Eight-Year Review of the
Charter of Human Rights and Responsibilities Act 2006

A submission by

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PREVIOUS FOUR-YEAR REVIEW SUBMISSION

I refer the Independent Reviewer to my submission to the Four-Year Review of the Charter of
Human Rights and Responsibilities Act 2006 (Vic) undertaken by the Scrutiny of Acts and
Regulations Committee (SARC), entitled ‘Inquiry into the Charter of Human Rights and
Responsibilities’. My submission is reproduced at the end of this submission, in “Appendix
B”. I re-iterate the submissions I made during the four-year review, and seek to build upon
these in this submission for the Eight-Year Review.

PREVIOUS COMMENTARY ON THE CHARTER

This submission refers to numerous articles and submissions that I have written in relation to
the Charter. For ease of reference, I list these in Appendix “A”.

EIGHT-YEAR REVIEW SUBMISSION

This submission will focus on the “enforcement” mechanisms under the Charter – or,
perhaps more aptly named, the “remedial” provisions. In particular, it will focus on the
meaning of s 32(1), the interaction between ss 7(2) and 32(1), and the role of s 36(2). The
interaction between ss 7(2) and 38 will also be briefly addressed.

This submission also makes reference to embedding a human rights culture in Victoria, the
need to continue to review the Charter at periodic intervals, and re-iterates key issues from
my Four-Year Review submission.

THE OPERATION OF S 32(1) AND ITS INTERACTION WITH S 7(2)

As the Independent Reviewer will be aware, the meaning of s 32(1) is unsettled in Victoria.
Section 32(1) states: ‘So far as it is possible to do so consistently with their purpose, all
statutory provisions must be interpreted in a way that is compatible with human rights’.

Moreover, the interaction of the s 7(2) limitations provision with Part III is unsettled. In
particular, there is a difference of opinion in relation to whether s 7(2) analysis is part of
ascertaining whether a statutory interpretation is ‘compatible with human rights’ under s 32(1), or whether s 7(2) is not relevant.

This submission will outline the main strands of the arguments, in order to highlight the need for clarity on these matters – indeed, in order to highlight the need for amendment of Charter in order to secure the original intention of the Charter-enacting Parliament.

**Parliamentary Intention to replicate s 3(1) UKHRA**

*Charter* replication of s 3(1) UKHRA and *Ghaidan*

As per my four-year review submission,¹ and my academic writing on the matter (see Appendix A);² there were clear parliamentary indications that s 32(1) of the Charter was intended to reproduce s 3(1) of the Human Rights Act 1998 (UK) (UKHRA), as it had been interpreted in cases such as Ghaidan v Godin-Mendoza ('Ghaidan').³ The similarity between s 3(1) and s 32(1) is striking. Section 3(1) reads as follows: ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’ The only relevant difference is that s 32(1) adds the words ‘consistently with their purpose’.

The question that has vexed the Australian judiciary is what impact the additional words of ‘consistently with their purpose’ have. On the one hand, were they intended to codify the British jurisprudence on s 3(1) of the UKHRA, most particularly Ghaidan⁴ and re S.⁵ On the other hand, were they intended to enact a different sort of obligation altogether.

There were clear indications in the pre-legislative history to the Charter that the addition of the phrase ‘consistently with their purpose’ was to codify Ghaidan – both by referring to that jurisprudence by name⁶ and lifting concepts from that jurisprudence in explaining the effect of the inserted phrase.⁷

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⁴ Id.
⁵ In re S (Minors) (Care Order: Implementation of Care Plan); In re W (Minors) (Care Order: Adequacy of Care Plan) [2002] UKHL 10 (re S).
⁷ Human Rights Consultation Committee, above n 66, 83; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 23: ‘The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.’
The Charter utilising the UK/NZ Method

Were the parliamentary intention behind s 32(1) recognised and implemented by Australian courts, the approach to applying s 32(1) would be similar to the approach taken by the British courts. The approach adopted by the British courts is similar to the approach of the courts in New Zealand under the Bill of Rights Act 1990 (NZ) (NZBORA). The equivalent statutory interpretation provision under the NZBORA is found in s 6, which reads ‘[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.’

Given that the UKHRA and the NZBORA are the most relevant comparative statutory rights instruments, and the Charter-enacting parliament’s intention to replicate s 3(1) of the UKHRA and the Ghaidhain jurisprudence thereto, it is reasonable for the approach to s 32(1) of the Charter to be modelled on the British and New Zealand approaches. The methodology adopted under both of these instruments is similar and, by and large, settled. This method gives the interpretation power a remedial reach and focuses on two classic “rights questions” and two “Charter questions”, and can be summarised as follows (“UK/NZ Method”):

The “Rights Questions”
First: Does the legislative provision limit/engage any of the protected rights in ss 8 to 27?

Second: If the provision does limit/engage a right, is the limitation justifiable under the s 7(2) general limits power or under a specific limit within a right?

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

Fourth: The judge must then decide whether the altered rights-compatible interpretation of the provision is “possible” and “consistent[] with [statutory] purpose”.

8 Bill of Rights Act 1990 (NZ) ("NZBORA").
9 Whether or not s 6 of the NZBORA and s 3(1) of the UKHRA achieve the same outcome is highly contested: see Claudia Geiring, "The Principle of Legality and the Bill of Rights Act: A Critical Examination of R v Hansen" (2008) 6 New Zealand Journal of Public and International Law 59, 66.
10 Human Rights Act 1998 (UK) c 42 ("UKHRA"). The methodology under the UKHRA was first outlined in Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595 [75] ("Donoghue"), and has been approved and followed as the preferred method in later cases, such as, R v A (No 2) [2001] UKHL 25 [58]; International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158[149]; Ghaidhain [2004] UKHL 30 [24].
11 The current methodology under the Bill of Rights Act 1990 (NZ) ("NZBORA") was outlined by the majority of judges in R v Hansen [2007] NZSC 7 ("Hansen"). This method is in contra-distinction to an earlier method proposed in Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (NZCA) (known as “Moenen No 1”).
12 Debeljak, ‘Parliamentary Sovereignty and Dialogue’, above n 2, 28 and 32.
The Conclusion...

Section 32(1): If the s 32(1) rights-compatible interpretation is “possible” and “consistent[] with [statutory] purpose”, this is a complete remedy to the human rights issue.

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

The “Charter” questions in essence reflect the “enforcement” mechanisms under the Charter, or the Charter “remedies”. There are two matters of importance that flow from the UK/NZ Method.

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

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

The earlier decisions of the Victorian judiciary supported the UK/NZ Method. In RJE, Nettle JA followed the UK/NZ Method and used s 32(1) to achieve a rights-compatible interpretation of s 11 of the Serious Sex Offenders Monitoring Act 2005 (Vic), but did not consider it necessary to determine whether s 32(1) replicated Ghaedan to dispose of the case. Similarly, in Das, Warren CJ in essence followed the UK/NZ Method and used s 32(1) to achieve a rights-compatible interpretation of s 39 of the Major Crime (Investigative Powers) Act 2004 (Vic), but did not need to determine the applicability of Ghaedan to dispose.

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15 Re Application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381, 59 – [53] ("Das"). Warren CJ refers to Nettle JA’s endorsement of the approach of Mason NPJ in HKSAR v Lai Kwong Wai [2006] HCAT 84, and applies it: see Das [2009] VSC 381 [53]. Nettle JA indicates that the Hong Kong approach is the same as the UKHRA approach under Poplar, and expressly follows the Poplar approach: see RJE [2008] VSCA 265 [116]. This is why Warren CJ’s approach is described as essentially following the UKHRA approach.
of the case.\(^{16}\) In *Kracke*, Bell J adopted the UK/NZ Method\(^ {17}\) and held that s 32(1) codified s 3(1) as interpreted in *Ghaidan*.\(^ {18}\) I have more fully explored this issue of methodology in my academic writing.\(^ {19}\)

The strength of the remedy

A related issue is the ‘strength’ of the remedial power of s 32(1). I have explored this extensively in my academic writing, and provide an excerpt here.

[T]he British jurisprudence is of three categories. The earlier case of *R v A* is considered the ‘high water mark’ for s 3(1), when a non-discretionary general prohibition on the admission of prior sexual history evidence in a rape trial was re-interpreted under s 3(1) to allow discretionary exceptions. One commentator considered that Lord Steyn’s judgment signalled ‘that the interpretative obligation is so powerful that [the judiciary] need scarcely ever resort to s 4 declarations’ of incompatibility, suggesting that ‘interpretation is more in the nature of a “delete-all-and-replace” amendment.’\(^ {20}\)

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

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The “narrowest” interpretation of s 3(1) was proposed by Lord Hoffman in *Wilkinson*. Lord Hoffman describes s 3(1) as ‘deeming’ the Convention to form a significant part of the background against which all statutes ‘had to be interpreted’, drawing an analogy with the principle of legality. His Lordship introduces an element of reasonableness, describing interpretation under s 3(1) as ‘the ascertainment of what, taking into account the presumption created by s 3, Parliament would reasonably be understood to have meant by using the actual language of the statute.’\(^ {21}\)

The British jurisprudence has retreated from the most radical remedial stance in *R v A*. Moreover, although the reasoning of Lord Hoffman was accepted by the other Law Lords in *Wilkinson’s* case,\(^ {22}\) *Wilkinson* has failed to materialise as the leading case on s 3(1); rather, *Ghaidan* remains the case relied upon.\(^ {23}\) Finally, the reach of *Ghaidan* has been grossly overstated, and its approach is not appropriately described as ‘radical’.\(^ {24}\)

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21. *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30 [1] (Lord Nicholls); [32] (Lord Hope); [34] (Lord Scott); [43] (Lord Brown) (*Wilkinson*).
Victorian Court of Appeal in *R v Momicilovic* rejects s 3(1) UKHRA and Ghaidan

Meaning of s 32(1) and alignment with *Wilkinson*

Despite this pre-legislative history, and the early decisions of Victorian judges, the Victorian Court of Appeal ("VCA") in *R v Momicilovic (VCA Momicilovic)*24 aligned its judgment most closely with the *Wilkinson* decision.25 The VCA *Momicilovic* Court held that s 32(1) "does not create a "special" rule of interpretation [in the Ghaidan sense], but rather forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision in question."26

The VCA Method

The VCA *Momicilovic* Court then outlined a three-step methodology for assessing whether a provision infringes a Victorian Charter right, as follows ("VCA Method"):

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

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

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

Tentatively,28 the VCA *Momicilovic* Court held that s 32(1) "is a statutory directive, obliging courts ... to carry out their task of statutory interpretation in a particular way."29 Section 32(1) is part of the "framework of interpretative rules",30 which includes s 35(a) of the Interpretation of Legislation Act and the common law rules of statutory interpretation, particularly the

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24 *R v Momicilovic* [2010] VSCA 50 ("VCA Momicilovic").
26 *VCA Momicilovic* [2010] VSCA 50 [35]. This is in contrast to Lord Walker's opinion that '[t]he words "consistently with their purpose" do not occur in s 3 of the HRA but they have been read in as a matter of interpretation': Robert Walker, 'A United Kingdom Perspective on Human Rights Judging' (Presented at Courting Change: Our Evolving Court, Supreme Court of Victoria 2007 Judges' Conference, Melbourne 9-10 August 2007) 4.
27 *VCA Momicilovic* [2010] VSCA 50 [35].
28 The VCA *Momicilovic* Court only provided its 'tentative views' because '[n]o argument was addressed to the Court on this question': *ibid* [101]. Indeed, three of the four parties sought the adoption of the Preferred UKHRA-based methodology as propounded by Bell J in *Kracke* [2009] VCAT 646 [65], [67] – [255].
29 *VCA Momicilovic* [2010] VSCA 50 [102].
30 *ibid* [103]. It is merely 'part of the body of rules governing the interpretative task': *ibid* [102].
presumption against interference with rights (or, the principle of legality). To meet the s 32(1) obligation, a court must explore ‘all “possible” interpretations of the provision(s) in question, and adopt[] that interpretation which least infringes Charter rights’, with the concept of “possible” being bounded by the ‘framework of interpretative rules’.

For the VCA MonecIovici Court, the significance of s 32(1) ‘is that Parliament has embraced and affirmed [the presumption against interference with rights] in emphatic terms’, codifying it such that the presumption ‘is no longer merely a creature of the common law but is now an expression of the “collective will” of the legislature. The guaranteed rights are also codified in the Charter.’

**Differences between the VCA Method and the UK/NZ Method**

I have previously summarised the main differences between the UK/NZ Method and the VCA Method, as follows:

*There are significant differences between the VCA and UK/NZ methods. Under the VCA method, s 32(1) is relevant during the initial and ordinary interpretative process, and has no remedial scope. Moreover, s 7(2) is not relevant to interpretation or assessing rights-compatibility, but is a step preparatory to ‘enforcement’ via s 36(2). By contrast, the UK/NZ method uses ordinary interpretative methods to establish whether a right is limited; then s 7(2) to adjudge the justifiability of the limit; with s 32(1) being utilised after an unjustified limit is established, as part of the remedial powers to address the unjustified limitation. As discussed below, the VCA method also differs to the method under constitutional instruments, even though the VCA (mistakenly) relied on constitutional methodology.*

**Problems with VCA MonecIovici**

There are many difficulties with the reasoning in *VCA MonecIovici* and the VCA Method proposed by that court. I have covered these in my academic writings,* and I urge the Independent Reviewer to consider these. I outline my main concerns here in brief.

First, it is by no means clear that the interpretation given to s 32(1) in *VCA MonecIovici* is correct, with the reasoning of the *VCA MonecIovici* Court being open to criticism.*

Secondly, to fully understand the apparent and intended links between s 3(1) of the UKHRA and s 32(1) of the Charter, one must explore the meaning of s 3(1) of the UKHRA and its related jurisprudence. I refer the Independent Reviewer to my academic writings on this.* An exploration of s 3(1) of the UKHRA will highlight that the s 32(1) additional words

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31 For sound and persuasive arguments about why s 32(1) creates a stronger obligation than the common law presumptions, being arguments that are contrary to this conclusion of the VCA MonecIovici Court, see Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, Australia, 2008) [3.11] – [3.17].
32 *VCA MonecIovici* [2010] VSCA 50 [103].
33 Ibid [104].
34 Ibid.
35 Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2, 348-49 (footnotes omitted).
‘consistently with their purpose’ are merely, and were intended as, a codification of the British jurisprudence on s 3(1) of the UKHRA, most particularly Ghaidan.

Moreover, and of particular relevance to my recommendation below, this more detailed discussion will illustrate why it is not necessary to include the phrase ‘consistently with their purpose’ in the rights-compatible statutory interpretation provision of s 32(1) in order to achieve a measure of balance between the parliamentary intentions contained in the Charter and the parliamentary intentions in any law being interpreted under the Charter. That is, s 3(1) of the UKHRA achieves a balance between the parliamentary intentions contained in the UKHRA and the parliamentary intentions in any law being interpreted under the UKHRA without the additional words ‘consistently with their purpose.’ Indeed, the British jurisdiction has ensured this.

Thirdly, it is important to understand why s 32(1) of the Charter is and ought to be considered a codification of Ghaidan. I refer the Independent Reviewer to my academic writings on this. This discussion is important as a contrast to the reasoning of the VCA Momiclovic Court. It also reinforces the need to be absolutely explicit about any parliamentary intentions behind any amendments to the wording of s 32(1) – that is, if s 32(1) is to be amended, as per my recommendation below, Parliament must be explicit about its intention that s 32(1) is a codification of Ghaidan.

Fourthly, beyond the implications from the debate about whether s 32(1) of the Charter codifies Ghaidan or not, the methodology adopted in VCA Momiclovic is problematic. The VCA Method undermines both (a) the operation of the s 7(2) limitations provision, and (b) the remedial reach of the rights-compatible statutory interpretation provision. Both of these issues will be more fully explored below.

High Court of Australia’s decision in Momiclovic v The Queen

The decision in VCA Momiclovic went on appeal to the High Court of Australia in Momiclovic v Queen (HCA Momiclovic). This is not the forum to fully explore the decision and its implications for the Charter; however, I urge the Independent Reviewer to consider my academic writing on the meaning and implications of HCA Momiclovic.

For current purposes, I will focus on the key aspects of the case that impact on ss 7(2) and 32, and their interaction. HCA Momiclovic can be divided between those judgments that more closely align with the VCA Momiclovic decision, and those that more closely align with the UK/NZ Method.

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39 Debeljak, ‘Who Is Sovereign Now?’, above n 2; Debeljak, ‘Parliamentary Sovereignty and Dialogue’, above n 2, 49-56; and Julie Debeljak, ‘Submission to the National Consultation’, above n 5, 57-60.
40 Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2; Debeljak, ‘Who Is Sovereign Now?’, above n 2, 21, 44.
41 See especially, Debeljak, ‘Who Is Sovereign Now?’, above n 2, 21, 40-41, 44-46.
42 Momiclovic v The Queen [2011] HCA 34 (HCA Momiclovic).
43 Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2.
Closer to *VCA Momiclovic*: French CJ, and Crennan and Kiefel JJ

By way of overview, the judgments of French CJ, and Crennan and Kiefel JJ most closely aligned with the reasoning in *VCA Momiclovic*, but did not necessarily support the *Momiclovic* Method. As per my academic writing:

> French CJ agrees with *VCA Momiclovic* that s 32(1) codifies the principle of legality and s 7(2) does not inform the interpretation process. His Honour held that s 36(2) is not an impermissible exercise of non-judicial power. Crennan and Kiefel JJ consider s 32(1) to be an ordinary rule of construction, without explicitly sanctioning the principle of legality characterisation, and that s 7(2) is a principle of *justification* which plays no role in the *interpretation* process. Their Honours reject both the UK/NZ and VCA methodologies. Their Honours held that s 36(2) does not interfere with the institutional integrity of the State courts and is valid. 

First, the interpretation of s 32(1) given by French CJ, and Crennan and Kiefel JJ, are open to critique. In particular, French CJ’s characterisation of s 32(1) as being a codification of the principle of legality, essentially adopting *VCA Momiclovic* and its reliance on *Wilkinson*, is open to critique. Similarly, the judgment of Crennan and Kiefel JJ is open to critique – especially their Honour’s comparison between s 3(1) of the *UKHRA* and s 32(1) of the *Charter*, and their conclusion that s 32(1) “does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes” – that is, that s 32(1) embodies a test of ordinary statutory construction.

Secondly, we must examine the role given to s 7(2) in both judgments. French CJ concluded that s 7(2) does not inform the interpretative process, and essentially approved of the VCA Method. This means that s 7(2) is not relevant to interpretation or assessing rights-compatibility, but is a step preparatory to ‘enforcement’ via s 36(2) declarations of inconsistent interpretation. The reasoning of French CJ leading up to these conclusions and these conclusions are open to critique.

Crennan and Kiefel JJ concluded that the outcomes of s 7(2) analysis have no bearing on ss 32(1), essentially because s 32(1) concerns interpretation and s 7(2) “contains no method appropriate to the ascertainment of the meaning and effect of a statutory provision.” The reasoning and assumptions underlying the conclusions of Crennan and Kiefel JJ are open to critique. Moreover, their Honours rejected the UK/NZ Method because it linked ss 7(2) with s 32(1), and reject the VCA Method because it linked ss 7(2) with 36(2).

The consequences of these decisions on s 7(2) and methodology, and the remedial role of s 32(1) will be explored below.

**Closer to UK/NZ Method: Gummow J (Hayne J concurring), Bell J and Heydon J**

By way of overview, the judgments of Gummow J (Hayne relevantly concurring), Bell J and Heydon J more closely align with the UK/NZ Method. The implications of the

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44 Ibid 355.
46 *HCA Momiclovic* [2011] HCA 34 [565].
48 Ibid 365-68.
49 *HCA Momiclovic* [2011] HCA 34 [574].
50 Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2, 369-370.
Commonwealth Constitution for the operation of ss 7(2), 32(1) and 36(2) have a greater influence on these judgments, with three of the four judges upholding the validity of ss 7(2) and 32(1), and one judge upholding the validity of s 36(2). As per my academic writing:

Justice Gummow rejects the VCA Moneilovic characterisation of s 32(1) and adopts the UK/NZ method, thereby recognising a role for s 7(2). However, his Honour holds s 36(2) invalid for offending Kable, but severable from the Charter. Justice Bell recognises a role for s 7(2), envisages a remedial reach for s 32(1), and essentially adopts the UK/NZ method. Her Honour holds that s 36(2) is a valid conferral of non-judicial power. Justice Heydon provides the fourth opinion supporting a role for s 7(2) and a strong remedial reach for s 32(1), which sits within the NZ/UK Model. However, the consequence of broadly characterising these provisions is their invalidation for violating Kable - indeed, his Honour invalidates the entire Charter.51

Most importantly for our purposes, "all four judges held that "compatibility with rights" includes an assessment of s 7(2) limitations52 - that is, all four judges envisaged a role for s 7(2) limitations/proportionality analysis in the process of establishing under s 32(1) whether a law can be interpreted compatibly with rights.

