultations between government departments and the Taskforce in relation to the preparedness of the departments, and media liaison. The Taskforce, intended to be a temporary body, was disbanded in March 2001. See generally Memorandum from the Home Office to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, February 2001 [4]-[12]; David Feldman, 'Whitehall, Westminster and Human Rights' (2001) 23(3) *Public Money and Management* 19, 20-21; John Wadham, 'The Human Rights Act: One Year On' [2001] *European Human Rights Law Review* 620, 622-3; Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 20-27; Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 16-7; Jeremy Croft, 'Whitehall and the Human Rights Act 1998' [2001] *European Human Rights Law Review* 392, 396-9.

<sup>80</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 21. See also Jeremy Croft, 'Whitehall and the Human Rights Act 1998' [2001] *European Human Rights Law Review* 392, 396.

<sup>81</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 21. See also Jeremy Croft, 'Whitehall and the Human Rights Act 1998' [2001] *European Human Rights Law Review* 392, 396.

<sup>82</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 21; Jeremy Croft, 'Whitehall and the Human Rights Act 1998' [2001] *European Human Rights Law Review* 392, 396. Two litigation co-ordinating groups have been established within Government: the ECHR Criminal Issues Co-ordinating Group and the ECHR Civil Litigation Co-ordinating Group. Their functions are to co-ordinate the approach to Convention rights issues that arise in criminal and civil litigation (respectively) and to notify relevant parts of the Government to any significant human rights developments. Both groups also review the critical areas of concern identified in the pre-*UK HRA* 'traffic light' audit. The

Unfortunately, the audit process focussed heavily on judicial challenges to legislation, policies and practices. Rather than using the *UK HRA* as ‘the springboard for further steps to be taken as part of a proactive human rights policy,’ the government adopted ‘a containment strategy’ aimed at ‘avoiding or reducing successful challenges’ to policy and legislative initiatives.<sup>83</sup> A more proactive approach would increase the influence of the executive in the process of delimiting the open-textured Convention rights. The executive should honestly and vigorously assert its understandings of the Convention rights. Moreover, the containment strategy is too judicial-centric.

Thus, any pre-audit that occurs in Tasmania 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.

### **QUESTION 19: SHOULD A SPECIAL BODY BE CREATED?**

A special body should be created with various responsibilities, including (a) reviewing legislation, (b) advising government on human rights policy, (c) conducting community education campaigns, (d) with a right of intervention in court proceedings, and (e) with an annual reporting obligation. In essence, the same obligations given to the Victorian Equal Opportunity Commission under s 41 of the *Victorian Charter* should be given to an equivalent body in Tasmania. Unlike Victoria, however, the Tasmanian Government must provide sufficient funds for the body to operate effectively, particularly its function of intervention. Tasmania should also consider whether such a body should have a role in mediating and conciliating disputes arising under the Charter between public authorities and individuals.

The establishment of an independent Commissioner will enhance the operation of any Charter of Human Rights for Tasmania. In particular, its educative role – both within government and the broader community – will facilitate the mainstreaming of a human rights culture. The failure to create a similar office under the British *UK HRA* is a continuing source of tension in the UK (although the UK look set to establish a form of human rights commission shortly). Tasmania should follow the lead of Victoria and the ACT, rather than Britain, in this respect.

### **QUESTIONS 20 AND 21: INDIVIDUAL ENFORCEMENT AND EXPRESS REMEDIES CLAUSES**

It is vital that individuals be empowered to enforce their rights when violated and for an express remedy to be provided. The *ACT HRA* is unsatisfactory in not providing any course of redress against public authorities that do not act compatibly with the protected rights. The *Victorian Charter* does make it unlawful for public authorities to act incompatibly with protected rights and to fail to give proper consideration to rights when acting (s 38), however it fails to provide a free-

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Criminal Group has issued ‘lines to take’ for prosecutors. Neither group is envisaged to be permanent, with funding allocated for 2 to 3 years. See further Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 32-33; Jeremy Croft, ‘Whitehall and the Human Rights Act 1998’ [2001] *European Human Rights Law Review* 392, 400-03.

