

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is important to note that the representative monopoly over the protection and promotion of human rights results in problematic consequences. First, human rights in Australia are under-enforced. The Commonwealth has signed the six major international human rights treaties.¹ Despite this international commitment to the promotion and protection of human rights, there are insufficient mechanisms to enforce those basic human rights within the domestic system, whether within the Commonwealth or Victorian jurisdictions. Secondly, and consequently, aggrieved persons and groups are denied an effective non-majoritarian forum within which their human rights claims can be assessed.² This, in turn, has 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 2: IF CHANGE IS NEEDED, HOW SHOULD THE LAW BE CHANGED TO ACHIEVE THIS?

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

If constitutional protection was not supported, the next best alternative would be to protect and promote human rights via an ordinary statute. If the statutory protection route is taken, it should be

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

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

modelled on the *Human Rights Act 1998* (UK) (the 'HRA'). The reasons for this will be discussed below in Question 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

When contemplating human rights protection within a domestic setting, we must consider the institutional model to be adopted. One issue dominates the institutional design question. Human

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

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

rights must be reconciled with democracy. In particular, judicial enforcement of human rights against the representative arms of government may produce anti-democratic tendencies.

Traditional Approaches to the Role of the Institutions of Government

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

1) Australia:

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

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

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

One way to move beyond the effective representative monopoly about human rights is by the adoption of a comprehensive human rights instrument which requires governmental actions to be justified against minimum human rights standards, and gives each arm of government a role in the refinement and enforcement of the guaranteed human rights. This is not, however, without controversy. We return to the debate over institutional design. Human rights and democracy are often characterised as irreconcilable concepts – the protection of the rights of the minority is supposedly inconsistent with democratic will formation by the process of majority rule. In particular, judicial review of the decisions of the representative arms against human rights standards is often characterised as anti-democratic – allowing the unelected judiciary to

review and invalidate the decisions of the elected arms supposedly undermines democracy. It is assumed that a judicially enforceable human rights instrument replaces a representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); or, more simply, replaces parliamentary supremacy with judicial supremacy.

2) United States:

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

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

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

Modern Approaches to the Role of the Institutions of Government

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

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

1) Human Rights and Democracy – reconcilable?

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

2) Features of Human Rights and Democracy?

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

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

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

The Charter

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

The *Charter* is contained within the Canadian Constitution. Section 1 guarantees a variety of essentially civil and political rights;¹⁰ however, under s 1, limits may justifiably be imposed on the protected rights. The judiciary is empowered to invalidate legislation that offends a *Charter* right and which cannot be justified under s 1.¹¹ The *Charter* also contains an ‘override clause’. Section 33(1) allows the parliament to enact legislation notwithstanding the provisions of the *Charter*. Thus, if the judiciary invalidate a law, parliament can respond by re-enacting the law notwithstanding the *Charter*.

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

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

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

The HRA

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

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

The Inter-Institutional Dialogue approach

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

1) Specification of Human Rights

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

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

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

Each arm of government will influence the definition and scope of the rights. The executive does this in policy making and legislative drafting; the legislature does this in legislative scrutiny and law-making; and the judiciary does this when interpreting legislation and adjudicating disputes. In the process of policy-making and drafting legislation, scrutinizing

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

legislation and passing laws, and adjudicating disputes, each arm articulate *its* distinct understanding of the rights. That is, whether expressly or implicitly, they articulate their understanding of the objectives of the rights; the purposes to be served by the rights; and the linguistic meaning of the rights.