In relation to s 32(1), as per my academic writing, Gummow J (with Hayne J relevantly concurring) held that s 32(1) does not confer a law-making function on the courts that is repugnant to judicial power under the Commonwealth Constitution. Gummow J notes that "purpose" in s 32(1) refers "to the legislative "intention" revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation." His Honour then refers to activities that "fall[] within the constitutional limits of that curial process" described in Project Blue Sky, being that "[t]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have"; but that "[t]he context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning." Gummow J concludes "[t]hat reasoning applies a foriōri where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1).53

Gummow J clearly recognised that the meaning to be given to a statutory provision may not correspond to its literal or grammatical meaning. However, his Honour failed to answer the question: to what extent can meaning change to achieve rights-compatibility; or what is the strength of the remedial force of s 32(1)? Gummow J did not explicitly reject or accept Ghaidah.54 His Honour also supported the UKJ/NZ method.55

Having held that s 7(2) informed the question of rights "compatibility", Justice Bell accepted the UK/NZ method, describing it in Charter language as follows:

1. If the literal or grammatical meaning of a provision appears to limit a Charter right [Rights Question 1], the court must consider whether the limitation is demonstrably justified by reference to the s 7(2) criteria [Rights Question 2]. If the ordinary meaning of the provision would place an unjustified limitation on a human right, the court is required to seek to resolve the apparent conflict between the language of the provision and the mandate of the Charter by giving the provision a meaning that is

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51 Ibid 373. 52 Ibid 373. For an explanation of the reasoning of the individual judges, see 373 to 375. 53 Ibid 376 (citations omitted). 54 For further discussion, see ibid 376-77. 55 Ibid 378.
compatible with the human right [Charter Enforcement Question 3] if it is possible to do so consistently with the purpose of the provision [Charter Enforcement Question 4].\textsuperscript{56}

In Justice Bell’s opinion, the \textsuperscript{57} 7(2) criteria ‘are readily capable of judicial evaluation’, and that ‘the purpose of the limitation, its nature and extent, and the question of less restrictive means reasonably available to achieve the purpose are matters that commonly will be evident from the legislation.’\textsuperscript{58} Her Honour noted the re-interpretative limit of ‘consistency with purpose’, which ‘directs attention to the intention, objectively ascertained, of the enacting Parliament. The task imposed by s 32(1) is one of interpretation and not of legislation.’\textsuperscript{59} Her Honour highlighted that s 32(1) ‘does not admit of “remedial interpretation” of the type undertaken by the Hong Kong Court of Final Appeal as a means of avoiding invalidity.’\textsuperscript{60}

The implications of her Honour’s comments about “remedial interpretation” are explored in my academic writings,” suffice to say that it is unclear why her Honour chose to distinguish the Hong Kong jurisprudence rather than tackle the British jurisprudence, in particular, \textit{Ghaidan}. It is also unclear why her Honour discusses ‘remedial interpretation’ ‘as a means of avoiding invalidity’, which addresses constitutional rights instruments, rather than ‘remedial interpretation’ focused on rights compatibility, which is the question under statutory rights instruments. In any event, Bell J clearly supports a role for s 7(2) in assessing compatibility of rights, and supports the UK/NZ method, although the ‘strength’ of the remedy remains uncertain.

Heydon J rejected the characterisation of s 32(1) offered in \textit{VCA Momicliev}.\textsuperscript{62} Indeed, Heydon J accepted the broader reading of s 32(1) which supports the UK/NZ Method and apparently accepts that s 32(1) was intended to codify \textit{Ghaidan}.\textsuperscript{63} However, this broad reading of s 32(1) was its downfall according to Heydon J, who held that s 32(1) was invalid for impermissibly conferring a legislative function of the judiciary in breach of separation of judicial powers under the \textit{Commonwealth Constitution}.

\section*{PROBLEMS WITH THE JURISPRUDENCE TO DATE}

I have written extensively about the jurisprudence to date, and I urge the Independent Reviewer to consider these articles. For current purposes, I focus on the role of s 7(2) proportionality analysis, the appropriate methodology for s 32(1) analysis, and the ‘strength’ of interpretation.

\textsuperscript{56} \textit{HCA Momicliev} [2011] HCA 34 [684].
\textsuperscript{58} \textit{HCA Momicliev} [2011] HCA 34 [684]. Compare with Heydon J ([429], [431], [433]).
\textsuperscript{59} Ibid. Bell J fails to consider the role of ‘so far as it is possible to do so’ in drawing the line between proper judicial interpretation and improper judicial law-making, along with other Justices.
\textsuperscript{60} Ibid, citing HKSR v Lam Kwong Wai (2006) 9 HKCFAR 574 at 604-608 [57]-[66] (emphasis added). Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2, 379 – 381.
\textsuperscript{61} \textit{HCA Momicliev} [2011] HCA 34 [411].
\textsuperscript{62} Ibid [445] – [454].
Section 7(2) Role and Method

There are numerous difficulties with the VCA Method's relegation of s 7(2) to being merely relevant to the decision whether to issues a s 36(2) declaration.

Let us first focus on the reasoning in VCA Momicilovic. The reasoning behind the VCA Momicilovic Court conclusion that s 7(2) is not relevant to interpretation is suspect, as the following illustrates:


[The first question is the interpretation of a right. In ascertaining the meaning of a right, the criteria for justification are not relevant. The meaning of the right is ascertained from the "cardinal values" it embodies. Collapsing the interpretation of the right and s 1 justification is insufficiently protective of the right...]

This passage does not undermine the UK/NZ method because there are two distinct inquiries under the 'rights questions'. The first inquiry concerns the scope of the right and the legislation as ordinarily ascertained, and whether the latter limits the former. Once a right is limited, the second and distinct inquiry focuses on the reasonableness and justifiability of the limit. Far from conflicting, the UK/NZ method shares the two-step approach in Canada. Moreover, under the UK/NZ method, there is no 'grafting' of limitations considerations onto interpretation considerations under s 32(1) – at the 'Charter enforcement questions' stage, the limitations power is 'spent'.

The VCA's reliance on this passage lies in its misunderstanding of what Elias CJ is discussing. Her Honour is discussing the 'meaning of the right', not the meaning of the challenged legislation. A discussion about the meaning of a right and its interaction with a limitations provision has been confused with a discussion about the meaning of s 32(1) and its interaction with a limitations provision. The Canadian discussion about two 'rights questions' cannot be relied upon by the VCA in a discussion about the interaction between one 'rights question' (i.e. s 7(2)) and one 'Charter enforcement question' (i.e. s 32(1)). French CJ similarly mistakenly relies on Elias CJ.46

Moreover, the conclusion in VCA Momicilovic that s 7(2) is not relevant to assessing rights-compatibility is problematic, as the following illustrates:

The VCA's conclusion misunderstands the nature of limitations. It is widely acknowledged, and explicitly mentioned in the Explanatory Memorandum (Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 9), that not all rights are absolute; and that rights must be balanced against each other, and other communal values and needs... Justifiable limits on rights are not problematic, whereas unjustifiable limits on rights are problematic. Constitutional and statutory rights instruments develop mechanisms to address the latter – whether via a judicial invalidation mechanism, or judicial interpretation or declaration mechanisms, respectively.47

Secondly, the VCA Momicilovic conclusions and the VCA Method do not reflect the text and structure of the Charter. Indeed, textual and structural arguments point to s 7(2) having a role in assessing whether a statutory provision is 'compatible' with rights. I have discussed this in

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46 Debeljak, 'Proportionality, Interpretation and Declaration', above n 2, footnote 46.
the context of critiquing judgment of French CJ in *HCA Momecillovic*. A one element of this critique, which relates to both *VCA Momecillovic* and French CJ, is as follows:

The VCA relies on the dissent of Elias CJ in *Hansen* to bolster its conclusion that s 7(2) analysis comes after s 32(1) ordinary interpretation. In considering the *NZBORA* methodology, Elias CJ opines that to apply the s 5 limitation before applying the s 6 interpretation “distorts the interpretative obligation under s 6 from preference for a meaning consistent with the rights and freedoms in Part 2 to one of preference for consistency with the rights as limited by a s 5 justification”: *Hansen* [2007] 3 NZLR 1, 9, as cited in *VCA Momecillovic* [2010] VSCA 50 [108]. Elias CJ did not think that approach conforms with the purpose, structure and meaning of the *NZBORA* as a whole: *Hansen* [2007] 3 NZLR 1, 9, as cited in *VCA Momecillovic* [2010] VSCA 50 [108].

Elias CJ’s view was dependent on the structural fact that the limitation and interpretation provisions are contained in Part 1 of the *NZBORA*, whereas the rights are contained in Part 2: Evans and Evans *Australia Bills of Rights*, above n Error! Bookmark not defined., [3.43] (emphasis in original). By contrast, Evans and Evans highlight the rights and limitations provision under the Charter are structurally contained in Part 2, with the interpretation provision being in Part 3; at [3.43]. Based on a structural analysis, s 7(2) must be part of the initial inquiry about whether a provision is ‘compatible with human rights’, with s 32(1) analysis occurring after any unjustified limitation has been identified.7

Thirdly, the VCA Method simply does not work – at least in the way envisaged by the *VCA Momecillovic* Court, in the sense that the VCA Method does not exclude consideration of proportionally, as follows:

7 The ordering of the VCA method poses challenges. The first step of the VCA method requires an interpreter to ‘ascertain the meaning of the relevant provision’ using the ‘framework of interpretive rules’: *VCA Momecillovic* [2010] VSCA 50 [103]. This involves the interpreter exploring ‘all “possible” interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights’: at [103]. From a doctrinal perspective, it is impossible to identify an interpretation that ‘least infringes’ a Charter right without first, considering the scope of the rights and the legislation, and establishing whether the legislation limits a right; and secondly, considering whether the limitation is reasonable and demonstrably justified. That is, answering step 1 includes full consideration of steps 2 and 3 of the VCA method. How can an interpretation that ‘least infringes’ a Charter right be identified without any discussion of the scope of the rights said to be ‘breached’ (VCA method step 2)? Moreover, how can an interpretation that ‘least infringes’ a Charter right be identified without undertaking some form of limitations analysis like s 7(2), particularly the less restrictive legislative means assessment under s 7(2)(e) (VCA method step 3). The entirety of the VCA methodology is in truth contained in step 1, with steps 2 and 3 becoming superfluous.8

Given these difficulties with the VCA Method, and that opinion is divided across the VCA and the HCA about the role of s 7(2), the Victorian Parliament should amend the Charter to make the role of s 7(2) clear. In my opinion:

- **Section 7(2) must** have a role to play under the s 32(1) interpretation obligation to interpret statutory provisions in a manner that is compatible with human rights; and
- **The UK/NZ Method is the correct method to be adopted when analysing ss 7(2), 32(1) and 36(2).**

My suggested amendments below reflect this position.

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60 Ibid 365-66.
Section 32(1) remedial reach and Method

The related problem is whether s 32(1) is to be given a remedial reach. Section 32(1) is given a remedial reach under the UK/NZ Method. Under the CoA Method, and the judgments of French CJ and Crennan and Kiefel JJ, the remedial reach of s 32(1) is, at best, minimised and, at worst, denied.

The importance of a remedial reach for s 32(1) cannot be underestimated. The Charter is not a constitutional instrument, such that laws that are unreasonably and unjustifiably limit rights cannot be invalidated. The only “remedy” under the Charter for laws that unreasonably and/or unjustifiably limit rights are contained in Part III – in particular, the only remedy is a rights-consistent interpretation, so far as it is possible to do so, consistently with statutory purpose.

If s 32(1) is not given remedial force, as reflected in the adoption of the UK/NZ Method, then the Charter in truth contains no remedy for laws that unreasonably and unjustifiably limit rights. In other words, the Charter does no more than codify the common law position of the principle of legality (which is little protection against express words of parliament or their necessary intendment), and clarifies the list of rights that come within that principle. This simply was not the intention of the Charter-enacting Parliament.

Despite the variously stated misgivings of some judges about remedial interpretation, it must be noted that both statutory and constitutional rights instruments employ interpretation techniques for remedial purposes. I refer the Independent Reviewer to my discussion of this. 9

In my opinion:

- Section 32(1) must be given a remedial interpretation; and
- The UK/NZ Method is the appropriate method to reflect a remedial interpretative role for s 32(1).

My suggested amendments below reflect this position.

Section 32(1) and ‘strength’ of remedial reach

Given the split within the judiciary about the ‘strength’ of s 32(1), the Victorian Parliament must clarify the strength of the remedial reach of s 32(1). The choice appears to be between the Ghaidan approach or the Wilkinson approach. The Hansen approach under the NZBORA seems to fall somewhere between the two.

The Independent Reviewer and the Victorian Parliament must give serious consideration to the need for a strong remedial reach for the rights-compatible interpretation provision of s 32(1) of the Charter, preferably reflecting the Ghaidan approach. Given that the judiciary has no power to invalidate laws that unreasonably or unjustifiably limit the guaranteed rights, that s 39 does not confer a freestanding cause of action or remedy for public authorities failing to meet their human rights obligations, and that ideally ss 7(2) and 32(1) impact on the exception to s 38(2) unlawfulness (see below), a strong remedial reach for s 32(1) is vital.

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9 Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2, 343-347 (for statutory instruments) and 350-353 (for constitutional instruments).
It must be re-iterated that strong remedial interpretation under s 32(1) is part of the ‘dialogue’ scheme underlying the Charter, and does not undermine parliamentary sovereignty – parliament can respond to unwanted or undesirable rights-compatible judicial interpretations by statutory provisions that clearly and explicitly adopt rights-incompatible provisions.10

In my opinion:

- Section 32(1) must be given a strong remedial reach in order to properly protect and promote rights in Victoria;
- This strong remedial approach should be reinforced in any amendments to the Charter, including some explicit parliamentary statement, by way of Explanatory Memorandum and Second Reading Speech, that the parliamentary intention is for s 32(1) to have a strong remedial reach.

My suggested amendments below reflect this position.

**LINKED ISSUE OF SECTION 38**

There are numerous issues surrounding the operation of s 38, particularly as it interacts with ss 7(2) and 32(1) that need clarification.

**Interaction of ss 32(1) and 38(2)**

In my four-year submission, I outlined my understanding of the interaction of ss 32(1) and 38(2) and the potential impact of VCA Momeilovic, as follows:

There are a number of exceptions to the application of s 38(1) unlawfulness in the Charter, with one being of particular relevance. Under s 38(2), there is an exception/defence to s 38(1) where the law dictates the unlawfulness; that is, there is an exception/defence to the s 38(1) obligations on a public authority where the public authority could not reasonably have acted differently, or made a different decision, because of a statutory provision, the law or a Commonwealth enactment. This applies, for example, where the public authority is simply giving effect to incompatible legislation.

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

To the same extent that the Court of Appeal decision in Momeilovic reduces the application of s 32(1), the s 38(2) exception/defence for public authorities is expanded. The counter-argument to a s 38(2) claim is to interpret the alleged rights-incompatible law to be rights-compatible under s 32(1) is strengthened because a rights-compatible interpretation is less likely to be given. This counter-argument that an alleged victim might make is now weakened to the same extent that s 32(1) is weakened by the Momeilovic Court. This has now been confirmed by the Deputy-President of VCAT

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10 Ibid; Debeljak, ‘Four-Year Review Submission’, above n 1, 11-17.
in *Dawson v Transport Accident Commission*. This consequential effect of the Court of Appeal decision in *Momcilovic* gives further support to the recommendation to amend s 32(1) of the *Charter* to remove the words "consistently with their purpose", bringing s 32(1) of the *Charter* into line with s 3(1) of the *UKHRA*.

I re-iterate this concern here, and my recommendation. My recommended amendments below ought to address this issue.

**Relevance of s 7(2)**

A related issue is the role of s 7(2) in the context of s 38. In my view, s 7(2) limitations analysis is just as relevant to s 38 assessments as it is to s 32(1) interpretations. That is, when s 38(1) states that it is ‘unlawful for a public authority to act in a way that is incompatible with a human right’, the concept of incompatibility includes an analysis of s 7(2) reasonableness and demonstrable justification. In other words, an act of a public authority that limits rights but does so in a manner that is reasonable and demonstrably justifiable under s 7(2) is not incompatible.

To the extent that this is not clear, I recommend that the interaction between ss 7(2) and 38(1) be made clear through the amendments proposed below.

**Section 32(1) and the exercise of broad statutory discretions**

I have had the advantage of reading the submission of Bruce Chen. In my opinion, s 32(1) should be interpreted to confine broad statutory discretions, such that the person or body upon whom a broad statutory discretion is conferred can only exercise that discretion in a manner compatible with human rights. Again, compatibly with human rights includes s 7(2) limitations analysis.

To the extent that this is not clear in the *Charter* and jurisprudence to date, I recommend amending the *Charter* to make this clear.

**AMENDMENTS**

In my opinion, the *Charter* as it stands supports a strong remedial reach for s 32(1), envisages a role for s 7(2) in considering compatibility with human rights, and supports the UK/NZ Method. Although this is recognised by many judges, it is not a uniformly held view. Given this, the *Charter* must be amended as described below.

**Section 32(1)**

Given the confusion that the additional words of ‘consistently with their purpose’ in s 32(1) of the *Charter* have generated, it is recommend that s 32(1) be amended to remove the words ‘consistently with their purpose’, bringing s 32(1) of the *Charter* into line with s 3(1) of the *UKHRA*.

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71 Debeljak, ‘Four-Year Review Submission’, above n 1, 22 (citations omitted).
72 Bruce Chen is a doctoral student at the Faculty of Law Monash University. I am his co-supervisor. The opinions expressed here are my own.
To bring s 32(1) into line with s 3(1) addresses the two problems arising out of VCA Mencilovic and HCA Mencilovic – that is: adoption of the wording of s 3(1) of the UKHRRA will sanction a reading of s 32(1) that is consistent with Ghaidan and re S, as was the apparent original intention of the Victorian Parliament in enacting the Charter; and will allow the judiciary to adopt the UK/NZ Method.

It is further recommended that the Parliament should explicitly state in any Explanatory Memorandum and Second Reading Speech to the amendment that the interpretation to be given to amended s 32(1) is that of a codification of Ghaidan and re S, and that s 32(1) is intended to have a strong remedial reach. As is apparent from the Mencilovic litigation, the insertion of the phrase ‘consistently with their purpose’, and the failure to explicitly (as opposed to implicitly) state that the additional words were intended to codify Ghaidan in the Second Reading Speech and the Explanatory Memorandum, permitted the VCA Mencilovic Court to reject what was otherwise the apparent intention of the Victorian Parliament in enacting s 32(1). The recommended amendments and the use of extrinsic materials as suggested should put the issue beyond doubt.

It is further recommended that the Independent Reviewer and Parliament consider whether the words ‘all statutory provisions must be interpreted’ in s 32(1) should be amended to reflect the s 3(1) wording that all statutory provisions ‘must be read and give effect to’. Crennan and Kiefel JJ attached significance to this difference of wording. Even though their Honours reasoning is open to critique, it may be wise to amend s 32(1) to remove all doubt.

**Interaction between s 7(2) and Part III of the Charter**

There are numerous ways in which the interaction of ss 7(2) with Part III could be amended. These amendments have been developed with the interaction of ss 7(2) and 32(1) predominantly in mind, but equally the amendments ought to fix any issues with the interactions between ss 7(2) and 38.

To ensure that the judges adopt an interpretation of the Charter that the Charter-enacting parliament intended, I recommend adopting all of the amendments below.

First, it is recommended that the language across all the pertinent provisions be amended to be consistent, with an explicit statement made in the Explanatory Memorandum and Second Reading Speech explaining the purpose behind the amendments – that being, to ensure the s 7(2) is part of the process for assessing compatibility with human rights, and supporting the UK/NZ Method. This means that all references to rights ought to be amended to use the term ‘compatible’, as follows:

- Currently, ss 32(1) and 38 refer to ‘compatibility’ with human rights, so no amendment of these provisions is needed;
- Section 36(2) currently uses the term ‘consistently’ and this should be amended to read ‘cannot be interpreted compatibly with a human right’;
- Consequential amendments throughout the Charter will need to be made to ensure this consistency, including to ss 1(2)(e), 3 (definition of ‘declaration of inconsistent interpretation’) and 37.