<sup>83</sup> Jeremy Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, University College London, London, 2000) 27. See also Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 22-3.

standing remedy for such acts of unlawfulness and a free-standing right to damages for such acts of unlawfulness (s 39) and, to this extent, is unsatisfactory.

The Australian jurisdictions do not follow the lead of Britain or Canada. The ACT and Victorian positions are, in varying degrees, in contrast to ss 6 to 9 of the *UK HRA*, which makes it unlawful for a public authority to exercise its powers under compatible legislation in a manner that is incompatible with rights. The definition of “public authority” includes a court or tribunal. Such unlawful action gives rise to three means of redress: (a) a new, *free-standing cause for breach of statutory duty*, with the *UK HRA* itself being the statute breached; (b) a new ground of illegality under administrative law; and (c) the unlawful act can be relied upon in any legal proceeding. Most importantly, under s 8 of the *UK HRA*, where a public authority acts unlawfully, a court may grant such relief or remedy, or make such order, within its power as it considers just and appropriate, which includes an award of damages in certain circumstances if the court is satisfied that the award is necessary to afford just satisfaction.<sup>84</sup>

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

The failure to create a separate cause of action and remedy in the ACT and Victoria will cause problems. Situations will inevitably arise where existing causes of action are inadequate to address violations of human rights and which require some form of remedy. In these situations, rights protection will be illusory. The NZ experience is instructive. Although the statutory *Bill of Rights Act 1990* (NZ) does not expressly provide for remedies, the judiciary developed two remedies for violations of rights – first, a judicial discretion to exclude evidence obtained in violation of rights and secondly, a right to compensation if rights are violated.<sup>85</sup> This may be the ultimate fate of the Victorian experiment. It is eminently more sensible for the parliament to provide for the inevitable rather than to allow the judiciary to craft solutions on the run.

One final, anecdotal point. I am involved in training various entities on the *Victorian Charter*. Section 39 of the *Victorian Charter* is extremely complex and creating a great deal of anxiety and concern about its actual meaning, scope and application. It seems that far from the Victorian Government’s intention that rights be more about promoting ‘dialogue, education, discussion and good practice rather than litigation’,<sup>86</sup> s 39 is going to spawn a great deal of litigation. In fact, the Victorian Government may find that it pays in legal fees an amount far in excess that which it would have paid had it simply provided a free-standing remedy and damages. Damages payouts in the international human rights tribunals and within domestic courts (especially Britain and New Zealand) have been relatively minimal.

## **QUESTION 22: WHAT OTHER STEPS SHOULD BE TAKEN TO ENHANCE PROTECTION OF HUMAN RIGHTS IN TASMANIA?**

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<sup>84</sup> The Consultative Committee recommended adopting the UK model in this regard, but the recommendation was not adopted: see ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [4.53] – [4.78].

<sup>85</sup> ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [3.22] – [3.23].

<sup>86</sup> Victoria Government, *Statement of Intent*, May 2005, [12].

There are numerous steps that need to occur to enhance human rights protection. I will address only one: the training of the judiciary. Tasmania should undertake extensive training of the judiciary and quasi-judicial bodies (including administrative tribunals) before any Charter comes into force, and its approach could be modelled on the British experience. Extensive training was undertaken for the judiciary by the British Judicial Studies Board and this training was well resourced. I have undertaken research into the training programme and am happy to share this with the Committee upon request.

### **QUESTION 23: REVIEW AT FIXED INTERVALS?**

A review of the operation of the Tasmanian Charter after five years of its operation is sensible. In particular, it is wise to review the operation of the mechanism that is chosen to protect rights.

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

### **FURTHER REFERENCES**

I refer the Committee to further articles I have written that elucidate the above matters. Those marked with an asterisk\* I have supplied copies of:

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

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