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

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

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

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

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

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

¹⁶ Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 12. For a detailed analysis of the policy-making changes introduced federally and within a select number of provinces post-*Charter*, see Patrick J Monahan and Marie Finkelstein, 'The *Charter* of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501. For further analysis of the pre-legislative scrutiny process, see Spencer M Zifcak, 'The *Charter* as a Dialogue: An Analysis of Canada's Experience with the Constitutional *Charter of Rights and Freedoms*' (1988) 6 *Law in Context* 62, 66-7; Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 595-600; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 3-6. For an analysis of the government's approach to *Charter* litigation and its influence over policy review, see Elizabeth J Shilton, 'Charter Litigation and the Policy Processes of Government: A Public Interest Perspective' [1992] 30 *Osgoode Hall Law Journal* 653; Mary Dawson, 'The Impact of the *Charter* on the Public Policy Process and the Department of Justice' [1992] 30 *Osgoode Hall Law Journal* 595, 600-01; Julie Jai, 'Policy, Politics and Law: Changing Relationships in Light of the *Charter*' (1998) 9 *National Journal of Constitutional Law* 1, 6-11, 17-20; Patrick J Monahan and Marie Finkelstein, 'The *Charter* of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501, 515-6, 522-3, 526, 528-9.

According to a departmental employee:

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

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

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

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

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

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

¹⁹ *Ibid* 7.

²⁰ *Ibid* 10.

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

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

refinement and interpretation of the *Charter* rights is not realised.

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

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

Section 19(1) statements allow the executive to effectively contribute to the inter-institutional dialogue about the definition and scope of the Convention rights. Statements of compatibility allow the executive to assert *its* understanding of the open-textured Convention rights in the context of policy formation and legislative drafting.²⁷ However, the effectiveness of the contribution depends on many factors, including the test used to assess the compatibility of proposed legislation and the quality of the explanation given for such assessments. In relation to the test, the Home Secretary indicated that 'the balance of argument'²⁸ must support compatibility – is it 'more likely than not that the provisions of the Bill will stand up to

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

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

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

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

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

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

challenge on Convention grounds before the domestic courts and the European Court.’²⁹

In relation to the quality of the explanation, the *HRA* does *not* impose an obligation on the responsible minister to explain their reasoning as to compatibility. The White Paper did, however, indicate that where a s 19(1)(b) statement was made, ‘Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the bill.’³⁰ During debate on the Human Rights Bill, it was suggested that the reasoning would be disclosed *only if* raised in parliamentary debate.³¹ The Home Office has indicated that a minister ‘is generally not in a position to disclose detailed legal advice, nor should it be necessary to do so.’³² Rather, s 19(1) statements should only indicate which Convention issues were considered and ‘the thinking which led to the conclusion reflected in the statement.’³³ The detail of the compliance issue ‘is most suitably addressed in context, during debate on the policy and its justification.’³⁴ During debate, the ‘Minister should be ready to give a general outline of the arguments which led him or her to the conclusion reflected in the [s 19] statement’; in particular, the Minister must ‘at least identify the Convention points considered and the broad lines of the argument.’³⁵

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

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

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

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

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

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

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

³⁴ *Ibid.*

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

³⁶ David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Summer Public Law* 323, 347-48. At the policy formulation and approval stage, *HRA Guidance* (2nd ed) requires ‘a general assessment

*HRA.*³⁷

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

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

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

The fourth problem is the lack of disclosure of the reasoning behind the executive's s 19(1) classification. It is the reasoning supporting the s 19(1) classification that is most important, as the reasoning reveals the executive's views about the definition and scope of the Convention rights, its preferred resolution of conflicts between Convention rights and other non-protected values, any consequential limits the proposed legislation may impose on Convention rights, and the executive's justification for such limits. Parliament – when scrutinising proposed legislation and passing legislation – and the judiciary – when judicially reviewing challenged legislation – do *not* benefit from the perspectives of the executive.³⁹

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

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

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

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

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

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

2) Limitations on rights:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁴ Leon E Trakman, William Cole-Hamilton and Sean 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.

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

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

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

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

⁴⁵ 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.

should be subject to widespread debate and democratic accountability.