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Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2, 359-64.
Secondly, I recommend that a definition of “compatibility with human rights” should be inserted into s 3 of the Charter, and that is clearly state that “the meaning of “compatibility with human rights” includes human rights that are reasonably and justifiably limited under s 7(2)”. 

Thirdly, I recommend that a provision be inserted into the Charter, either as a free-standing provision under Part I, or as an additional sub-section to s 6, which clearly highlights how Part II and Part II are to interact. In particular, it must clearly state that “the meaning of “compatibility with human rights” includes human rights that are reasonably and justifiably limited under s 7(2)”, and that all uses of that phrase in Part III refer to human rights subject to limitations analysis. The section could read:

(a) A reference to ‘compatibly with human rights’ in the Charter means human rights that are reasonably and justifiably limited under s 7 of the Charter.

(b) For the sake of clarity, this includes any reference to ‘compatibly with human rights’ in Part III.

For clarity, a note may be included that states: ‘For clarity, a statutory provision, or an act of a public authority, that limits rights but does so in a manner that is reasonable and demonstrably justifiable under s 7(2) is not incompatible with human rights.’

Section 36(2)

There is some question as to the constitutionality of s 36(2) under the Commonwealth Constitution. Section 36(2) was narrowly upheld in HCA Momcilovic, with four judges finding it valid but for different reasons.  

Section 36(2) plays an important role in formalising the ‘dialogue’ between the arms of government about human rights, as discussed in my Four-Year Review submission, and elsewhere. Because of this, it is recommended that s 36(2) is retained.

Were the Independent Reviewer or the Victorian Parliament minded to avoid any risk of unconstitutionality, s 36(2) could be amended to give an alternative body the role of alerting the executive and parliament to a judicial finding under s 32(1) that a statutory provision could not be interpreted compatibly with human rights. Such an amendment, and any consequential amendments, would not be difficult to draft.

EMBEDDING A HUMAN RIGHTS CULTURE

A vital component of respecting, protecting and promoting human rights is embedding a human rights culture within the arms of government and their many offshoots, and more broadly within the community. I urge the Independent Reviewer to consider the following academic writing on the issue:


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74 Ibid 354, 371-2, 381-82.  
75 Debeljak, ‘Four-Year Review Submission’, above n 1, 11-17.  
ANOTHER REVIEW OF THE CHARTER

Periodic review of the Charter has provided an opportunity for reflection on the Charter to date, and consideration of strengths and weaknesses with its operation into the future.

I recommend another review of the Charter be recommended by the Independent Reviewer, to be held between five and ten years after this eight-year review.

OTHER MATTERS ARISING FROM MY FOUR-YEAR SUBMISSION

As indicated at the beginning of this submission, I re-iterate the submissions I made during the four-year review, in relation to:

- The inclusion of economic, social and cultural rights;
- The need for a free-standing cause of action under s 39 of the Charter;
- The inclusion of courts and tribunals in the definition of “public authorities” under the Charter;
- The inter-institutional dialogue method for promoting and protecting rights, including its benefits; and
- The use of both internal and external limitations provisions (including the repeal of s 15(3)), and the need to exclude absolute rights from the operation of s 7(2).

Particular reference should be made to my submission regarding repealing the s 31 override provision in the Charter. SARC accepted this recommendation in its Four-Year review, citing my submission in support. It is hoped that the Independent Reviewer supports the repeal of s 31 of the Charter.

Submitted By:

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APPENDIX A

Previous articles and submissions that I have written, and that are referred to in my Eight-year Review submission are:

- Julie Debeljak, ‘Submission to the National Consultation on Human Rights’, submitted to the National Consultation on Human Rights Committee, 15 June 2009 (extracts).
APPENDIX B

*Inquiry into the Charter of Human Rights and Responsibilities*

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

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10 June 2011

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

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

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

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

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

Secondly, the weight of international human rights law and opinion supports the indivisibility, interdependence, inter-relationship and mutually reinforcing nature of all human rights – that is, civil, political, economic, social, cultural, developmental, environmental and other group rights. This was confirmed as a major outcome at the United Nations World Conference on Human Rights in Vienna.77 Moreover, amongst international human rights experts, "[i]t is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity."78 Any

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77 Dr Julie Debeljak (B.Ee/LLB(Hons), LLM (1) (Cantab), PhD), Senior Lecturer at Law and Foundational Deputy Director of the Castan Centre for Human Rights Law, Monash University.
domestic human rights framework must comprehensively protect and promote all categories of human rights for it to be effective.  

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

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

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. Let us consider some examples.

The right to life – a classic civil and political right – is a right in point. Assessing this right in line with the Maastricht principles, 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

(Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands), with the Maastricht Guidelines being the result of the meeting. In the Introduction to the Guidelines, the experts state: ‘These guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international level.’


Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, above n 78.
have the duty to *protect* the right to life. This is a duty to regulate society so as to diminish the risk that third parties will take each other’s lives, which is a partly negative and partly positive duty, and partly cost-free and partly costly duty. Thirdly, States have a duty to *fulfil* the right to life, which is comprised of positive and costly duties, such as, the duty to ensure low infant mortality and to ensure adequate responses to epidemics.

The right to adequate housing – a classic economic and social right – also highlights the artificial nature of the distinctions. Again, assessing this right in line with the Maastricht principles,86 first, States have a duty to *respect* the right to adequate housing, which is a largely negative, cost-free duty, such as, the duty not to forcibly evict people. Secondly, States have a duty to *protect* the right to adequate housing, which comprises of partly negative and partly positive duties, and partly cost-free and partly costly duties, such as, the duty to regulate evictions by third parties (such as, landlords and developers). Thirdly, States have a duty to *fulfil* the right to adequate housing, which is a positive and costly duty, such as, the duty to house the homeless and ensure a sufficient supply of affordable housing.

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

Indeed the experience of South Africa highlights that economic, social and cultural rights are readily justiciable. The South African Constitutional Court has and is enforcing economic, social and cultural rights. The Constitutional Court has confirmed that, at a minimum, socio-economic rights must be negatively protected from improper invasion. Moreover, it has confirmed that the positive obligations on the State are quite limited: being to take ‘reasonable legislative and other measures, within its available resources, to achieve progressive realisation’ of those rights. The Constitutional Court’s decisions highlight that enforcement of economic, social and cultural rights is about the *rationality* and *reasonableness* of decision making, that is, the State is to actrationally and reasonably in the provision of social and economic rights. So, for example, the government need not go beyond its available resources in supplying adequate housing and shelter; rather, the court will ask whether the measures taken by the government to protect the right to adequate housing were reasonable.87 This type of judicial supervision is well known to the Australian legal system, being no more and no less than what we require of administrative decision makers – that is, a similar analysis for judicial review of administrative action is adopted.

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

In *Soobramoney v Minister of Health (KwaZulu-Natal)* (1997),88 Soobramoney argued that a decision by a hospital to restrict dialysis to acute renal/kidney patients who did not also have heart disease violated his right to life and health. The Constitutional Court rejected this claim, given the intense demand on the hospital’s resources. It held that a ‘court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.’ In particular, it found that the limited facilities had to be made available on a

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86 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, above n 78.
87 See further Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1696 (CC); Government of South Africa v Grooteboom 2000 (11) BCLR 1169 (CC); Minister of Health v Treatment Action Campaign (2002) 5 SA 721 (CC).
88 Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1696 (CC).
priority basis to patients who could still qualify for a kidney transplant (i.e. those that had no heart problems), not a person like the applicant who was in an irreversible and final stage of chronic renal failure.

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

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

The Constitutional Court admitted it was not institutionally equipped to undertake across-the-board factual and political inquiries about public spending. It did, however, recognise its constitutional duty to make the State take measures in order to meet its obligations — the obligation being that the Government must act reasonably to provide access to the socio-economic rights contained in the Constitution. In doing this, judicial decisions may have budgetary implications, but the Constitutional Court does not itself direct how budgets are to be arranged.

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

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

Beyond the South African experience, the increasing acceptance of the justiciability of economic, social and cultural rights has led to a remarkable generation of jurisprudence on these rights. Interestingly, this reinforces the fact the economic, social and cultural rights do indeed have justiciable qualities — the rights are becoming less vague and more certain, and thus more suitable for

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88 Government of the Republic South Africa & Ors v Grootboom and Ors 2000 (11) BCLR 1169 (CC).
90 Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 [88].
adjudication. Numerous countries have incorporated economic, social and cultural rights into their domestic jurisdictions and the courts of these countries are adding to the body of jurisprudence on economic, social and cultural rights.\textsuperscript{92}

Moreover, the clarity of economic, social and cultural rights is being improved by the United Nations Committee on Economic, Social, and Cultural Rights\textsuperscript{93} currently through its concluding observations to the periodic reports of States' Parties\textsuperscript{94} and through its General Comments. This will only improve, given the recent adoption by consensus of the United Nations of the Optional Protocol to the \textit{International Covenant on Economic, Social and Cultural Rights} (2008),\textsuperscript{95} which allows individuals to submit complaints to the Committee about alleged violations of rights under \textit{ICESCR}. Once the Optional Protocol comes into force, there will be even greater clarity given to the scope of, content of, and minimum obligations associated with, economic, social and cultural rights. This ever-increasing body of jurisprudence and knowledge will allow Victoria to navigate its responsibilities with a greater degree of certainty.

Further, one should not lose sight of the international obligations imposed under \textit{ICESCR}. Article 2(1) of \textit{ICESCR} requires a State party to take steps, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights, by all appropriate means, including particularly the adoption of legislative measures. Article 2(2) also guarantees that the rights are enjoyed without discrimination. The flexibility inherent in the obligations under \textit{ICESCR}, and the many caveats against immediate realisation, leave a great deal of room for State Parties (and government’s thereof) to manoeuvre. As the Committee on Economic, Social and Cultural Rights acknowledges in its third General Comment, progressive realisation is a flexible device which is needed to reflect the realities faced by a State when implementing its obligations.\textsuperscript{96} It essentially “imposes an obligation to move as expeditiously and effectively as possible towards”\textsuperscript{97} the goal of eventual full realisation. Surely this is not too much to expect of a developed, wealthy, democratic polity, such as, Victoria?

Finally, I support the Castan Centre suggestion that economic, social and cultural rights may not need to be fully judicially enforceable as a first step. That is, as a first step, the judiciary may only be empowered to decide that in a certain situation economic, social and cultural rights are breached vis-à-vis a particular individual; with it then being up to the government to decide how to fix that situation.\textsuperscript{98} This system is in place in the European system. Under art 46 of the \textit{European Convention on Human Rights} (1951) (“\textit{ECHR}”), States parties have agreed to “abide by” decisions of the European Court. This has been interpreted to mean that the European Court identifies when a violation of rights has occurred, with the State party being obliged to respond to an adverse decision by fixing the human rights violation. In other words, the European Court judgments impose


\textsuperscript{93} The Committee on Economic, Social and Cultural Rights is established via ECOSOC resolution in 1987 (note, initially States parties were monitored directly by the Economic and Social Council under \textit{ICESCR}, opened for signature 16 December 1966, 999 UNTS 3, pt IV (entered into force January 1976)).

\textsuperscript{94} \textit{ICESCR}, opened for signature 16 December 1966, 999 UNTS 3, arts 16 and 17 (entered into force 3 January 1976).


\textsuperscript{99} \textit{ECHR}, opened for signature 4 November 1950, 213 UNTS 221, art 46 (entered into force 3 September 1953).
obligations of results: the State Party must achieve the result (fixing the human rights violation), but the State Party can choose the method for achieving the result. This means that the executive and parliament can choose how to remedy the violation, without having the precise nature of the remedy being dictated by the judiciary.

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

There are two major issues to be discussed under this Term of Reference. The first issue relates to the provision of remedies under s 39 of the Charter, and is thus linked to this Term of Reference, but also to the Term of Reference about the availability to Victorians of accessible, just and timely remedies for infringements of rights. The second issue relates to the definition of “public authority” and specifically to the exclusion of courts and tribunals from this definition.

Remedies under s 39 of the Charter

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

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

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

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

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

Section 39(3) clearly indicates that no independent right to damages will arise merely because of a breach of the Charter. Section s 39(4), however, does allow a person to seek damages if they have a pre-existing right to damages. All the difficulties associated with interpreting s 39(1) with respect to pre-existing relief or remedies will equally apply to s 39(4).
Section 39 is a major weakness in the Charter. First, it undermines the enforcement of human rights in Victoria. To force an applicant to "piggy-back" a Charter claim on a pre-existing relief or remedy adds unnecessary complexity to the vindication of human rights claims against public authorities, and may result in alleged victims of a human rights violation receiving no remedy in situations where a "piggy-back" pre-existing relief or remedy is not available.

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

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

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

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

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

The failure to create an unconstrained freestanding cause of action and remedy under the Charter will cause problems. Situations will inevitably arise where pre-existing causes of action are inadequate to address violations of human rights and which require some form of remedy. In these situations, rights protection will be illusory. The New Zealand experience is instructive. Although the statutory Bill of Rights Act 1990 (NZ) does not expressly provide for remedies, the judiciary developed two remedies for violations of rights – first, a judicial discretion to exclude evidence obtained in violation of rights; and, secondly, a right to compensation if rights are violated.114 This may be the ultimate fate of the Charter – if the Victorian Parliament does not legislate to provide for appropriate, effective and adequate remedies, the judiciary may be forced to develop remedies in its inherent jurisdiction. It is eminently more sensible for the Victorian Parliament to provide for the inevitable rather than to allow the judiciary to craft solutions on the run.

It should also be noted that Section 24 of the Canadian Charter of Rights and Freedoms 1982 (‘Canadian Charter’116) empowers the courts to provide just and appropriate remedies for violations of rights, and to exclude evidence obtained in violation of rights if to admit it would bring the administration of justice into disrepute.

For further discussion on the human rights obligations of public authorities, particularly the complexity associated with not enacting a freestanding cause of action or remedy, see Appendix 5 (pp 12-20).117

**Definition of “public authorities”, particularly excluding courts and tribunals**

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

In the United Kingdom, courts and tribunals are core/wholly public authorities. This means that courts and tribunals have a positive obligation to interpret and develop the common law in a manner that is compatible with human rights. The major impact of this to date in the United Kingdom has been with the development of a right to privacy.118

Under the Victorian Charter, in contrast, courts and tribunals were excluded from the definition of public authority. The Human Rights Consultation Committee report indicates that the exclusion of courts was to ensure that the courts are not obliged to develop the common law in a manner that is compatible with human rights. This is linked to the fact that Australia has a unified common law.119 The Human Rights Consultation Committee’s concern was that the High Court of Australia may strike down that part of the Charter if courts and tribunals were included in the definition of “public authority”.

The position under the UK HRA is to be preferred to the current position under the Charter. First, given that courts and tribunals will have human rights obligations in relation to statutory law, it seems odd to not impose similar obligations on courts and tribunals in the development of the common law.

118 Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22, para 135.
It is not clear that to alter common law obligations pertaining to the relevance of human rights considerations by statute would fall foul of the principle of a unified common law – after all, State by State accident transport and workplace injury legislation, which codifies and alters the common law by statute, have not been found to be problematic. Why should similar statutory codification of the common law pertaining to human rights be treated any differently? Accordingly, it is much more preferable to include courts and tribunals in the definition of public authorities.

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

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

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

There are a number of issues to be addressed in relation to the role and functioning of the courts and tribunals under the Charter. Some consideration will be given to the need to retain a role for the judiciary under the Charter, before turning to the specific operation of ss 32 and 38.

Retention of the Judicial Role

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

The Dialogue Model under the Charter

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

At the other “extreme” is the United States Constitution (‘US Constitution’). The United States adopted the traditional model of domestic human rights protection, which relies heavily on judicial

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Kracke v Mental Health Review Board And Ors (General) [2009] VCAT 646 [236] – [254].
review of legislative and executive actions on the basis of human rights standards. Under the US Constitution,\textsuperscript{111} 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.\textsuperscript{112} Alternatively, the representative arms can attempt to limit human rights by controlling the judiciary. This can be attempted through court-stacking and/or court-bashing. Court-stacking and/or court-bashing are inadvisable tactics, given the potential to undermine the independence of the judiciary, the independent administration of justice, and the rule of law – all fundamental features of modern democratic nation States committed to the protection and promotion of human rights.

Given the difficulty associated with representative responses to judicial invalidation of legislation, it is argued that the US Constitution essentially gives judges the final word on human rights and the limits of democracy. There is a perception that comprehensive protection of human rights: (a) transfers supremacy from the elected arms of government to the unelected judiciary; (b) replaces the representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); (c) and results in illegitimate judicial sovereignty, rather than legitimate representative sovereignty. This can be referred to the “judicial monologue” model.

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

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

A brief overview of the way in which the dialogue is established under the Charter, and the judicial role within the dialogue is appropriate. There are three main mechanisms used to establish the dialogue. The first dialogue mechanism relates to the specification of the guaranteed rights: human rights specification is broad, vague and ambiguous under the Charter and the UK HRA. This creates an inter-institutional dialogue about the definition and scope of the rights. Refining the ambiguously specified rights should proceed with the broadest possible input, ensuring all interests, aspirations, values and concerns are part of the decision matrix. This is achieved by ensuring that more than one institutional perspective has influence over the refinement of the rights, and arranging a diversity within the contributing perspectives. Rather than having almost exclusively representative views (such as, Victoria prior to the Charter) or judicial views (such as, in the United States), the Victorian

\textsuperscript{111} United States Constitution (1787) (‘US Constitution’).
\textsuperscript{112} United States Constitution (1787) (‘US Constitution’).
\textsuperscript{113} 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.
and British models ensure all arms of government contribute to, and influence the refinement of, the meaning of the rights. The executive does this in policy making and legislative drafting; the legislature does this in legislative scrutiny and law-making; and the judiciary does this when interpreting legislation and adjudicating disputes.

The second dialogue mechanism relates to the myth that rights are absolute ‘trumps’ over majority preferences, aspirations or desires. In fact, most rights are not absolute. Under the Charter and UK HRA, rights are balanced against and limited by other rights, values and communal needs. A plurality of values is accommodated, and the specific balance between conflicting values is assessed by a plurality of institutional perspectives. In terms of dialogue, all arms of government make a legitimate contribution to the debate about the justifiability of limitations to human rights. The representative arms play a significant role, particularly given the fact that a very small proportion of legislation will ever be challenged in court. The executive and legislature will presumably try to accommodate human rights in their policy and legislative objectives, and the legislative means chosen to pursue those objectives. Where it is considered necessary to limit human rights, the executive and legislature must assess the reasonableness of the rights-limiting legislative objectives and legislative means, and decide whether the limitation is necessary in a free and democratic society. Throughout this process, the executive and legislature bring their distinct perspectives to bear. They will be informed by their unique role in mediating between competing interests, desires and values within society; by their democratic responsibilities to their representatives; and by their motivation to stay in power – all valid and proper influences on decision making.