Despite the perception that the override clause is only a theoretical possibility in Canada, in reality the override has been used on numerous occasions and has not exacted such a high political price. The use of s 33 is more widespread than most commentators admit.⁴⁶ To be sure, the override has only been used twice as a direct response to a judicial ruling. The first such use was in Saskatchewan, where the provincial legislature used s 33 to re-enact back-to-work legislation that was invalidated by the Saskatchewan Court of Appeal for violating freedom of association under the s 2(d) of the *Charter*.⁴⁷ The second such use was in Quebec, where the provincial legislature used s 33 to re-enact unilingual public signs legislation invalidated by the Supreme Court for violating freedom of expression under the s 2(b) of the *Charter*.⁴⁸ However, s 33 has been used on sixteen occasions in total – 13 occasions in Quebec, once in the Yukon, once in Saskatchewan, and once in Alberta. On another occasion the Albertan Government tabled a Bill that included a notwithstanding clause, but it was withdrawn before it was enacted.⁴⁹ Only two of the 17 legislative attempts to utilise an override clause never came into force: once in the Yukon and once in Alberta.⁵⁰ Four of the 17 notwithstanding provisions have been repealed or expired without re-enactment, covering three Quebec uses and the Saskatchewan use.⁵¹ The ten remaining invocations of the override in Quebec have been

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

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

⁴⁸ For the Supreme Court decision, see *Ford* [1988] 2 SCR 712. The law affected was *Charter of the French Language*, RSQ 1977, c C-11 and the override legislation was *An Act to amend the Charter of the French Language*, SQ 1988, c 54. Following an individual communication to the United Nations Human Rights Committee ("HRC"), in which the HRC was of the view that the legislation violated the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'), the provincial legislature amended the legislation to allow bilingual public signs on the proviso that French was present and predominant: see *An Act to amend the Charter of the French Language*, SQ 1993, c 40. An override was not attached to the 1993 legislation. See Peter W Hogg and Alison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 85-6, 114-5; Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 264, 270-1.

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

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

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

renewed on numerous occasions.

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

However, there is counter-veiling evidence that the use of s 33 is not political suicide. Three provincial governments have been re-elected after using the override clause. The Bourassa Government in Quebec was re-elected after using the override clause to re-instate the unilingual public signs legislation despite the controversy; the Devine Government in Saskatchewan was re-elected after it used the override clause to re-instate the back-to-work legislation invalidated by the Saskatchewan Court of Appeal; and the Klein Government in Alberta was re-elected after using the override clause to prohibit homosexual marriages.⁵⁵ This suggests that '[s]ection 33 is not politically fatal.'⁵⁶

Under the *HRA*, the remedial powers of the judiciary have been limited. Rather than empowering the judiciary to invalidate laws that are incompatible with Convention rights, the judiciary can only make declarations of incompatibility.⁵⁷ A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision to which the

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

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

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

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

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

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

declaration applies, nor is the declaration binding on the parties to the proceeding in which it is made. In other words, the judge must apply the incompatible law in the case at hand.

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

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

Moreover, Parliament may take this course in response to a s 3 interpretation for many reasons. Parliament may seek to clarify the judicial interpretation or address an unforeseen consequence arising from the interpretation. Alternatively, parliament may take heed of the judicial perspective, but wish to emphasise a competing Convention right or other non-protected value *it* considers was inadequately accounted for by the judiciary. Conversely, parliament may disagree with the judiciary's assessment of the legislative policy or its interpretation of the legislative means and seek to re-assert its own view. The latter response is valid under the *HRA* dialogically conceived, provided parliament listens openly and respectfully to the judicial viewpoint, critically re-assesses its own ideas against those of the differently motivated and situation institution, and respects the culture of justification imposed by the Convention rights and the *HRA*, in the sense that justifications must be offered for any qualifications or limitations on rights thereby continuing the debate. The inter-institutional dialogic model *does not* envisage *consensus*.

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

Fourthly, the government may derogate from the *ECHR*, such that the right temporarily no longer applies in Britain. This is the most extreme response, and can be equated to using s 33 of the *Charter*. From an international perspective, derogation is necessary to alter Britain's international legal obligations, and may be necessary to ensure that domestic grievances do not succeed before the European Court of Human Rights. From a domestic perspective, derogation

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

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

will never be *necessary* because judicially assessed incompatible legislation cannot be judicially invalidated. However, the representative arms may *choose* to derogate to secure compliance with the *HRA* (as opposed to the Convention rights guaranteed therein). Domestically, they may derogate to resolve an incompatibility based on the judicially assessed illegitimacy of a legislative objective. Moreover, where the judiciary considers the legislative *means* to be incompatible, derogation allows the representative arms to re-assert *their* understanding of the interaction of Convention rights and any conflicting non-protected values, as reflected in *their* chosen legislative means.⁶⁰

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

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

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

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

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

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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.