If the legislation is challenged, the judiciary then contributes to the dialogue. The judiciary must assess the judgments of the representative institutions. From its own institutional perspective, the judiciary must decide whether the legislation limits a human right and, if so, whether the limitation is justified. Taking the s 7(2) test under the Charter as an example, the judiciary, first, decides whether the legislative objective is important enough to override the protected right – that is, a reasonableness assessment. Secondly, the judiciary assesses the justifiability of the legislation: is there proportionality between the harm done by the law (the unjustified restriction to a protected right) and the benefits it is designed to achieve (the legislative objective of the rights-limiting law)? The proportionality assessment usually comes down to a question about minimum impairment: does the legislative measure impair the right more than is necessary to accomplish the legislative objective? Thus, more often than not, the judiciary is concerned about the proportionality of the legislative means, not the legislative objectives themselves. This is important from a democratic perspective, as the judiciary rarely precludes the representative arms of government from pursuing a policy or legislative objective. With minimum impairment at the heart of the judicial concern, it means that parliament can still achieve their legislative objective, but may be required to use less-rights-restrictive legislation to achieve this. The judicial analysis will proceed from its unique institutional perspective, which is informed by its unique non-majoritarian role, and its particular concern about principle, reason, fairness and justice. If the judiciary decides that the legislation constitutes an unjustified limitation, that is not the end of the story. The representative arms can respond, under the third mechanism, to which we now turn.113

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

The legislature and executive have a number of responses: the legislature and executive may respond to s 32 judicial interpretations and must respond to s 36 judicial declarations.108 Let us explore the range of available responses. First, parliament may decide to do nothing, leaving the s 32 judicially-assessed interpretation in place or the s 36 judicially-assessed incompatible law in operation.109 There is no compulsion to respond to a s 32 rights-compatible interpretation. If the executive and parliament are pleased with the new interpretation, they do nothing. In terms of s 36 declarations, although s 37 requires a written response to a declaration, it does not dictate the content of the response. The response can be to retain the judicially-assessed rights-incompatible legislation,110 which indicates that the judiciary’s perspective did not alter the representative viewpoint. The debate, however, is not over: citizens can respond to the representative behaviour at election time if so concerned, and the individual complainant can seek redress under the ICCPR.111

Secondly, parliament may decide to pass ordinary legislation in response to the judicial perspective.112 It may legislate in response to s 36 declarations for many reasons. Parliament may reassess the legislation in light of the non-majoritarian, expert view of the judiciary. This is a legitimate interaction between parliament and the judiciary, recognising that one institution’s perspectives can influence the other.113 Parliament may also change its views because of public pressure arising from the declaration. If the represented accept the judiciary’s reasoning, it is quite correct for their representatives to implement this change. Finally, the threat of resort to international processes under the ICCPR could motivate change, but this is unlikely because of the non-enforceability of international merits assessments within the Australian jurisdiction.114

Similarly, Parliament may pass ordinary legislation in response to s 32 interpretations for many reasons. Parliament may seek to clarify the judicial interpretation, address an unforeseen consequence

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108 Charter 2006 (Vic), s 37.
110 Indeed, the very reason for excluding parliament from the definition of public authority was to allow incompatible legislation to stand.
112 For a discussion of examples of the second response mechanism under the HRA, see Julie Debeljak, Human Rights and Institutional Dialogue: Lessons for Australian from Canada and the United Kingdom, PhD Thesis, Monash University, 2004, ch 5.5.3(b).
Dr Julie Debeljak

arising from the interpretation, or emphasise a competing right or other non-protected value it considers was inadequately accounted for by the interpretation. Conversely, parliament may disagree with the judiciary’s assessment of the legislative objective or means and legislate to re-instate its initial rights-incompatible legislation using express language and an incompatible statutory purpose in order to avoid any possibility of a future’s rights-compatible interpretation. Institutional dialogue models do not envisage consensus. Parliament can disagree with the judiciary, provided parliament listens openly and respectfully to the judicial viewpoint, critically re-assesses its own ideas against those of the differently motivated and situated institution, and respects the culture of justification imposed by the Charter – that is, justifications must be offered for any limitations to rights imposed by legislation and, in order to avoid its interpretation, parliament must be explicit about its intentions to limit rights with the concomitant electoral accountability that will follow.

Thirdly, under s 31, parliament may choose to override the relevant right in response to a judicial interpretation or declaration, thereby avoiding the rights issue. The s 32 judicial interpretative obligation and the s 36 declaration power will not apply to overridden legislation.\textsuperscript{126} Given the extraordinary nature of an override, such declarations are to be made only in exceptional circumstances and are subject to a five yearly renewable sunset clause.\textsuperscript{127} Overrides may also be used “pre-emptively” – that is, parliament need not wait for a judicial contribution before using s 31. Pre-emptive use, however, suppresses the judicial contribution, taking us from a dialogue to a representative monologue. It is unclear why an override provision was included in the Charter, and this issue is subject to exploration below.

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

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

Dialogue models have the distinct advantage of forcing the executive and the legislature to take more responsibility for the human rights consequences of their actions. Rather than being powerless recipients of judicial wisdom, the executive and legislature have an active and engaged role in the human rights project. This is extremely important for a number of reasons. First, it is extremely important because far most legislation will never be the subject of human rights based litigation;\textsuperscript{128} we really rely on the executive and legislature to defend and uphold our human rights. Secondly, it is the vital first step to mainstreaming human rights. Mainstreaming envisages public decision making which has human rights concerns at its core. And, of course, mainstreaming rights in our public institutions is an important step toward a broader cultural change.

See further:


\textsuperscript{126} See legislative note to Charter 2006 (Vic), s 31(6).

\textsuperscript{127} Charter 2006 (Vic), ss 31(4), (7) and (8). The ‘exceptional circumstances’ include ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria’: Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 21.

\textsuperscript{128} See above n 114.
Recommendations

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

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

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

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

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

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

The Operation of s 32


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

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

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

The similarity between s 3(1) and s 32(1) is striking, with the only relevant difference being that s 32(1) adds the words ‘consistently with their purpose’. The question is what impact these additional words have: were they intended to codify the British jurisprudence on s 3(1) of the UK HRA, most particularly Ghaidan v Godin-Mendoza;¹³² or were they intended to enact a different sort of obligation altogether.

It is not currently certain that the wording used in s 32 of the Charter¹³³ achieve a codification of the British jurisprudence in Ghaidan and re S.¹³⁴ There were clear indications in the pre-legislative history to the Charter that the addition of the phrase ‘consistently with their purpose’ was to codify Ghaidan – both by referring to that jurisprudence by name¹³⁵ and lifting concepts from that jurisprudence in explaining the effect of the inserted phrase.¹³⁶ Despite this pre-legislative history, the Court of Appeal in R v Momiclovic (′Momiclovic′)¹³⁷ held that s 32(1) ‘does not create a “special” rule of interpretation [in the Ghaidan sense], but rather forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision in question.’¹³⁸ It then outlined a three-step methodology for assessing whether a provision infringes a Victorian Charter right, as follows (′Momiclovic Method′):

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

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

¹³³ And, for that matter, s 30 of the Human Rights Act 2004 (ACT) (′ACT HRA′).
¹³⁴ In re S (Minors) (Care Order: Implementation of Care Plan); In re W (Minors) (Care Order: Adequacy of Care Plan) [2002] UKHL 10.
¹³⁶ Human Rights Consultation Committee, Victorian Government, Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee, 2005, 83; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 23: ‘The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.’
¹³⁷ R v Momiclovic [2010] VSCA 50 (′Momiclovic′).
¹³⁸ Ibid [35]. This is in contrast to Lord Walker’s opinion that ‘[t]he words “consistently with their purpose” do not occur in s 3 of the HRA but they have been read in as a matter of interpretation’; Robert Walker, ‘A United Kingdom Perspective on Human Rights Judging’ (Presented at Courting Change: Our Evolving Court, Supreme Court of Victoria 2007 Judges’ Conference, Melbourne 9-10 August 2007) 4.
Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified. 159

Tentatively, the Moneclovic Court held that s 32(1) is a statutory directive, obliging courts ... to carry out their task of statutory interpretation in a particular way. 160 Section 32(1) is part of the ‘framework of interpretative rules’, 161 which includes s 35(a) of the I LA and the common law rules of statutory interpretation, particularly the presumption against interference with rights (or, the principle of legality). 162 To meet the s 32(1) obligation, a court must explore ‘all “possible” interpretations of the provision(s) in question, and adopt[] that interpretation which least infringes Charter rights’, 163 with the concept of “possible” being bounded by the ‘framework of interpretative rules’. For the Moneclovic Court, the significance of s 32(1) is that Parliament has embraced and affirmed [the presumption against interference with rights] in emphatic terms, codifying it such that the presumption is no longer merely a creature of the common law but is now an expression of the “collective will” of the legislature. 164 The guaranteed rights are also codified in the Charter. 165

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

Nevertheless, SARC should be aware of a number of issues that flow from this lack of legal certainty. First, it is by no means clear that the interpretation given to s 32(1) by the Moneclovic Court is correct, with the reasoning of the Court of Appeal being open to criticism. I refer SARC to Appendix 1, 166 which is an article I wrote critiquing the reasoning of the Court of Appeal decision.

Secondly, for a greater exploration of the meaning of s 3(1) of the UKHRA and its related jurisprudence, I refer you to Appendix 1, 167 Appendix 4 (pp 40-49) 168 and Appendix 2 (pp 51-60). 169 This exploration of s 3(1) of the UKHRA will highlight that the s 32(1) additional words ‘consistently with their purpose’ are merely, and were intended as, a codification of the British jurisprudence on s 3(1) of the UKHRA, most particularly Ghaidan. Moreover, and of particular relevance to my

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159 Moneclovic [2010] VSCA 50 [35].
160 The Moneclovic Court only provided its “tentative views” because “[n]o argument was addressed to the Court on this question”: Ibid [101]. Indeed, three of the four parties sought the adoption of the Preferred UKHRA-based methodology as propounded by Bel J in Kracke [2009] VCAT 646 [65], [67] – [235].
161 Moneclovic [2010] VSCA 50 [102].
162 Ibid [103]. It is merely “part of the body of rules governing the interpretative task”: [102].
163 For sound and persuasive arguments about why s 32(1) creates a stronger obligation than the common law presumptions, being arguments that are contrary to this conclusion of the Moneclovic Court, see Carolyn Evans and Simon Evans, Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act (LexisNexis Butterworths, Australia, 2008) [3.11] – [3.17].
164 Moneclovic [2010] VSCA 50 [103].
165 Ibid [104].
166 Ibid.
170 Julie Debeljak, ‘Submission to the National Consultation on Human Rights’, submitted to the National Consultation on Human Rights Committee, 15 June 2009 (extracts).
Dr Julie Debeljak

recommendation below, this more detailed discussion will illustrate why it is not necessary to include the phrase ‘consistently with their purpose’ in the rights-compatible statutory interpretation provision of s 32(1) in order to achieve a measure of balance between the parliamentary intentions contained in the Charter and the parliamentary intentions in any law being interpreted under the Charter. That is, s 3(1) of the UK HRA achieves a balance between the parliamentary intentions contained in the UK HRA and the parliamentary intentions in any law being interpreted under the UK HRA without the additional words “consistently with their purpose.” Indeed, the jurisprudence has ensured this.

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

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

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

The “Rights Questions”

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

The “Charter Questions”

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155 UKHRA (UK) c 42. The methodology under the UKHRA was first outlined in Donoghue [2001] EWCA Civ 595 [75], and has been approved and followed as the preferred method in later cases, such as, R v A [2001] UKHL 25 [58]; International Transport Roth Gmbh v Secretary of State for the Home Department [2002] EWCA Civ 158 [149]; Ghaidan [2004] UKHL 30 [24].
156 Bill of Rights Act 1990 (NZ) (“NZBORA”). The current methodology under the NZBORA was outlined by the majority of judges in R v Hansen [2007] NZSC 7 (“Hansen”). This method is in contradistinction to an earlier method proposed in Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (NZCA) (known as “Moenen No 1”).
Third: If the provision imposes an unjustified limit on rights, interpreters must consider whether the provision can be “saved” through a s 32(1) interpretation; accordingly, the judge must alter the meaning of the provision in order to achieve rights-compatibility.

Fourth: The judge must then decide whether the altered rights-compatible interpretation of the provision is “possible” and “consistent[] with [statutory] purpose”.

The Conclusion...

Section 32(1): If the s 32(1) rights-compatible interpretation is “possible” and “consistent[] with [statutory] purpose”, this is a complete remedy to the human rights issue.

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

Prior to the Moncilovic decision, three Supreme Court judges in separate decisions, sanctioned the Preferred Method. In RJE, Nettle JA followed the Preferred Method and used s 32(1) to achieve a rights-compatible interpretation of s 11 of the Serious Sex Offenders Monitoring Act 2005 (Vic), but did not consider it necessary to determine whether s 32(1) replicated Ghaidan to dispose of the case. Similarly, in Das, Warren CJ in essence followed the Preferred Method and used s 32(1) to achieve a rights-compatible interpretation of s 39 of the Major Crime (Investigative Powers) Act 2004 (Vic), but did not need to determine the applicability of Ghaidan to dispose of the case. In Kracke, Bell J adopted the Preferred Method and held that s 32(1) codified s 3(1) as interpreted in Ghaidan. This issue of methodology is more fully discussed in Appendix 1.

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

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

Recommendation

Given the confusion that the additional words of “consistently with their purpose” in s 32(1) of the Charter have generated, it is recommend that s 32(1) be amended. Section 32(1) should be amended to remove the words “consistently with their purpose”, bringing s 32(1) of the Charter into line with s 3(1) of the UK HRA. To bring s 32(1) into line with s 3(1) addresses the two problems arising out of

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130 Re Application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381, [50] – [53] (‘Das’). Warren CJ refers to Nettle JA’s endorsement of the approach of Mason NPJ in HKSAR v Lam Kwong Wai [2006] HKCFA 84, and applies it: see Das [2009] VSC 381 [53]. Nettle JA indicates that the Hong Kong approach is the same as the UKHRA approach under Poplar, and expressly follows the Poplar approach: see RJE [2008] VSCA 265, [116]. This is why Warren CJ’s approach is described as essentially following the UKHRA approach.
132 Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646, [52] – [65] (‘Kracke’)
133 Ibid [65], [214].
the Court of Appeal decision in Muncilovic – that is, adoption of the wording of s 3(1) of the UK HRA will sanction a reading of s 32(1) that is consistent with Ghaidan and re S, as was the apparent original intention of the Victorian Parliament in enacting the Charter, and will allow the judiciary to adopt the Preferred Methodology.

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

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

Section 38(1) flow on effect

There is one consequential issue to the narrow reading of s 32(1) of the Court of Appeal in Muncilovic which bears mention. As mentioned above, s 38(1) outlines two situations where a public authority will be considered to act unlawfully under the Charter: first, it is unlawful for a public authority to act in a way that is incompatible with protected rights, and secondly, it is unlawful for a public authority, when making a decision, to fail to give proper consideration to a protected right. There are a number of exceptions to the application of s 38(1) unlawfulness in the Charter, with one being of particular relevance. Under s 38(2), there is an exception/defence to s 38(1) where the law dictates the unlawfulness; that is, there is an exception/defence to the s 38(1) obligations on a public authority where the public authority could not reasonably have acted differently, or made a different decision, because of a statutory provision, the law or a Commonwealth enactment. This applies, for example, where the public authority is simply giving effect to incompatible legislation.\(^{10}\)

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

To the same extent that the Court of Appeal decision in Muncilovic reduces the application of s 32(1), the s 38(2) exception/defence for public authorities is expanded. The counter-argument to a s 38(2) claim is to interpret the alleged rights-incompatible law to be rights-compatible under s 32(1) is strengthened because a rights-compatible interpretation is less likely to be given. This counter-argument that an alleged victim might make is now weakened to the same extent that s 32(1) is weakened by the Muncilovic Court. This has now been confirmed by the Deputy-President of VCAT.

\(^{10}\) See the notes to Victorian Charter 2006 (Vic), s 38. Note that s 32(3) of the Victorian Charter states that the interpretative obligation does not affect the validity of secondary legislation 'that is incompatible with a human rights and is empowered to be so by the Act under which it is made.' Thus, secondary legislation that is incompatible with rights and is not empowered to be so by the parent legislation will be invalid, as ultra vires the enabling legislation.
in *Dawson v Transport Accident Commission.*\(^{166}\) This consequential effect of the Court of Appeal decision in *Morello v Jovic* gives further support to the recommendation to amend s 32(1) of the *Charter* to remove the words ‘consistently with their purpose’, bringing s 32(1) of the *Charter* into line with s 3(1) of the *UK HRA*.

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

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

**Justifiable Limitations to Rights**

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

**Internal and External Limitations**

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

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

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

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

In relation to the second issue, of whether internal or external limitations provisions are preferable, there is no theoretical difference between them. Both internal and external limitations achieve the same outcome – that a right may be limited if strict test of reasonableness and demonstrable justifiability are met. Moreover, the tests for both internal and external limitations consider very similar (if not identical) elements. Both internal and external limitations tests both require: first, prescription by law; secondly, the achievement of a legitimate legislative objective (as listed within the article itself in internal limits or not restricted under general limitations provisions); and thirdly, necessity or justifiability in a democratic society, which tends to require a combination of...
reasonableness (that is, demonstration of a pressing social need) and proportionality (being made up of rationality, minimum impairment and proportionality). 50

A difference between the internal and external limitations provisions is that the internal limitations provisions specifically list the legislative objectives that may be pursued when justifiably limiting a right – for example, under s 15(3) of the Charter the legislative objectives that can justifiably be pursued through a limitation are protection of the rights and reputation of other persons, and the protection of national security, public order, public health or public morality. The external limitations provisions do not do this; the parliament is free to pursue whatever legislative objectives it likes with respect to limiting rights, provided that those legislative objectives are reasonable (i.e. pressing and substantial); that is, 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'). 51

There is no major advantage or strength to the internal listing of legislative objectives. The specific listing of legislative objectives in internal provisions is of little practical assistance or substantive impact because the legislative objectives of most rights-limiting laws can readily be classified within the legislative objectives that tend to be listed as legitimate in internal limitation provisions. 52 In other words, because of the open-textured and vague nature of the specified legitimate legislative objectives listed in internal limitations clauses, these clauses do not tend to restrict the objectives that can be pursued in rights-limiting legislation. For example, one is hard pressed to think of a law that limits freedom of expression which could not be characterised as having a legislative objective that protects the rights and reputation of other persons, and/or protects national security, public order, public health or public morality. Consequently, there is no major advantage in having the legitimate legislative objectives specified in internal clauses, rather than leaving the legitimate legislative objectives open as per external limitation provisions.

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

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

**Absolute Rights and Section 7(2)**

It is appropriate to provide the capacity to balance rights against other rights, and other valuable but non-protected principles, interests and communal needs, through a general external limitations provision of the type contained in s 7(2) of the Charter. However, the external limitations provision in s 7(2) applies to all of the guaranteed rights in the Charter, and fails to recognise that some of the

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50 Debeljak, Balancing Rights, above n 175, 425.
52 For example, art 22(2) of the ICCPR, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) states that:

[no limitation may be placed on the exercise of the right to freedom of association] other than those which are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

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

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

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rights guaranteed are so-called "absolute rights" under international law. To apply s 7(2) to all of the guaranteed rights violates international human rights law to the extent that it applies absolute rights.

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

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

The solution to this problem is to retain the generally-worded external limitations provision, but to specify which protected rights it does not apply to. It is recommended that s 7(2) be amended to exclude the following sections from its operation: ss 8, 10, 11(1), 11(2), 21(2), 21(8), and 27. This outcome should be achieved by legislative amendment to the Charter.

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

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


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

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

I refer to Appendix 3. The issue of whether a small number of rights ought to be excluded from the external limitations provision is directly addressed (Appendix 3, pp 432-435). By way of background, the different mechanisms for limiting rights (Appendix 3, pp 424-427), and the main reasons linked to institutional design for justifying limitation to rights, namely the preservation of parliamentary sovereignty and the creation of an institutional dialogue about rights and their justifiable limits (Appendix 3, pp 427-422), are also explored.

**Override the Provision**

**Superfluous**

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

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

**Inadequate Safeguards**

One might nevertheless accept the inclusion of an override power – even if it was superfluous – if it did not create other negative consequences. This cannot be said of the override provision in s 31 of the Charter. A major problem with s 31 is the supposed safeguards regulating its use. Overrides are exceptional tools; overrides allow a government and parliament to temporarily suspend guaranteed rights that they otherwise recognise as a vital part of a modern democratic polity. In international law, the override equivalent – the power to derogate – is similarly recognised as a necessity, albeit an unfortunate necessity.

In recognition of this exceptionality, the power to derogate is carefully circumscribed in international and regional human rights law. First, in the human rights context, some rights are non-derogable.

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

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

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

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

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

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

One answer is oversight. When the executive and parliament place a limit on a right because of public
safety, security or welfare, such a decision can be challenged in court. The executive and parliament
must be ready to argue why the limit is reasonable and justified in a free and democratic society,
against the specific list of balancing factors under s 7(2). The executive and parliament must be
accountable for limiting rights and provide convincing justifications for such action. The judiciary
then has the opportunity to contribute its opinion as to whether the limit is justified. If the judiciary
consider that the limit is not justified, it can then exercise its s 32 power of interpretation where
possible and consistent with statutory purpose, or issue a s 36 declaration of incompatibility.

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

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176 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21
177 Section 7(2) of the Victorian Charter outlines factors that must be balanced in assessing a limit, as
follows: (a) the nature of the right; (b) the importance of the purpose of the right; (c) the nature and
extent of the limitation; (d) the relationship between the limitation and its purposes; and (e) any less
restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve – a
minimum impairment test.
Another answer is the way the Charter undermines human rights. By setting the standard for overrides and "exceptional circumstances" too low, it places human rights in a precarious position. It becomes too easy to justify an absolute departure from human rights and thus undermines the force of human rights protection.

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

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

Recommendation

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

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

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

Section 37 of the South African Bill of Rights states, inter alia:

(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.

...
(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that (a) the derogation is strictly required by the emergency; and (d) the legislation is (i) consistent with the Republic's obligations under international law applicable to states of emergency; (ii) conforms to subsection (5); and (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise (a) indemnifying the state, or any person, in respect of any unlawful act; (b) any derogation from this section; or (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

See further Appendix 3, p 440, and pp 458-61.\textsuperscript{181}

Economic, Social and Cultural Rights

Any amendment to s 31 of the Charter modelled on art 4 of the ICCPR and s 37 of the South African Bill of Rights will have to account for the fact that ICESCR does not contain an explicit power of derogation. It appears that derogation from economic, social and cultural rights is not allowed under international human rights law. This absence of a power to derogate is explicable because derogation is unlikely to be necessary given that a State Parties' obligations under art 2(1) of the ICESCR are limited to progressive realisation to the extent of its available resources, as follows:

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

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

APPENDICES

- Appendix 2: Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the National Consultation on Human Rights Committee, 15 June 2009 (extracts).


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PROPORTIONALITY, RIGHTS-CONSISTENT INTERPRETATION AND DECLARATIONS UNDER THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES: THE MOMCILOVIC LITIGATION AND BEYOND

JULIE DEBELJAK*

The meaning, scope and interaction of the key provisions relating to the rights-compatibility of legislation under the Charter of Human Rights and Responsibilities Act 2006 (Vic) were analysed by the Victorian Court of Appeal in R v Momcilovic. On appeal, the High Court of Australia reviewed this analysis and considered the constitutionality of the key provisions. Although overall the High Court upheld the provisions as constitutional, no majority opinion emerged on the scope and operation of the provisions in Victoria, with similar differences of opinion reflected in the Victorian superior courts. Opinions differed on: the role, if any, of limitations under s 7(2); whether s 32(1) is an ordinary rule of statutory construction or a 'remedial' rule of interpretation; and the constitutionality and role of s 36(2) declarations of inconsistent interpretation. Even where a degree of agreement was apparent on one provision, the reasoning underlying the agreement differed, and/or there was no agreement on the interlinking provisions. An overarching theme concerned the methodology by which to approach the key provisions, which again produced disagreement.

This article will critically analyse the multiplicity of views in the High Court, both because of the importance of the decision and because its application in Victoria is unclear. Regarding the latter, the Victorian superior courts have considered the Court of Appeal decision to not be overruled by the High Court, and continue to rely on it in varying degrees, whilst also seeking to identify a ratio from the High Court. By way of background, the article will explore the choices facing the Court of Appeal and its decision. It will then analyse the five High Court judgments, focusing on the thematic issues of limitations, ordinary/ remedial interpretation, declarations, and methodology. It concludes with a review of the Victorian superior courts' reaction to the High Court decision. Analysis will be limited to consideration of the Charter of Human Rights and Responsibilities Act 2006 (Vic) as it operates in Victoria. In

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addition to the specific disagreements on the key provisions, broader issues of parliamentary sovereignty, the proper role of the judiciary and democratic governance will be examined.

I INTRODUCTION

The Charter of Human Rights and Responsibilities Act 2006 (Vic) ("Charter") has survived its first major test case. The meaning, scope and interaction of the key provisions relating to the rights-compatibility of legislation were analysed by the Victorian Court of Appeal (VCA) in R v Momcilovic. On appeal, the High Court of Australia (HCA) reviewed this analysis and considered the constitutionality of those provisions in Momcilovic v The Queen. The HCA upheld the validity of the Charter, but no clear majority emerged on the key provisions. In particular, opinions differed on: the role, if any, of s 7(2) limitations; whether s 32(1) encapsulates ordinary interpretative principles or confers a remedial rule of interpretation; and the constitutionality and role of s 36(2) declarations of inconsistent interpretation. Even where there was apparent agreement on one provision, the reasoning underlying that agreement differed, and/or opinions on other interconnected provisions differed.

The details of these differences, and their impact on the operation of the Charter in Victoria, have received little in-depth or critical analysis. This article addresses this vacuum: first, because of the significance of the decision; and secondly, because the proper and constitutional operation of the key provisions in Victoria is not settled — confronted with no clear majority in HCA Momcilovic, the Victorian superior courts consider VCA Momcilovic to not be overruled and continue to rely on it in varying ways. This is so despite the ‘tentative’ nature of the views expressed in VCA Momcilovic, with the VCA cautioning that ‘n[o]
argument was addressed to the Court on [the question of the operation of s 32(1)], and the further exploration of the scope of s 32(1) must await an appropriate case.

This article begins by canvassing the disputed legislation, the core issues before the VCA (the characterisation and strength of s 32(1), and the methodology for rights-assessment of legislation), and the VCA decision. It then explores the five judgments delivered in *HCA Mencilovic*, focussing on the meaning, scope and interaction of ss 7(2), 32(1) and 36(2), a discussion that involves the s 32(1) characterisation/strength and methodology questions. Analysis is limited to the *Charter* as it operates in Victoria, highlighting the depth and breadth of disagreement of the HCA. The article concludes with an examination of the Victorian superior courts' response to *HCA Mencilovic*, which is of three kinds — first, judgments that follow *VCA Mencilovic* as approved by French CJ in *HCA Mencilovic*; secondly, one judgment that expands upon the codification of the principle of legality characterisation; and thirdly, judgments that suggest s 32(1) reaches beyond a codification of the principle of legality.

There are specific tensions across the Victorian superior courts and the HCA over the scope, operation and constitutionality of the provisions relating to the rights-compatibility of legislation. These tensions are instances of much broader tensions over the retention of parliamentary sovereignty, the limits of judicial power, and the democratic nature of our governance and legal system, particularly where recognition of rights are concerned.

II BACKGROUND

A The Legislation

The rights-compatibility of a reverse onus provision in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ("Drugs Act") was challenged. Under s 5, a substance is deemed "to be in the possession of a person so long as it is upon any land or premises occupied by him ... unless the person satisfies the court to the contrary" (emphasis added). A failure to discharge this reverse onus exposed an accused

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7 That is, the operation of a similar model at the federal level, or the operation of the *Charter* where the Victorian courts are exercising federal judicial power, are not the focus of this article, and will only be mentioned in passing.

8 This article is not intended to address the issue of the competence of the Victorian parliament to limit its sovereignty or to reconstitute itself (see, eg, *A-G (NSW) v Thréouarn* (1931) 44 CLR 394). This article considers the jurisprudence to date, and this issue has not come before the courts.
to a conviction for drug trafficking under ss 73(2) and 71AC of the Drugs Act, which is an offense punishable by up to 15 years imprisonment. According to pre-Charter interpretation principles, s 5 imposed a legal burden of disproving possession on the balance of probabilities.

The VCA had to consider whether the reverse legal burden in s 5 imposed an unjustifiable limitation on the presumption of innocence under s 25(1) of the Charter. If it did, the VCA had to consider whether s 5 should be interpreted under s 32(1) as imposing only a reverse evidentiary burden to ensure rights-compatibility. If the s 32(1) interpretation was not available, the VCA had to consider whether to issue a declaration under s 36(2).

B The Choices

VCA Moncilovic addressed two fundamental issues: (a) the characterisation and strength of s 32(1); and (b) the methodology for the legislation-related mechanism.

1 Characterisation and Strength of Section 32(1)?

Section 32(1) provides that ‘[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights’. It is modelled on s 3(1) of the Human Rights Act 1998 (UK) c 42 (‘UKHRA’), which provides that ‘[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’. The s 32(1) insertion of ‘consistently with their purpose’ is a relevant textual difference. The Human

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9 Section 73(2) of the Drugs Act provides that where a person is in possession of a drug of dependence of a trafficable quantity, ‘the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence’. Section 71AC then criminalises drug trafficking, providing that a person who traffics in a drug of dependence is guilty of an offence punishable by up to 15 years imprisonment. Under s 70, ‘trafficking’ includes to ‘have in possession for sale’. Accordingly, if a person fails to satisfy a court that they were not in possession under s 5, there is prima facie evidence of drug trafficking under s 73(2), for which the person will be guilty of a criminal offence under s 71AC.

10 Drugs of dependence of a trafficable quantity were found in an apartment owned and occupied by Vera Moncilovic. Moncilovic shared this apartment with her partner, Velimir Markovski. Moncilovic claimed she had no knowledge of the drugs, and Markovski admitted that the drugs were in his possession for the purpose of drug trafficking. Nevertheless, Moncilovic was deemed to be in possession of the drugs under s 5 and charged under s 71AC of the Drugs Act. Although Moncilovic led some evidence that she was not in possession of the drugs, the legal onus to disprove possession on the balance of probabilities was not discharged and Moncilovic was convicted with one count of trafficking in a drug of dependence.


12 This argument was put by three of the four parties and the amicus curiae. R v Lamberti [2002] 2 AC 545 (‘Lamberti’) is the equivalent British case, where the original words of the legislature were retained, but the judges altered the meaning of the words by reading the legislative words as imposing only an evidential burden of proof: at 563 [17] (Lord Slynn), 574–5 [42] (Lord Steyn), 586–7 [84], 589 [91], 589–90 [93]–[94] (Lord Hope), 659–10 [157] (Lord Clyde). Lord Hutton dissented: at 625 [198]. The equivalent case from New Zealand is R v Hannan [2007] 3 NZLR 1 (‘Hannan’), where the reverse onus provision was held to be incapable of an interpretation other than imposing a legal burden of proof.
Rights Consultation Committee report\textsuperscript{13} indicates that the phrase was intended to codify s 3(1) of the UKHRA as interpreted in the leading case of Ghaidan v Godin-Mendoza,\textsuperscript{14} as does other extrinsic material.\textsuperscript{15} Less textually similar is s 6 of the New Zealand Bill of Rights Act 1990 (NZ) (\textit{NZBORA}), which reads '[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.'\textsuperscript{16} Where it is not possible or consistent with statutory purpose to interpret legislation compatibly with rights, the legislation remains enforceable;\textsuperscript{17} and the judiciary may only issue an unenforceable declaration of inconsistent interpretation under s 36(2),\textsuperscript{18} rather than invalidate the legislation.

By not empowering judges to invalidate legislation under ss 32(1) and 36(2), parliamentary sovereignty is said to be retained. Under constitutional instruments, if legislation unjustifiably limits a right, the remedies include judicial invalidation of the legislation; whereas, under statutory instruments, the remedy is rights-consistent judicial interpretation limited by an inability to judicially legislate, coupled with an unenforceable declaration. However, the veracity of the parliamentary sovereignty retention claim depends on the reach of s 32(1), with the line between proper judicial interpretation (\textit{possible} interpretation) and improper judicial lawmaking (\textit{not possible} interpretation) being key. Defining this line under s 3(1) has proved elusive,\textsuperscript{19} and is further complicated by consistently with their purpose in s 32(1).


\textsuperscript{14} [2004] 2 AC 557 (\textit{Ghaidan}). In explaining the insertion of 'consistently with their purpose', the HRCC Report states that 'the courts would be provided with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation', an approach which 'is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured': HRCC Report, above n 13, 82–3, citing Ghaidan [2004] 2 AC 557, 572 [33] (Lord Nicholls), 596 [110] (Lord Rodger).


\textsuperscript{16} Whether or not s 6 of the \textit{NZBORA} and s 3(1) of the UKHRA achieve the same outcome is highly contested: see Claudia Geiring, 'The Principle of Legality and the Bill of Rights Act: A Critical Examination of \textit{R v Hansen}' (2008) 6 New Zealand Journal of Public and International Law 59, 66.

\textsuperscript{17} See Chirner ss 32(3), 36(5).

\textsuperscript{18} Section 4 of the UKHRA also provides for declarations of incompatibility. The \textit{NZBORA} does not contain an express declaration power, and judicial efforts to imply one have not been sustained: see \textit{Mooney v Film and Literature Board of Review} [2000] 2 NZLR 9, 17 [20] (\textit{Mooney}); Claudia Geiring, 'On a Road to Nowhere: Implied Declarations and the New Zealand Bill of Rights Act' (2009) 40 Victoria University of Wellington Law Review 613, 617 [3], 326, 328, 348. Although, the fact of incompatibility 'is discerned from the Court's reasoning process rather than one that is positively proclaimed as some sort of formal declaration': at 328.

\textsuperscript{19} Ghaidan [2004] 2 AC 557, 570 [27] (Lord Nicholls).
Correctly, the VCA considered British jurisprudence on s 3(1) for guidance. At one end of the spectrum is Ghaidan. Although Ghaidan is considered a retreat from R v A, its approach is considered ‘radical’ because of Lord Nicholls’ obiter comments about the rights-compatible purposes of the UKHRA potentially being capable of overriding rights-incompatible purposes of a challenged law:

the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear … Section 3 may require the court to depart from … the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires the court to depart from the intention of the enacting Parliament. The answer … depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

The other end of the spectrum is Wilkinson. Lord Hoffman draws an analogy between s 3(1) and the principle of legality. His Lordship introduces an element of reasonableness, describing interpretation under s 3(1) as ‘the ascertainment of what, taking into account the presumption created by s 3, Parliament would reasonably be understood to have meant by using the actual language of the statute’. Although Lord Hoffman’s reasoning was accepted by the other Law Lords in Wilkinson, it failed to materialise as the leading case on s 3(1); rather, Ghaidan remains the case relied upon. The VCA sought to resolve whether

20 [2004] 2 AC 557. In Ghaidan, the heterosexual definition of ‘spouse’ under the Rents Act 1977 (UK) s 42, sch 1 para 3(2) was found to violate art 8 (right to home) when read with art 14 (right to non-discrimination) of the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (‘ECHR’). The Court of Appeal and House of Lords ‘saved’ the rights-incompatible provision via s 3(1) by reinterpreting the words ‘living with the original tenant as his or her wife or husband’ to mean living with the original tenant ‘as if they were his or her wife or husband’: Ghaidan v Godin-Mendoza [2003] Ch 380, 395 [35] (Busson LJ) (emphasis in original); Ghaidan [2004] 2 AC 557, 572 [35] (Lord Nicholls), 577 [51] (Lord Steyn), 604 [129] (Lord Rodger), 608–9 [144] (Baroness Hale). Lord Millett dissented. His Lordship agreed that there was a violation of the rights (at 583 [55]), and agreed with the general approach to s 3(1) interpretation (at 586 [69]), but did not agree that the particular s 3(1) interpretation that was necessary to save the provision was ‘possible’ on the facts: see especially at 583 [57], 588 [78], 591 [82], 592 [96], 592–3 [99]–[101].

21 As are the cases leading up to Ghaidan: see, eg, Lambert [2002] 2 AC 545; Re S (Minors) (Care Order: Implementation of Care Plan) [2002] 2 AC 291 (‘Re S’); R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837 (‘Anderson’); Bellinger v Bellinger [2003] 2 AC 467 (‘Bellinger’).

22 R v A [No 2] [2002] 1 AC 45 (‘R v A’) is considered the ‘boldest exposition’ on s 3(1): Keir Starmer, ‘Two Years of the Human Rights Act’ (2003) 14 European Human Rights Law Review 14, 16. It has also been described as the ‘high point’ and ‘radical’: D Rose and C Weir, ‘Interpretation and Incompatibility: Striking the Balance’ in J Jewell and J Cooper (eds), Delivering Rights (Hart Publishing, 2003). This case will not be discussed in this article because neither the VCA nor the HCA proposed going as far as R v A. For a not so radical take on R v A, see Aileen Kavanagh, ‘Unlocking the Human Rights Act: The ‘Radical’ Approach to Section 3(1) Revisited’ (2005) 10 European Human Rights Law Review 259, 259.


24 R (Wilkinson) v Inland Revenue Commissioners [2006] 1 All ER 529 (‘Wilkinson’).


the Charter-enacting Parliament sanctioned a Ghaidan-radical, or a Wilkinson-
reasonable, approach to s 32(1).

2 The Methodology

The VCA also sought to establish the methodology for achieving rights-compatible legislative interpretation. Under the UKHRA and NZBORA, the methodology adopted is similar. Three individual judges of the Supreme Court of Victoria had essentially adopted this approach in R v E, Kracke, and Das.

The method focuses on two ‘rights questions’ and two ‘Charter enforcement questions’, and is summarised in Charter-language as follows:

The ‘Rights Questions’
First: Does the legislative provision limit a right?
Second: If yes, is the limitation reasonable and justifiable under s 7(2) or a right-specific limitation?

The ‘Charter Enforcement Questions’
Third: If the legislative provision unjustifiably limits rights, can the provision be ‘saved’ through s 32(1) interpretation; accordingly, the judge must alter the meaning of the provision in order to achieve rights-compatibility.
Fourth: Is the altered rights-compatible interpretation of the provision ‘possible’ and consistent with statutory purpose?

The Conclusion
Section 32(1): If the s 32(1) rights-compatible interpretation is ‘possible’ and consistent with statutory purpose, this is a complete remedy to the human rights issue.
Section 36(2): If the s 32(1) rights-compatible interpretation is not ‘possible’ and/or not consistent with statutory purpose, the judge may issue a non-enforceable declaration under s 36(2).

This is referred to as the ‘UK/NZ Method’. Three aspects are noteworthy. First, the concept of ‘rights-compatibility’ focuses on rights as reasonably and

28 The methodology under the UKHRA was first outlined in Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48, 72–3 [73] (Donoghue), and has been approved and followed as the preferred method in later cases: see, eg, R v A [2002] 1 AC 45, 72 [58]; International Transport Roth GmbH v Secretary of State for the Home Department [2003] QB 728, 784 [149] (Roth); Ghaidan [2004] 2 AC 557, 570 [24].
29 The current methodology under the NZBORA was outlined by the majority of judges in Honnen [2007] 3 NZLR 1, 27–4 [57]–[62]. This method is in contra-distinction to an earlier method proposed in Moonen [2000] 2 NZLR 9, 15–17 [15]–[20].
justifiably limited, not rights in their absolute form. This recognises that not all rights are absolute, and that justifiable limitations on rights are an expected and acceptable part of resolving conflicts between rights, and between rights and other values in a democratic society.34 Secondly, if a limit is justified, that concludes the inquiry — there is no judicial reinterpretation under the third step, and no judicial assessment of possibility and consistency under the fourth step.35 Importantly, this preserves parliamentary sovereignty.36 Thirdly, s 32(1) interpretation comes after an unjustified limitation by way of judicial remedy. A rights-compatible interpretation of legislation is a complete remedy for what would otherwise have been a rights-incompatible application of the law.

C The VCA Momcilovic Decision

VCA Momcilovic aligned s 32(1) most closely with Wilkinson.37 Section 32(1) was characterised as an ordinary principle of statutory interpretation, and a unique methodology was proposed that weakened the role of s 7(2).

1 Characterisation and Strength of Section 32(1)?

The VCA unanimously held that s 32(1) ‘does not create a “special” rule of interpretation [in the Ghaidan sense], but rather forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision in question’.38 The ‘framework of interpretive rules’39 includes s 32(1) of

35 The best way to primarily preserve parliamentary sovereignty, whilst secondarily promoting rights, is to seek judicial involvement after a problem is identified. The UK/NZ Method, which allows judicial remedial intervention only after an unjustified limitation on rights is demonstrated, better preserves parliamentary sovereignty than the VCA Method. This was recognised by Geiringer: ‘[T]he heart of the legal methodology of the majority in Hensen is “a concern that the interpretative direction in section 6 should not be invoked to limit or subvert Parliament’s deliberate and demonstrably justified policy choices”’ Geiringer, ‘The Principle of Legality’, above n 16, 68.
38 Ibid 446 [35]. This is in contrast to Lord Walker’s opinion that ‘[t]he words “consistently with their purpose” do not occur in s 3 of the United Kingdom Act but they have been read in as a matter of interpretation’. Lord Walker, ‘A United Kingdom Perspective on Human Rights Judging’ (2007) 8 Judicial Review 295, 297.
39 VCA Momcilovic (2010) 25 VR 436, 464 [103]. Section 32(1) is merely ‘part of the body of rules governing the interpretive task’ at 464 [102].
the Charter, s 35(a) of the Interpretation of Legislation Act 1984 (Vic) ('ILA'), and the common law rules of statutory interpretation, particularly the presumption against a parliamentary intention to interfere with or infringe rights (the principle of legality). To meet the s 32(1) obligation, a court must explore 'all “possible” interpretations of the provision(s) in question, and [adopt] that interpretation which least infringes Charter rights', with the concept of 'possible' being bounded by the 'framework of interpretive rules'.

For the VCA, the significance of s 32(1) is that Parliament 'embraced', 'affirmed' and codified the principle of legality, such that it 'is no longer merely a creature of the common law but is now an expression of the “collective will” of the legislature'. Moreover, the guaranteed rights are codified in the Charter.