Conclusion: The Charter or the HRA?

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

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

Conversely, under the *HRA*, the representative arms enjoy the benefits of legislative inertia: if the judiciary issues a declaration of incompatibility, the judicially-assessed Convention-incompatible law remains valid, operative and effective, such that the representative arms need not do anything positive to maintain the status quo. However, the representative arms must pass remedial legislation if they consider it necessary, and legislative inertia may set in. This may be for many reasons, including the timing of an election, the unpopularity of a decision, or an already full legislative program. This is a weaker form of representative accountability for the human rights implications of governmental actions, and has a tendency to weaken the promotion and protection of human rights. The remedial order procedure under the *HRA* only alleviates some causes of legislative inertia and is not a mandatory response to a declaration of incompatibility, so does not answer the criticism. Yet, given the retention of the right of individuals to petition the European Court of Human Rights and the obligation on Britain to implement its decisions, legislative inertia may not prove too problematic in Britain. However, legislative inertia remains a problem in Victoria and Australia, given the lack of enforceability of the views of the human rights treaty-monitoring bodies and the recent distancing of Australia from the international human rights regime.⁶² This is not a bar to Victoria adopting the British model; rather, it is an issue to be aware of and improve upon if Victoria adopts it.

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

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

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

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

under-enforcement of rights and leaves the judiciary more open to allegations of improper activism and law-making. Accordingly, this submission recommends the *Charter* as the preferred model of adoption.⁶⁴

For further discussion of:

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

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

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

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

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

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

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

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

There are numerous changes that a Charter of Human Rights would require. Due to time constraints, I will only address one: the creation of an independent Human Rights Commission. This could be modelled on that introduced under the ACT-HRA. Part 6 of the ACT-HRA establishes the office of Human Rights Commissioner, which is to be undertaken by the existing Discrimination Commissioner. The Commissioner's functions are four-fold. Firstly, the Commissioner is to review Territory law and the common law for compliance with the protected rights and report to the Attorney-General. This report will be presented to the Legislative Assembly. Secondly, the Commission is to provide education about the *HRA* and human rights generally. Thirdly, the Commissioner may advise the Attorney-General on any matter relevant to the *HRA*. Finally, the Commissioner may intervene in court proceedings with leave.

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

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

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

1) Review of Legislation:

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

The pre-*HRA* audit undertaken under the auspices of the Human Rights Unit of the Home Office

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

(‘Unit’).⁶⁷ The Unit created a universal system for human rights auditing of legislation, policies and practices according to ‘a “traffic light” system which grades the degree of risk according to the significance or sensitivity of an issue, its vulnerability to challenge and the likelihood of challenge.’⁶⁸ A red light indicated a ‘strong chance of challenge in an operationally significant or very sensitive area’, which required priority action; a yellow light indicated a ‘reasonable chance of challenge, which may be successful’, which required action where possible; and a green light indicated ‘little or no risk of challenge, or damage to an operationally significant area’, such that no action was required.⁶⁹ The audit results served two main functions. First, the Cabinet Office used the results to identify priority areas to be dealt with before the *HRA* came into operation. Secondly, the results have influenced the work of specialist human rights legal teams within the executive post-*HRA*.⁷⁰

Unfortunately, the audit process focussed heavily on judicial challenges to legislation, policies and practices. Rather than using the *HRA* as ‘the springboard for further steps to be taken as part of a proactive human rights policy,’ the government adopted ‘a containment strategy’ aimed at

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

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

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

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

‘avoiding or reducing successful challenges’ to policy and legislative initiatives.⁷¹ A more proactive approach would increase the influence of the executive in the process of delimiting the open-textured Convention rights. The executive should honestly and vigorously assert its understandings of the Convention rights. Moreover, the containment strategy is too judicial-centric.

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

2) Training of the Judiciary:

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

FURTHER REFERENCES

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

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

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

1 August 2005

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