2 Methodology

The VCA proposed the following methodology ('VCA Method'):

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

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

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

There are significant differences between the VCA Method and UK/NZ Method. Under the VCA Method, s 32(1) is relevant during the initial and ordinary interpretative process, and has no remedial scope. Moreover, s 7(2) is not

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40 Ibid 464 [103].
41 Ibid 465 [104].
42 Ibid.
43 Ibid 446 [35].
44 One 'fundamental consideration' reinforcing the VCA's conclusion about method 'is that the emphatic obligation which s 32(1) imposes ... is directed at the promotion and protection of those rights as enacted in the Charter', which led it to 'reject the possibility that Parliament is to be taken to have intended that s 32(1) was only to operate where necessary to avoid what would otherwise be an unjustified infringement of a right': VCA Moumelovic (2010) 25 VR 436, 466 [107]. The VCA's underlying motivation is to ensure the broadest reading of the rights themselves. This demonstrates a misunderstanding about the accepted approach to identifying the scope of a right — in brief, rights are given their broadest meaning possible, with the appropriate boundaries being placed on rights through justifiable limitations; see, eg, Hunter v Southam Inc [1984] 2 SCR 145, R v Big M Drug Mart Ltd (1985) 1 SCR 295. The rich jurisprudence on the scope of rights was cited with approval in Krachke (2009) 29 VAR 1, 19–20 [28]–[36] and confirmed in Das (2009) 24 VR 415, 434 [80], 441–2 [115], 445 [128].
45 In its effort to avoid characterising s 32(1) as replicating the 'Ghanian-radical' s 3(1), the VCA rejected a remedial methodology as well: see Debeljak, 'Who Is Sovereign Now?', above n 15, 23.
relevant to interpretation\textsuperscript{46} or assessing rights-compatibility,\textsuperscript{47} but is a step preparatory to ‘enforcement’ via s 36(2). By contrast, the UK/NZ Method uses ordinary interpretative methods to establish whether a right is limited; then s 7(2) to adjudge the justifiability of the limit; with s 32(1) being utilised after an unjustified limit is established, as part of the remedial powers to address the unjustified limitation. As discussed below, the VCA Method also differs to the method under constitutional instruments, even though the VCA (mistakenly) relied on constitutional methodology.\textsuperscript{48}

In applying its methodology, the VCA held that, first, the proper meaning of s 5 is the imposition of a reverse legal onus, and that it was not possible consistently with its purpose to construe s 5 as imposing an evidential onus:\textsuperscript{49} secondly, ‘that the combined effect of s 5 and s 71AC is to limit the presumption of innocence’;\textsuperscript{50} and thirdly, that the limitation was not reasonable or demonstrably justified under s 7(2).\textsuperscript{51} Although a rights-compatible interpretation was not available, s 5 remained valid and enforceable under s 32(2) of the Charter.\textsuperscript{52} The only ‘remedy’ available was a s 36(2) declaration, which the VCA did issue.\textsuperscript{53}

\textsuperscript{46} The VCA refers to Elias CJ’s dissent in Hasseu, where her Honour relies on the Canada Act 1992 (UK) c 11, sch B pt 1 (‘Canadian Charter’) to highlight that the limitations question is a ‘distinct and later enquiry’ to interpretation: \textit{VCA Monoclonic} (2010) 25 VR 436, 466 [169]; quoting \textit{Hasseu} (2007) 3 NZLR 1, 15 [32] (emphasis added).

Referring to the 	extit{Canadian Charter}, Elias CJ states:

The first question is the interpretation of the right. In ascertaining the meaning of the right, the criteria for justification are not relevant. The meaning of the right is ascertained from the "cardinal values" it embodies. Collapsing the interpretation of the right and the s 1 justification is insufficiently protective of the right.

This passage does not undermine the UK/NZ Method because there are two distinct inquiries under the ‘rights questions’. The first inquiry concerns the score of the right and the legislation as ordinarily ascertained, and whether the latter limits the former. Once a right is limited, the second and distinct inquiry focuses on the reasonableness and justifiability of the limit. Far from confusing the UK/NZ Method shares the two-step approach in Canada. Moreover, under the UK/NZ Method, there is no ‘grafting’ of limitation considerations onto interpretation considerations under s 32(1)— at the ‘Charter enforcement questions’ stage, the limitations power is ‘spent’. The VCA’s reliance on this passage lies in its misunderstanding of what Elias CJ is discussing. Her Honour is discussing the ‘meaning of the right’, not the meaning of the challenged legislation. A discussion about the meaning of a right and its interaction with a limitations provision has been confused with a discussion about the meaning of s 32(1) and its interaction with a limitations provision. The Canadian discussion about two ‘rights questions’ cannot be relied upon by the VCA in its discussion about the interaction between one ‘rights question’ (that is, s 7(2)) and one ‘Charter enforcement question’ (that is, s 32(1)).

French CJ similarly mistakenly relies on Elias CJ: see text accompanying below n 166.

\textsuperscript{47} The VCA’s conclusion misunderstands the nature of limitations. It is widely acknowledged, and explicitly mentioned in the Explanatory Memorandum that not all rights are absolute, and that rights must be balanced against each other, and other communal values and needs: Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Tas) 9; see generally Deebjak, ‘Balancing Rights’, above n 34. Justifiable limits on rights are not problematic, whereas unjustifiable limits on rights are problematic. Constitutional and statutory rights instruments develop mechanisms to address the latter — whether via a judicial invalidation mechanism, or judicial interpretation or declaration mechanisms, respectively.

\textsuperscript{48} See above n 46.

\textsuperscript{49} \textit{VCA Monoclonic} (2010) 25 VR 436, 446 [35], 467 [113], 469 [119].

\textsuperscript{50} Ibid 470 [123]. See also 473 [135].

\textsuperscript{51} Ibid 477 [152] [153].

\textsuperscript{52} Ibid 477 [154].

\textsuperscript{53} Ibid 478 [155] [157].
3 Critique of VCA Momcilovic

I previously examined VCA Momcilovic, critiquing the VCA’s reliance on Wilkinson, its approach to the language of s 32(1), its analysis of the intention of Parliament in enacting s 32(1), the reasoning underlying its conclusion that s 32(1) is not a ‘special’ rule of interpretation, that s 32 is a codification of the principle of legality, and the VCA’s methodology. In essence, I argue that the VCA cherry-picked from comparative jurisprudence, extrinsic materials, and textual and structural interpretation arguments, to avoid a methodology that gives s 32(1) a remedial reach and Ghaidan-radical interpretation. Although this article focuses on HCA Momcilovic, this earlier critique remains relevant because French CJ and Crennan and Kiefel JJ sanction some or all of the VCA decision, and because Victorian superior courts continue to rely on the ‘tentative views’ expressed in VCA Momcilovic.

D Constitutional Instruments

Before considering HCA Momcilovic, we must consider the approach to interpretation and remedies under constitutional instruments, such as the Canadian Charter. Although the VCA and French CJ relied on the Canadian Charter to support the VCA reasoning, the method under the Canadian Charter more closely mimics the UK/NZ Method. Like the UK/NZ Method, review under the Canadian Charter consists of ‘rights questions’ and ‘enforcement questions’, as follows:

The ‘Rights Questions’
First: Does the legislative provision limit a right?
Second: If yes, is the limitation reasonable and justifiable under s 1 limitations?

The ‘Charter Enforcement Questions’
Third: If the legislative provision unjustifiably limits rights, the enforcement options include:
(a) Interpretation-based remedies, such as reading in, reading down and severance;

54 For a broader ranging critique, see Debeljak, ‘Who Is Sovereign Now?’, above n 15.
57 See below n 165 and accompanying text.
58 This method also reflects the influence of the ECHR and the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘CCPR’). Peter W Hogg, Thomson Carswell, Constitutional Law of Canada, vol 2 (at 5th ed, 2012 Release 1) 38-2 [38.1].
(b) Invalidation.\textsuperscript{60}

c Remedial powers, such as providing a just and appropriate remedy, and the exclusion of evidence.\textsuperscript{64}

There are four salient points. First, the Canadian judiciary undertakes ordinary statutory interpretation when considering the first ‘rights question’ — that is, when characterising the challenged legislation, the court examines its purpose and effect.\textsuperscript{65} Moreover, ‘where the language of a statute will bear two interpretations’, one which limits a right and one which will not, ‘the Charter can be applied simply by selecting the interpretation that does not abridge the Charter right’.\textsuperscript{64} As Hogg notes, this ‘is simply a canon of construction (or interpretation)’, through which the Canadian Charter ‘achieves its remedial purpose solely by the interpretation of the challenged statute’.\textsuperscript{65} The first steps under the Canadian Charter and the UK/NZ Method are similar.

Secondly, if legislation limits rights, the judiciary assesses the reasonableness and demonstrable justifiability of the limit under the second ‘rights question’, which ‘involves the interpretation and application of s 1’.\textsuperscript{66} This is similar to step 2 under the UK/NZ Method. Most importantly, limits analysis is not part of the initial interpretation process, nor part of the consequential remedies — it is a distinct stage.\textsuperscript{67}

\textsuperscript{60} The power to invalidate comes from the ‘supremacy’ clause, which states that ‘[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of its inconsistency, of no force or effect’. Constitution Act 1982 (UK) c 11, sch B s 52.

\textsuperscript{61} Section 24 of the Canadian Charter contains remedial powers. Section 24(1) empowers the courts to give any person whose rights have been denied or infringed a remedy that is just and appropriate in the circumstances. Section 24(2) empowers a court to exclude evidence obtained in violation of rights if to admit it would bring the administration of justice into disrepute. Section 24 remedies are generally not be invoked if s 52 has been engaged: Schachter v Canada\textsuperscript{[92]} 2 SCR 679 (‘Schachter’). Section 24 remedies are generally used where the actions of a government official are unconstitutional, although exercised under constitutional legislation. For examples of remedies under s 24, see Justice Frank Iacobucci, ‘Judicial Review by the Supreme Court of Canada Under the Canadian Charter of Rights and Freedoms: The First Ten Years’ in David M Beatty (ed), Human Rights and Judicial Review: A Comparative Perspective (Martinus Nijhoff, 1994) 93, 126.

\textsuperscript{62} See, eg, Oakes [1986] 1 SCR 103, 14–18.

\textsuperscript{63} Hogg, above n 58, vol 2 (2007 Release 1) 36-22 [36.7(a)].

\textsuperscript{64} Ibid vol 2 (2007 Release 2) 36-25 [36.7(e)]. This is referred to as one of three presumptions of constitutionality: at vol 2 (2008 Release 1) 38-10 [38.5].

\textsuperscript{65} Ibid vol 1 (2006 Release 1) 15-26 [15.7]. Hogg continues: ‘[G]eneral language in a statute which is literally apt to extend beyond the power of the enacting Parliament or Legislature will be construed more narrowly so as to keep it within the permissible scope of power. Reading down is simply a canon of construction (or interpretation). It is only available where the language of the statute will bear the (valid) limited meaning as well as the (invalid) extended meaning...’


Thirdly, the ‘remedial mechanisms’ under the Canadian Charter go beyond invalidating offending legislation, and include reading in and reading down.\textsuperscript{68} Such interpretation-based ‘remedies’ are available only after s 1 is ‘spent’ — that is, after an unjustifiable limitation is established.\textsuperscript{69} Hogg notes that with reading down, ‘[t]he vindication of the Charter right is accomplished solely by interpretation’.\textsuperscript{70} ‘Remedial interpretation’ under the Canadian Charter mimics the UK/NZ Method.\textsuperscript{71}

Fourthly, the general rule under the Canadian constitution that ‘courts may not reconstruct an unconstitutional statute in order to render it constitutional’ is subject to many exceptions, including severance, reading in and reading down.\textsuperscript{72} Similarly to the UK/NZ Method, however, there is a point where remedial interpretations go beyond the proper judicial role. Just as s 32(1) remedial interpretations which are not possible and/or consistent with statutory purpose are not sanctioned under the Charter, in Canada ‘[t]here is a point at which … an unconstitutional statute cannot be salvaged except by changes that are too profound, too policy-laden and too controversial to be carried out by a court’.\textsuperscript{73} Both statutory and constitutional rights instruments employ interpretation techniques for remedial purposes, and both identify a line between legitimate judicial interpretation and illegitimate judicial lawmaking.

\textsuperscript{68} Schachter [1992] 2 SCR 679, 695–702. Reading in legislative provisions will only be available in the ‘clearest of cases’ (at 718, 727), and where three conditions are met: (a) the legislative objective must be clear, and severance or reading in must further that objective or interfere less with the objective than would invalidating the entire legislation; (b) the legislature’s choice to pursue the objective by way of the impugned legislation is not so explicit that severance or reading in would unacceptably interfere with the legislative sphere; and (c) severance or reading in would not involve a substantial change to the budgetary implications of the objective such as to change the nature of the legislative scheme: at 705–15, 718. See also Minow v Trudel [1995] 2 SCR 418; Friend v Alberta [1998] 1 SCR 493. See generally Hogg, above n 58, vol 2 (2013 Release 1) 40–15–40–18 [40.1(f)]; Iacobucci, above n 61, 122–3; Chief Justice Antonio Lamar, ‘Canada’s Legal Revolution: Judging in the Age of the Charter of Rights’ (1994) 28 Israel Law Review 579, 587–8.

\textsuperscript{69} See generally, Hogg, above n 58, vol 2 (2010 Release 1) 40–3–40–4 [40.1(b)].


\textsuperscript{71} Hogg, above n 58, vol 2 (2007 Release 1) 40–19 [40.1(g)]. ‘[R]eading down achieves its remedial purpose solely by the interpretation of the challenged statute’; at vol 1 (2006 Release 1) 15–26 [15.7]. Hogg does differentiate reading down from severance (‘whereas severance involves holding part of the statute to be invalid’; at vol 1 (2006 Release 1) 15–26 [15.7]) and reading in (‘is not a technique of interpretation, but rather a technique of judicial amendment, altering the statute to make it conform to the Constitution’; at vol 2 (2007 Release 1) 40–19 [40.1(g)]).

\textsuperscript{72} Both instruments have additional remedies, such as declaration in the United Kingdom and invalidation in Canada.

\textsuperscript{73} Hogg, above n 58, vol 2 (2008 Release 1) 40–23 [40.1(i)].

\textsuperscript{74} Ibid. See Schachter [1992] 2 SCR 679, 705; Hunter v Southern Inc [1984] 2 SCR 145; Singh v Minister of Employment and Immigration [1985] 1 SCR 177 (‘Singh’); Rocket v Royal College of Dental Surgeons of Ontario [1990] 2 SCR 232; Canadian Foundation for Children, Youth and the Law v A-G (Canada) [2004] 1 SCR 76; City of Montreal v 2952-1366 Quebec [2005] 3 SCR 141. Indeed, just like the UKHHR, ‘[i]t is all a matter of degree, which is difficult to articulate and to predict’: Hogg, above n 58, vol 2 (2008 Release 1) 40–23 [40.1(g)]. The Canadian judges adopt interesting metaphors, such as, the appropriateness of ‘crude surgery’ to save a provision ‘but not plastic or re-constructive surgery’: see Hogg, above n 58, vol 2 (2008 Release 1) 40–24 [40.1(i)], quoting Bette J in Singh [1985] 1 SCR 177, 236. See also Binnie J’s reference to ‘radical surgery’ in City of Montréal v 2952-1366 Quebec [2005] 3 SCR 141, 145, 184.
The method under United Kingdom and New Zealand statutory instruments has a closer connection to the Canadian constitutional instrument than does the VCA Method. The reliance of the VCA and French CJ on the Canadian Charter is misconceived.

III THE HCA MOMCILOVIC DECISION

On appeal, the HCA identified numerous constitutional law issues. This article focuses on those that pertain to the validity and operation of the Charter in Victoria.\(^75\)

A Constitutional Background

Two relevant constitutional issues arose. The first concerns the constitutional relationship between the arms of government. As described in Zheng v Cai, judicial interpretation of a law is ‘an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws’.\(^76\) Related is the constitutional tradition ‘that it is the task of the judiciary in interpreting an Act to seek to interpret it “according to the intent of the them that made it”’.\(^77\) These considerations influenced the construction of s 32(1).

The second concerns the separation of judicial powers. Because Vera Momcilovic had moved to Queensland by the hearing date, the VCA had in fact been exercising federal jurisdiction because it became a matter ‘between a State and a resident of another State’ under s 75(iv) of the Constitution. The implied separation of judicial powers principle that a Chapter III court\(^78\) can only exercise judicial power, or a non-judicial power incidental thereto,\(^80\) arose. HCA Momcilovic thus has implications for the Charter when a Victorian Court is exercising federal

\(^75\) For analysis of some of the broader constitutional issues, see Bateman and Stellios, above n 3.


\(^77\) HCA Momcilovic (2011) 245 CLR 1, 44 [37] (French CJ), quoting Stock v Frank Jones (Tiptop) Ltd [1978] 1 All ER 948, 951 (Viscount Dilhorne).

\(^78\) Chapter III courts are the High Court of Australia, other federal courts, and state courts that are vested with federal jurisdiction.

\(^79\) R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254 (‘Boilermakers’ Case’). The other principle is that federal judicial power may only be exercised by a Chapter III court; New South Wales v Commonwealth (1915) 20 CLR 54; Waterside Workers’ Federation v JW Alexander Ltd (1918) 25 CLR 434; Bremby v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245. There are two exceptions to this rule. First, certain non-judicial bodies have historically exercised some judicial power, for example contempt of parliament (R v Richards; Ex parte Patpatrick and Bresne (1955) 92 CLR 157), public service disciplinary tribunals (R v White; Ex parte Hynes (1963) 109 CLR 665), and courts martial (R v Bevan (1942) 66 CLR 452; Ex parte Elias and Gordon; Re Tracey; Ex parte Ryan (1989) 166 CLR 518). Second, federal judicial power can be delegated, under supervision, by a Chapter III court to one of its officers: Harris v Catechune (1991) 172 CLR 84.

\(^80\) R v Joske; Ex parte Shop Distributive and Allied Employees’ Associations (1976) 135 CLR 194.
jurisdiction, and for the (in)validity of Charter-like provisions if enacted by a future federal parliament. These issues are not discussed here.81

Rather, this article concerns the validity of the Charter when operating in Victoria under state jurisdiction. There is no separation of powers doctrine in the Victorian Constitution.82 However, the HCA has extended federal constitutional separation of powers protections to state courts. In Kable83 and later cases,84 the HCA held that because state courts are vested with federal jurisdiction, they are considered part of the federal judicial system, and separation of powers applies. Accordingly, state parliaments cannot confer a power or function on a state court which substantially impairs its institutional integrity, which will be repugnant to, or incompatible with, its exercise of the judicial power of the Commonwealth.85 Essentially, state courts can only exercise judicial powers, or non-judicial powers, that are not repugnant to or incompatible with the exercise of federal judicial power thereby maintaining their institutional integrity. Kable was potentially relevant to ss 7(2), 32(1) and 36(2).

B The Outcome

Five Justices held that the s 5 ‘possession’ deeming provision did not apply to the s 71AC offence of trafficking, which required the composite ‘possession for sale’. Their Honours held that because MOncilovic should not have been deemed in ‘possession’, the jury had been misdirected and the trial miscarried.86 The HCA quashed MOncilovic’s conviction, set aside her sentence, and ordered a new trial. However, the HCA expressed, inter alia,87 the validity and operation of the Charter in Victoria.

Six judges (excluding Heydon J) held that s 32(1) operated as a valid rule of statutory interpretation, but their reasoning differed. Four judges (French CJ, Bell, Crennan and Kiefel JJ) held that s 36(2) was valid but for different reasons, with Crennan and Kiefel JJ finding that a declaration should not have been made

81 See Bateman and Stellon, above n 3.
82 Constitution Act 1975 (Vic) (‘Victorian Constitution’).
83 Kable v DPP (NSW) (1996) 189 CLR 51 (‘Kable’).
85 That is, repugnant to or incompatible with its role as a repository of federal jurisdiction under an integrated court system under ch III of the Commonwealth Constitution. ‘Institutional integrity’ refers to the defining or essential characteristics of a court, including: the reality and appearance of independence and impartiality; procedural fairness; adherence to the open court principles; and the giving of reasons for decision. see generally Kable (1996) 189 CLR 51; International Finance Trust (2009) 240 CLR 319; Totani (2010) 242 CLR 1; Wainohu (2011) 243 CLR 181.
86 HCA MOncilovic (2011) 245 CLR 1, 31 [5], 58–9 [72]–[74] (French CJ); 86 [146(x)]–[197]–[202] (Gummow J, Hayne J concurring), 229–30 [666]–[612] (Crennan and Kiefel JJ). Although Kiefel J held that the deeming provision of s 5 did apply to the trafficking offence of s 71AC, her Honour still held that the jury had been misdirected: at 251–2 [692], 254–5 [699]–[702].
87 For example, six judges held that s 71AC of the Drugs Act was not invalid for inconsistency with the trafficking offence provision of the Criminal Code Act 1992 (Cth).
in this proceeding. Three judges (Gummow, Hayne and Heydon JJ) held that s 36(2) was invalid. Overall, a majority of five held that the VCA's declaration was invalid or should not have been made, and it was set aside.

The extent of disagreement about the validity and operation of the Charter in Victoria, within the federal constitutional constraints, is remarkable. The judgments will be considered in two categories — those most aligned with the VCA, and those most aligned with the UK/NZ Method. Analysis within each category will focus on the thematic issues surrounding ss 7(2), 32(1), 36(2) and their interactions.

C Support for VCA Momcilovic

The judgments of French CJ, and Crennan and Kiefel JJ more closely align with the VCA reasoning, although not necessarily the VCA Method. In brief, French CJ agrees with VCA Momcilovic that s 32(1) codifies the principle of legality and s 7(2) does not inform the interpretation process. His Honour held that s 36(2) is not an impermissible exercise of non-judicial power. Crennan and Kiefel JJ consider s 32(1) to be an ordinary rule of construction, without explicitly sanctioning the principle of legality characterisation, and that s 7(2) is a principle of justification which plays no role in the interpretation process. Their Honours reject both the UK/NZ and VCA methodologies. Their Honours held that s 36(2) does not interfere with the institutional integrity of the state courts and is valid.

1 Section 32(1)

Both judgments consider comparative jurisprudence, but highlight the unique aspects of the Charter and its broader constitutional setting. This is the prelude to supporting the narrow Wilkinson-reasonable approach to s 32(1). The constitutional relationship between the arms of government informs the judgments, but s 32(1) is construed on its own terms.88

French CJ began by noting Zheng’s reference to interpretation being ‘an expression of the constitutional relationship between the arms of government’,89 and referring to the ‘constitutional tradition’ that judges interpret legislation ‘according to the intent of them that made it’.90 His Honour noted that the ‘duty of the Court’ is ‘to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have’,91 with the ascertaining of legislative intention being

88 HCA Momcilovic (2011) 245 CLR 1, 209 [540]. The principles of separation of powers had no influence.
89 Ibid 44 [38], quoting Zheng (2009) 239 CLR 446, 455 [28].
90 HCA Momcilovic (2011) 245 CLR 1, 44 [37], quoting Stock v Frank Jones (Tipton) Pty Ltd [1978] All ER 948, 951 (Viscount Dilhorne).
91 HCA Momcilovic (2011) 245 CLR 1, 45 [38], quoting Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Haynes JJ) (‘Project Blue Sky’).
a matter of complying with the common law and statutory rules of construction.\textsuperscript{92} According to common law rules, 'the meaning given to ... [statutory] words must be a meaning which they can bear';\textsuperscript{93} subject to 'an exceptional case' where 'the common law allows a court to depart from grammatical rules and to give an unusual or strained meaning to statutory words where the ordinary meaning and grammatical construction would contradict the apparent purpose of the enactment', although 'the court is not thereby authorised to legislate'.\textsuperscript{94} These common law rules of construction '[help] to define the boundaries between the judicial and legislative functions'.\textsuperscript{95}

French CJ analyses the British jurisprudence, and recognises that \textit{Ghaidan} 'is routinely cited and applied and treated as authoritative'.\textsuperscript{96} His Honour, however, avoids \textit{Ghaidan} by holding that s 3(1) 'has a history and operates in a constitutional setting which is materially different from that which exists in Australia',\textsuperscript{97} and that s 32(1) 'exists in a constitutional setting which differs from the setting in which the ... [UKHRA] operates'.\textsuperscript{98}

Considering s 32(1) within its unique constitutional setting, French CJ refers to the \textit{VCA Minciclovic} analysis of the Second Reading Speech:

\begin{quote}
in which s 32(1) was described as a provision which 'recognises the traditional role for the courts in interpreting legislation'. ... It observed, correctly in my respectful opinion, that if Parliament had intended to make a change in the rules of interpretation accepted by all areas of government in Victoria 'its intention to do so would need to have been signalled in the clearest terms'.\textsuperscript{99}
\end{quote}

The Chief Justice opines that s 32(1):

\begin{quote}
mandates an attempt to interpret statutory provisions compatibly with human rights. There is, however, nothing in its text or context to suggest that the interpretation which it requires departs from established understandings of that process. The sub-section limits the interpretation which it directs to that which is consistent with the purpose of the statutory provision under consideration. It operates upon constructional choices which the language of the statutory provision permits.\textsuperscript{100}
\end{quote}

\textsuperscript{92} \textit{HCA Minciclovic} (2011) 245 CLR 1, 44–5 [38], citing \textit{Lacey v A-G (Qld)} (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

\textsuperscript{93} \textit{HCA Minciclovic} (2011) 245 CLR 1, 45 [39]. French CJ then quotes Lord Reid in \textit{Jones v Director of Public Prosecutions} [1962] AC 635, 662.

\textsuperscript{94} \textit{HCA Minciclovic} (2011) 245 CLR 1, 45 [40] (emphasis added).

\textsuperscript{95} Ibid 46 [42].

\textsuperscript{96} Ibid 49 [48] (citations omitted).

\textsuperscript{97} Ibid 49 [49].

\textsuperscript{98} Ibid 50 [50].


\textsuperscript{100} \textit{HCA Minciclovic} (2011) 245 CLR 1, 50 [50].
Two propositions — that a change in the rules of interpretation should ‘have been signalled in the clearest of terms’\(^{101}\) and that ‘nothing in its text or context’ suggests s 32(1) interpretation ‘departs from established understandings of that process’\(^{102}\) — have been previously critiqued.

French CJ then accepts that s 32(1) codifies the principle of legality, relying on Wilkinson:

Section 32(1) does what Lord Hoffmann and the other Law Lords in Wilkinson said s 3 of the ... [UKHRA] does. It requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. ... Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.

The Court of Appeal was essentially correct in its treatment of s 32(1).\(^{103}\)

The explicit approval of VCA Mencilovic opens French CJ to criticism. First, it is ‘far from clear that Wilkinson adopts a weaker or narrower conception of s 3(1) than Ghaidan as a general matter’.\(^{104}\) Although French CJ sought to distance s 32(1) from Ghaidan, his Honour’s approval of Wilkinson may indeed sanction Ghaidan. Secondly, my previous analysis of the VCA’s reliance on Geiringer’s principle of legality conceptualisation of s 6 of the NZBORA warrants mention:

Geiringer’s central thesis — ‘that s 6 may on occasion entitle the courts to adopt constructions that are at odds with statutory purpose’ — and her conclusion ‘that in an appropriate case, even quite strong legislative indications of “purpose” must yield to the statute-litely mandated imperatives set out in the NZBORA’ — are based on the common law: ‘[w]here fundamental values are perceived to be threatened, there is a long history of common law courts utilizing presumptions of interpretation to promote literal or even strained meanings in disregard of statutory purpose’.\(^{105}\)

As I conclude in that article, the principle of legality characterisation does not support French CJ’s underlying concern that s 32(1) ‘limits the interpretation which it directs to that which is consistent with the purpose of the statutory

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101 Ibid 48 [46], quoting VCA Mencilovic (2010) 25 VR 436, 464 [100]. See also Debeljak, ‘Who is Sovereign Now?’, above n 15, 32. For a discussion of how the Victorian Parliament’s concerns about the displacement of parliamentary intention and the avoidance of legislative objectives are reflected in the preceding British jurisprudence: see at 35–6. For further critique of the VCA Mencilovic reliance on the Second Reading Speech: see at 33.

102 HCA Mencilovic (2011) 245 CLR 1, 50 [50]. See also Debeljak, ‘Who is Sovereign Now?’, above n 15, 29–33, 35, 48. For a discussion of how the parliamentary debates indicate that s 32(1) was intended to be more than a codification of the principle of legality: see at 38–9.

103 HCA Mencilovic (2011) 245 CLR 1, 50 [51].


provision under consideration':106 this characterisation 'does not avoid Ghaidan-type interpretative analysis' and 'it does not automatically elevate the statutory purpose of the impugned provision over the statutory purpose of the rights instrument'.107

Thirdly, French CJ fails to acknowledge the limitations imposed by 'so far as it is possible to do so'108. In terms of preserving the traditional constitutional relationships, the British jurisprudence indicates that the word 'possible' limits judicial power: what is 'possible' is interpretation; what is not 'possible' is legislation.109 Similarly, the Charter envisages 'possibility' as the operative limit on judicial power. The s 1(2)(b) purposes provision refers to interpretation 'so far as is possible in a way that is compatible with human rights' without any reference to 'consistently with their purpose'. This indicates the Charter-enacting parliament's intention that 'possibility' be the predominant limit to interpretation rather than 'consistently with their purpose', which should be reflected in a traditional purposive interpretation of s 32(1), particularly where that purpose is stated in the legislation.110 The preservation of the traditional constitutional relationship was intended to be guaranteed by the concept of 'possibility', rather than a narrow, non-remedial reading of s 32(1).

Finally, in construing s 5 of the Drugs Act, French CJ distinguishes Hong Kong Special Administrative Region v Lam Kwong Wai,111 where Mason N PJ stated that 'remedial interpretation' would require courts 'to give the statutory provision an interpretation that is consistent with the protected rights, even an interpretation that is strained in the sense that it was not an interpretation which the statute was capable of bearing as a matter of ordinary common law interpretation'.112 The Lam Kwong Wai and Project Blue Sky rules of construction are similar — both acknowledge that ordinary common law interpretation is driven by purpose,

106 HCA Moccenovic (2011) 245 CLR 1, 50 [50]. Nor did Geiringer's central thesis support the fundamental underpinnings of the conclusion in VCA Moccenovic: Debeljak, 'Who Is Sovereign Now?', above n 15, 50.
107 Debeljak, 'Who Is Sovereign Now?', above n 15, 50.
108 Indeed, his Honour fails to give any meaning or effect to the phrase, which itself eschews the traditional interpretative obligation to give all words some meaning and effect: see D C Pearce and R S Geddes, Statutory Interpretation in Australia (LexisNexis Butterworths, 7th ed, 2011) 49–50 [2.26].
109 For example, Lord Woolf CJ in Donoghue [2002] QB 48 emphasised that when the court decides whether a re-interpretation of a legislative provision is 'possible', the courts 'task is still one of interpretation': at 72–3 [75]. If the court must 'radically alter the effect of the legislation' to secure compatibility, 'this will be an indication that more than interpretation is involved': at 73 [76]. See also Ghaidan [2004] 2 AC 557, 571–2 [32]–[33] (Lord Nicholls), as cited below nn 124–5 and accompanying text. See also Aden v Newham London Borough Council [2002] 1 All ER 931, 945 [42] ('Aden'); Roth [2003] QB 728, 785 [156].
110 Mills v Meeking (1990) 169 CLR 214, 235 (Dawson J). Dawson J's comments relate to s 35(a) of the IIA. Pearce and Geddes make similar observations in relation to s 15AA of the Acts Interpretation Act 1901 (Cth): Pearce and Geddes, above n 108, 33–36 [2.9]–[2.10]. Note that 'where an interpretation has been adopted that does not fit readily with ... [an objects] clause, it has had to be explained': at 157 [4.49].
111 Hong Kong Special Administrative Region v Lam Kwong Wai (2006) 9 HKCFAR 574 ('Lam Kwong Wai').
and both acknowledge that a straïned interpretation that is not open on ordinary common law principles is acceptable. Any distinction between the two is not apparent.

French CJ sought to preserve the traditional constitutional relationship between the arms of government. Rather than relying solely on the constitutional relationship to justify a narrow reading of s 32(1), his Honour chose to rely on the questionable statutory interpretation of the VCA, which itself represents a straïned interpretation of the history, text and context of s 32(1).113 Moreover, his Honour failed to give any meaning or effect to the phrase intended to preserve the constitutional relationship — ‘so far as it is possible to do so’.114

Crennan and Kiefel JJ approach the operation of and interaction between the key provisions as ‘matters to be determined by reference to the construction of the Charter in its own terms’.115 Focussing on s 32(1), their Honours begin by comparing the Charter provisions with comparative provisions, and conclude that ‘important differences in the terms of the sections are themselves sufficient to distinguish s 32(1) of the Charter from s 3(1) of the ... [UKHRA]’.116

One difference is the rather emphatically expressed direction in s 3(1) that a “statute must be read and given effect” in a way which is compatible with rights; and that this produced the outcome of compatibility in Ghaidan.117 Furthermore, the approach in Ghaidan paid ‘insufficient attention’ to the words ‘so far as it is possible to do so’, and whether those words ‘are directed to compliance with the usual rules of statutory interpretation in the context of the Charter’.118 Their Honours then suggest that ‘consistently with their purpose’ in the Charter ‘points clearly to the task ordinarily undertaken by courts in construing legislation’, citing the principle from Project Blue Sky that construction ought to ‘achieve consistency with the language and the purpose of the statute’.119

This must be examined. First, contrary to their Honours suggestion, the British judiciary has paid little attention to the words ‘be read and given effect’, particularly in relation to distinguishing judicial interpretation from judicial legislation. Rather, the judiciary has used the phrase ‘so far as is possible to do so’ to impose the boundary between legitimate judicial interpretation and illegitimate judicial legislation.120 Moreover, there is no suggestion in the British

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113 See Debeljak, “Who is Sovereign Now?”, above n 15.
114 See above n 108.
115 HCA Momcilovic (2011) 245 CLR 1, 209 [540].
116 Ibid 211 [546].
117 Ibid 210 [544].
118 Ibid.
120 See Donoghue (2002) QBD 48, 73 [76]; Aday (2002) 1 ALR 673, 875 [156]; Lambert (2002) 2 AC 545, 585–6 [81] (Lord Hope); Cooper v Secretary of State for Work and Pensions (2002) EWHTC 191 (Admin) (14 February 2002) [158]; R (Cooper) v Secretary of State for Work and Pensions (2003) 3 All ER 665, 681 [26]; R v S (2002) 2 AC 291, 313 [37]–[40] (Lord Nicholls); Ghaidan (2004) 2 AC 557, 570 [27] (Lord Nicholls). See, eg, Lord Millett in Ghaidan: “section 3 requires the court to read legislation in a way which is compatible with the Convention only ‘so far as it is possible to do so’. It must, therefore, be possible, by a process of interpretation alone, to read the offending statute in a way which is compatible with the Convention’ at 583 [66] (emphasis in original). See generally Debeljak, “Parliamentary Sovereignty and Dialogue”, above n 33, 40–9.
jurisprudence that ‘so far as possible to do so’ sanctions only ‘the usual rules of statutory interpretation’.

Secondly, contrary to their Honours suggestion, the jurisprudential development of the meaning of ‘possible’, which culminates in Ghaidan, does not necessarily undermine the ‘consistency with language and purpose’ emphasised in Project Blue Sky. The UKHRA-enacting parliamentary intention underlying s 3(1) certainly emphasised language: s 3(1) enables ‘the courts to strive to find an interpretation of legislation that is consistent with convention rights, so far as the plain words of the legislation allow’.121 Numerous judgments also highlight the importance of language and purpose. In R v A, Lord Hope held that any modified interpretation should not conflict with the express language of the legislation, nor any necessary implications thereto, as both are ‘means of identifying the plain intention of Parliament’.122 In Lambert, the majority retained the original language used by parliament, but altered the meaning of the words.123

In Ghaidan, after discussing the potentially competing intentions of the UKHRA and challenged legislation, Lord Nicholls articulates a set of guidelines about what s 3(1) does and does not allow, with an emphasis on language and purpose.124 Section 3(1) allows ‘language to be interpreted restrictively or expansively’; is ‘apt to require a court to read in words which change the meaning of the enacted legislation’; and allows a court to ‘modify the meaning, and hence the effect, of ... legislation’; allows implying words provided they ‘go with the grain of the legislation’.125 However, s 3(1) does not allow the courts to ‘adopt a meaning inconsistent with a fundamental feature of legislation’; any s 3(1) re-interpretation must be compatible with the underlying thrust of the legislation being construed’ and must ‘go with the grain of the legislation’.126 Any attempt at altering the language — be it expansive or restrictive interpretation, reading in words, or modifying meaning — is limited by the underlying purpose of the legislation — its fundamental features, its thrust, its grain.127 Moreover, Lord Nicholls opines that judges may (not must) depart from legislative intention, but not where it would undermine the fundamental features of legislation, be incompatible with the underlying thrust of legislation, or go against the grain of legislation. It is

121 United Kingdom, Parliamentary Debates, House of Commons, 3 June 1998, vol 313, col 421–2 (Jack Straw) (emphasis added). Moreover, the Home Secretary stated that ‘it is not our intention that the courts, in applying ... [s 3], should contort the meaning of words to produce implausible or incredible meanings’. at col 422
122 [2001] 1 AC 45, 87 [108] (Lord Hope). His Lordship preferred to read down any language that threatened compatibility: at 87 [110]. Other judges have expressed a preference for the approach of Lord Hope: see, eg, Adam [2002] 1 All ER 931, 93 [David Steel J].
124 See above n 23 and accompanying text.
125 Ghaidan [2004] 2 AC 557, 571–2[32]. Lord Rodger agreed with these propositions: at 600–1 [121], 602 [124], as did Lord Millett: at 585–6 [67].
126 Ibid 572 [33] (Lord Nicholls), 601 [121] (Lord Rodger), 585–6 [67] (Lord Millett). Lord Nicholls developed these ideas in the earlier case of Re S [2002] 2 AC 291, 313 [40].
127 It should also be noted that these techniques are part of the ordinary statutory interpretation toolbox: see, eg, Pearce and Geddes, above n 108, 54–63 [2.32]–[D.49].
difficult to conceive of a case where a rights-incompatible legislative intention would not be reflected in the fundamental features, the underlying thrust, and the grain of the legislation, so as to leave the statutory language open to judicial re-write.\textsuperscript{128} Finally, the ratio of Lord Nicholls relies on the parliamentary intention underlying the challenged legislation.\textsuperscript{129}

Another difference relied on is the distinction between 'must be read and given effect' under s 3(1) and 'must be interpreted' under s 32(1). Crennan and Kiefel JJ opine that use of the latter:

was intended to overcome any misapprehension about the role of the courts in construing legislation. The reference to interpretation must be taken to be a reference to that process of construction as understood and ordinarily applied by courts, a process which is to be taken as accepted by the other arms of government in a system of representative democracy.\textsuperscript{130}

This must be examined. Regarding textual differences, the HRCC Report,\textsuperscript{131} Explanatory Memorandum,\textsuperscript{132} and the Second Reading Speech\textsuperscript{133} indicate that Parliament attached no significance to the difference, and the words 'interpreted' and 'read and give effect to' were used interchangeably. The phrases are also

\textsuperscript{128} In my opinion, \textit{R v A} [2002] 1 AC 45 is not even an instance of this. See Kavanagh, 'Unlocking the Human Rights Act', above n 22.

\textsuperscript{129} Lord Nicholls identifies the 'essential feature' of the definition of 'spouse' as 'the cohabitation of a heterosexual couple', when considering whether a legitimate aim exists for justifying discrimination (art 14) in the legislative provision for social housing (art 8), and holds that 'the reason underlying this social policy ... is equally applicable to the survivor of a homosexual couple', whom 'as much as a heterosexual couple, share each other's life and make their home together': \textit{Ghandar} [2004] 2 AC 557, 568 [17]. Lord Nicholls also acknowledges the primary object of introducing assured tenancies — to increase the number of properties available for renting in the private sector — when considering whether there is a justification for extending protection to cohabiting heterosexual partners but not cohabiting homosexual partners. His Lordship holds that 'this policy objective of the Housing Act 1988 can afford no justification for amending paragraph 2 [of sch 1 of the Rent Act 1977 (UK)] c 42' so as to include cohabiting heterosexual partners but not cohabiting homosexual partners': at 569 [20]. Finally, his Lordship explicitly considers whether the rights-compatible interpretation of Rent Act 1977 (UK) c 42, sch 1 para 2, so as to include cohabiting homosexual couples, was 'consistent' with the social policy underlying paragraph 2': at 572 [35].

\textsuperscript{130} \textit{HRCA Monocovic} (2011) 245 CLR 1, 210 [545], citing \textit{Zheng} (2009) 239 CLR 446, 455–6 [28].

\textsuperscript{131} \textit{HRCC Report}, above n 13. The Report recommended the words 'a Victorian law must be read and given effect,' and noted that this wording would provide the courts 'with clear guidance to interpret legislation to give effect to a right': at 82 (emphasis added).

\textsuperscript{132} Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic). The Explanatory Memorandum notes that the object of s 32(1)'is to ensure that courts and tribunals interpret legislation to give effect to human rights', and that s 32(2) permits consideration of international and comparative jurisprudence 'relevant to a human right in reading and giving effect to a statutory provision': at 23 (emphasis added).

\textsuperscript{133} Victoria, \textit{Parliamentary Debates}, Legislative Assembly, 4 May 2006, 1289–95 (Rob Hulls, Attorney-General). The Second Reading Speech refers to rights-compatible interpretation 'so far as it is possible to do so consistently with their purpose and meaning': at 1293 (emphasis added).
used interchangeably in the extrinsic materials to the UKHRA and the British jurisprudence. Commentators have not attributed any significance to these textual differences.

Turning to Zheng, the HCA in that case stated that:

judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in NAAV v Minister for Immigration and Multicultural and Indigenous Affairs, the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.

The NAAV reference is to French J’s examination of the rules of construction. In discussing purposive construction, French J notes that ‘legislative intention’ describes ‘an attributed intention based on inferences drawn from the statute itself’. His Honour states that the use of legislative intention:

in the process of statutory interpretation is of fundamental importance because it directs courts to objective criteria of construction which are recognised as legitimate. It requires reference to matters which were before the Parliament when the law was enacted. The first and best criterion

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134 There are numerous references to ‘interpretation’ in Home Department (UK), Rights Brought Home: The Human Rights Bill, Cm 3782 (1997): ‘The Bill provides for legislation ... to be interpreted so far as possible so as to be compatible with the Convention’ and ‘[t]he courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so’ (at 2.7) (emphasis added); ‘This “rule of construction” is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations’; (at 2.8) (emphasis added). Moreover, the parliamentary debate contained numerous references to ‘interpretation’. Lord Cooke of Thorndon noted that s 3 ‘will require a very different approach to interpretation from that to which United Kingdom courts are accustomed’ and ‘the common law approach to statutory interpretation will never be the same again’: United Kingdom, Parliamentary Debates, House of Lords, 3 November 1997, vol 582, col 1272–3 (emphasis added). The Lord Chancellor used the terms interchangeably: ‘[Section] 3 provides that legislation, whenever enacted, must as far as possible be read and given effect in a way which is compatible with the convention rights. This will ensure that, if it is possible to interpret a statute in two ways ... the courts will always choose the interpretation which is compatible’: United Kingdom, Parliamentary Debates, House of Lords, 3 November 1997, vol 582, col 1230 (Lord Irvine of Lairg) (emphasis added). The Home Secretary also used the terms interchangeably: ‘[Section] 3 provides that legislation, whenever enacted, must as far as possible be read and given effect in such a way as to be compatible with convention rights. We expect that, in all cases, the courts will be able to interpret legislation compatibly with the convention’: United Kingdom, Parliamentary Debates, House of Commons, 16 February 1998, vol 306, col 778 (Jack Straw) (emphasis added).

135 See, eg, ‘the exercise which the court is called on to perform is still one of interpretation; not legislation: (legislation must be “read and given effect to”): Ghaidan [2004] 2 AC 557, 584 [63] (Lord Millett) (emphasis in original). In Ghaidan, Lord Rodger examines the differences between the concept of “read”/“interpreted” on the one hand, and “give effect” on the other: at 595 [107].


139 Ibid 411 [430] (emphasis added).
is the ordinary, grammatical meaning of the words themselves. ... It is sometimes said that the courts 'ascertain' the intention of the legislature by considering the meaning of the words it has used ... However the meaning of a legislative word is not like a rock lying on the ground waiting to be found. It is a product of interpretation which is legitimate if and only if the interpretation process invokes criteria which, whether developed by courts or decreed by statute, or both, are broadly understood by the Legislature, the Executive and the judiciary.

In some cases the grammatical and ordinary meaning of a statute may lead to absurdity or inconvenience in its operation or be inconsistent with the object of the Act ... In that event, the Court may apply additional generally accepted and understood criteria to the process of interpretation so that what emerges may still properly be described as according with legislative intention. One of those criteria ... is ... a court should have regard to the mischief which it was designed to cure. ....

It is also important to have regard to criteria of construction which Parliament has prescribed and which are set out in the Acts Interpretation Act.140

Such general statements concerning the role of the rules of construction are instructive insofar as explaining how the rules justify and fashion judicial interpretation. However, such statements say nothing about the substantive content of the rules themselves. Why limit these substantive rules to judge-made common law and the ILA? Why is ss 32(1) not considered a new substantive rule of construction? The answer cannot be because the rules of construction are fixed, given that common law rules develop over time and the ILA is ordinary legislation subject to change. It cannot be because of the democratic roots of the ILA, because the same can be said of the Charter and cannot be said of the common law rules. Indeed, the new Charter rules of construction received democratic sanction in Parliament, and the Executive is subject to these new rules through its s 28 pre-legislative scrutiny obligations and its s 38 obligations as a public authority.

It is difficult to accept Crennan and Kiefel JJ’s conclusion that ‘[t]he reference to interpretation must be taken to be a reference to that process of construction as understood and ordinarily applied by courts’141 when other NAAP factors are accounted for. Regarding NAAP’s concern with 'matters before the Parliament', the HRCC Report was before Parliament, and it contained an explicit reference to Gheidan for the insertion of the words 'consistently with their purpose'.142

140 Ibid 411–12 [432]–[434].
141 Legislative intention 'operates as a persuasive declaration or an acceptance that the interpretation adopted is legitimate in a representative democracy characterized by parliamentary supremacy and the rule of law'. NAAP (2002) 123 FCR 298, 411 [430].
142 HCA Moneglos (2011) 245 CLR 1, 210 [545].
143 For an exploration of the link between 'consistently with their purpose' and Gheidan based on the Second Reading Speech, Explanatory Memorandum and parliamentary debate, see Delulak, 'Who Is Sovereign Now?' above n 15.
Moreover, s 32(1) is modelled on s 3(1) when many alternatives were available.144 Regarding NAP's reference to 'mischief', the 'mischief' of the Charter included better protection of rights in Victoria.145 As Heydon J notes, '[t]he function of s 32(1) evidently is to make up for the putative failure of the common law rules by legitimising reliance on a much broader kind of "purposive" interpretation going beyond the traditional search for "purpose" as revealed in the statutory words'.146

The joint judgment then contemplates the intended interaction between ss 7(2), 32(1) and 36(2). Regarding s 32(1), their Honours hold that "[s]ection 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes. ... The Charter forms part of the context in which a statute is to be construed" — relying on Lord Hoffman in Wilkinson.147 This suggests that structurally s 32(1) will form part of the initial interpretative task. Earlier critiques relating to the text and context of s 32(1) not departing from established understandings of ordinary interpretation, and Wilkinson, equally apply here.148

Crennan and Kiefel JJ also argue that, given s 32(3)(a) acknowledges a rights-compatible interpretation may not always be possible, '[i]t cannot therefore be said that s 32(1) requires the language of a section to be strained to effect consistency with the Charter',149 and conclude150 that a court's role in ascertaining the meaning of the legislation remains one of interpretation.144 Equally arguable is that the phrase 'so far as is possible to do so' ensures the judicial task 'remains one of interpretation', without relying on s 32(3)(a), yet this phrase is not relevantly explored by their Honours.

The joint judgment is driven in part by traditional constitutional relationships and in part by ordinary statutory construction. The distinctions drawn between the Charter and UKHRA rely on both but are open to critique, as are their Honours' textual and contextual arguments for reliance on Wilkinson, and their failure to give any meaning or effect to 'so far as it is possible to do so'.

144 For example, the Parliament could have codified the principle of legality as stated in any number of cases, used s 6 of the NZBORA, or used s 20 of the Human Rights Act 2004 (ACT) as it was worded at the time.
145 Department of Justice, Victoria, 'Human Rights Statement of Intent' (May 2005), reproduced in HRCR Report, above n 13, appendix B, 161
146 HCA Monomovic (2011) 245 CLR 1, 181 [450].
147 Ibid 217 [565], citing Wilkinson [2006] 1 All ER 529, 535 [17].
148 See above nn 102–3, 105.
149 HCA Monomovic (2011) 245 CLR 1, 217 [566] (emphasis added).
150 Before so concluding, their Honours refer to McGrath J in Hinson, and draw a connection between s 32(3)(a) and s 4 of the NZBORA. Relevant to methodology and their Honours' discussion of s 7(2) below, McGrath J in Hinson did note that '[s]ubject only to the application of s 5, which concerns justified limitations, the effect of s 4 is that any inconsistent legislation prevails over the Bill of Rights': Hinson [2007] 3 NZLR 1, 62 [179] (emphasis added). Their Honours' reliance on the interaction of ss 4, 5 and 6 in the NZBORA will only go so far, given that McGrath J supports the UKNZ methodology and the joint judges explicitly reject this methodology: HCA Monomovic (2011) 245 CLR 1, 220 [579] n 953.
151 HCA Monomovic (2011) 245 CLR 1, 217 [566].
2 Section 7(2)

French CJ and Crennan and Kiefel JJ approach s 7(2) through statutory interpretation, not constitutional analysis. The characterisation of s 7(2) in both judgments is linked to the characterisation of s 32(1) being part of the ordinary interpretative process. The failure to conceive of s 32(1) as a remedy results in ‘one of the key provisions in the Charter’¹⁵² having little to no consequence on rights protection.

French CJ refers to the Second Reading Speech in determining the operation of s 7(2). His Honour notes the Speech refers to the non-absoluteness of rights, the factors to be balanced, that s 7(2) will ‘assist courts and government in deciding when a limitation arising under the law is reasonable and demonstrably justified’, and that where a limit is justified ‘action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right’¹⁵³ French CJ then concludes that ‘[t]he Second Reading Speech did not spell out the context in which courts would be called on to make such decisions’.¹⁵⁴

This conclusion must be challenged. First, the Speech states that s 7(2) will ‘assist courts’ in assessing limitations, indicating judicial involvement. Secondly, that justified limitations ‘will not be prohibited’ suggests the enforcement mechanisms will not apply to justified limitations; this, in turn, suggests that references to ‘compatible with human rights’ in ss 32(1) and 38(1) include the limitations analysis. Thirdly, the characterisation of justified limitations as ‘not incompatible with the right’ in the Speech explicitly confirms the role of s 7(2) in assessing compatibility.

French CJ only addresses the third argument. Although the link between s 7(2) and compatibility in the Speech is conceded, his Honour concludes ‘the same linkage was not made in the Explanatory Memorandum and ... is not made in the text of the Charter. Ministerial words in the Second Reading Speech cannot supply that statutory connection’.¹⁵⁵ The Charter does not define ‘compatible with human rights’, but its textual usage and the structure of the Charter supplies the meaning. Regarding structure, Evans and Evans note that ‘the [s 7(2)] limitation provision is in Pt 2 ... and forms part of the specification of the human rights that

¹⁵⁵ Ibid 43 [31].
are protected by Pt 2;\(^{156}\) such that a provision imposing a justified limitation is ‘compatible with rights’;\(^{157}\)

Regarding text, ‘compatibility with rights’ is used in s 28 statements of compatibility. If ‘compatibility with human rights’ in s 28 referred to the rights without reference to s 7(2), statements of incompatibility would be required for proposed laws that technically violate rights but are patently reasonable and demonstrably justifiable.\(^{158}\) This is not the routine practice with s 28 statements.\(^{159}\) If s 28 contemplates a role for s 7(2), why wouldn’t s 32(1)?\(^{160}\) A similar argument applies to s 30 reports by the Scrutiny of Acts and Regulations Committee, s 31 overrides, and s 38 obligations on public authorities.\(^{161}\)

Moreover, the Explanatory Memorandum links s 7(2) with ‘compatibility with rights’. It notes that ‘[t]he operation of ... [s 7(2)] envisages a balancing exercise between Parliament’s desire to protect and promote human rights and the need


\(^{157}\) Ibid. French CJ seems to make a similar mistake to the VCA. The VCA relies on the dissent of Elias CJ in _Hansen_ to bolster its conclusion that s 7(2) analysis comes after s 32(1) ordinary interpretation. In considering the NZBOR(A) methodology, Elias CJ opines that to apply the s 5 limitation before applying the s 6 interpretation ‘distorts the interpretative obligation under s 6 from preference for a meaning consistent with the rights and freedoms in Part 2 to one of preference for consistency with the rights as limited by a s 5 justification’: _Hansen_ [2007] NZLR 1 1 9 [6], quoted in _VCA Monimicovic_ (2010) 25 VR 436, 466 [108]. Elias CJ did ‘not think that approach conform to the purpose, structure and meaning of the ... [NZBOR(A)] as a whole’: _Hansen_ [2007] NZLR 1, 9 [6], quoted in _VCA Monimicovic_ (2010) 25 VR 436, 466 [108]. Elias CJ’s view was dependant on the _structural_ fact that the limitation and interpretation provisions are contained in pt 1 of the NZBOR(A), whereas the rights are contained in pt 2: Evans and Evans, _Australian Bills of Rights_, above n 157, 100 [3.43]. By contrast, Evans and Evans highlight that the rights and limitations provision under the _Charter_ are _structurally_ contained in pt 2, with the interpretation provision being in pt 3: at 100 [3.43]. Based on a structural analysis, s 7(2) must be part of the initial inquiry about whether a provision is ‘compatible with human rights’, with s 32(1) analysis occurring after an unjustified limitation has been identified. For an analysis of the different impacts on the judicial interpretative provision flowing from the majority and the dissenting judgments in _Hansen_, see Geringer, ‘The Principle of Legality’, above n 16, 92.

\(^{158}\) Indeed, the centrality of identifying and justifying limits was highlighted in the Second Reading Speech:

‘The charter will make sure that there is proper debate about whether proposed measures strike the right balance between the rights of Victorians and what limits can be justified in a free and democratic society’; _Victoria, Parliamentary Debates, Legislative Assembly_, 4 May 2006, 1290 (Rob Hulls, Attorney-General).

\(^{159}\) Victorian Government, Submission No 324 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, _Review of the Charter of Human Rights and Responsibilities Act 2006_, 2011, 13–16 [39]–[51], appendix A, especially 14 [42], 15 [46]. Moreover, s 28(4) provides that a statement of incompatibility is not binding on any court. The Explanatory Memorandum notes that s 28(4) ‘makes clear that the Supreme Court has an independent role in determining questions ... with respect to the interpretation of statutory provisions, including provisions for which a statement of compatibility has been made’: Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21 (emphasis added). Linking statutory interpretation with statements of compatibility bolsters the argument that ‘compatibility for human rights’ means the same thing under ss 28 and 32(1).

\(^{160}\) After all, one rule of statutory interpretation is ‘that where a word is used consistently in legislation it should be given the same meaning consistently’; Pearce and Geddes, above n 108, 119 [4.6]. Pearce and Geddes quote from Hodges J in _Craig, Williamsaon Pty Ltd v Barrowculliff_ [1915] VLR 450, 452: ‘I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament’.

\(^{161}\) See below nn 208–9, 213–16 and accompanying text.
to limit human rights in some circumstances.\(^{162}\) This is explicit parliamentary intention that limiting rights was equally as necessary as protecting and promoting rights. This suggests that 'compatibility with human rights' encapsulates the three concepts of protecting, promoting and justifiably limiting rights.\(^{163}\) The Explanatory Memorandum also acknowledges that s 7(2) is modelled on s 5 of the NZBORA, which envisages a role for limitations in assessing interpretation consistent with the guaranteed rights.\(^{164}\)

French CJ then accepts the Human Rights Law Centre's submission that the Canadian Supreme Court 'expressly declined to consider s 1 of the Canadian Charter when interpreting a reverse onus provision. It applied s 1 only when considering whether the impugned law should be upheld'.\(^{165}\) Accordingly, proportionality was said to not be an interpretative function.\(^{166}\) This is not disputed, but does not further the argument. First, that s 7(2) is not part of the interpretive function is of no consequence — as discussed above,\(^{167}\) neither s 1 nor s 7(2) are meant to influence interpretation; rather, they assess justification after an initial ordinary interpretation. Secondly, as discussed above, the analysis ignores the fact that remedial interpretation is available where a limitation is not justified under the Canadian Charter. Just because the s 1 or s 7(2) proportionality assessment is not an interpretative function does not preclude interpretation as a remedy — an initial interpretation can be supplemented by remedial interpretation under statutory and constitutional instruments.\(^{168}\) French CJ's argument depends on the contested assumption that s 32(1) is a rule of ordinary interpretation and no regard being paid to remedial interpretation under the Canadian Charter.

Excluding s 7(2) from the concept of 'compatibility of rights' by relying on a contested assumption then bolsters the arguments in favour of that very assumption. French CJ concludes:

The logical structure of s 7(2) is such that it cannot be incorporated into the content of the rights and freedoms set out in the Charter. The compatibility which is to be sought in applying s 32(1) is compatibility 'with human rights'. Section 7(2) cannot inform the interpretive process which s.32(1) mandates. The question whether a relevant human right is subject to a limit which answers the criteria in s 7(2) can only arise if the statutory provision under consideration imposes a limit on its enjoyment.


\(^{163}\) Indeed, this conception creates the 'missing link' between s 7(2) and compatibility.


\(^{165}\) HCA Micellovic [2011] 245 CLR 1, 43 [33]. For a critique of the VCA Micellovic reasoning, see above n 46.

\(^{166}\) Ibid 43–4 [34].

\(^{167}\) See discussion under the heading 'Constitutional Instruments' above.

\(^{168}\) As well as invalidation under the Canadian Charter and the making of a declaration under the Charter.
Whether it does so or not will only be determined after the interpretive exercise is completed.\textsuperscript{169}

This is open to critique. First, the UK/NZ Method does not seek to 'incorporate' s 7(2) into the content of the rights — that is what qualifications do, not limitations. With qualifications, the scope of the right is altered (that is, reduced) to the extent of the qualification, such that if legislation falls within the qualification, no violation is found.\textsuperscript{170} With limitations, the full scope of the right is compared with legislation to assess whether a violation occurs. Section 7(2) assessment may then excuse that violation, but it does not alter the scope of the rights; justification excuses the limitation of the fully-constituted right.\textsuperscript{171}

Secondly, s 7(2) is not intended to 'inform the interpretative process', whether s 32(1) is characterised as ordinary or remedial, and s 7(2) is only meant to operate 'after the interpretative exercise is completed'. Both of these arguments simply raise the question — is s 32(1) ordinary or remedial interpretation? Both the VCA Method and the UK/NZ Method recognise that s 7(2) is not applied until the challenged legislation is interpreted, compared with the rights, and the former encroaches the latter; but they differ on whether s 32(1) is part of the initial ordinary interpretation or the later remedial interpretation. French CJ's analysis does not necessarily favour one over the other.

Crennan and Kiefel JJ similarly approach s 7(2) as an ordinary interpretative task. Their Honours correctly acknowledge that rights are not absolute, that rights are read as subject to justifiable limitations, that s 7(2) has no influence on the interpretation of a statutory provision, and that if a limit on a right is justified under s 7(2) there is compatibility between the provision and the Charter.\textsuperscript{172} However, Crennan and Kiefel JJ held that the outcomes of s 7(2) analysis have

\textsuperscript{169} HCA Monctonovic (2011) 245 CLR 1, 44 [35] (emphasis added). On the same logic, his Honour concludes that s 7(2) will be excluded from s 36(2) when considering whether a provision can be interpreted consistently with a right, but may be relevant to the Court's decision whether to exercise the discretion to make a declaration: at 44 [36].

\textsuperscript{170} For example, under ICCPR art 9 and ECHR art 5, every person has the right to liberty and security of the person, and to be free from arbitrary arrest — but this right is qualified in specified circumstances, such as non-arbitrary arrest, lawful detention after conviction by a competent court, or the detention of a minor for the lawful purpose of educational supervision: see ICCPR arts 8–10, 14, ECHR art 5. Qualifications impact on the definition of the right by reducing its scope — that is, a non-arbitrary arrest does not come within the definition of the right and does not constitute a violation of the right. See also Iain Currie and Johan de Wial, The Bill of Rights Handbook (Qld, 5th ed, 2005) 186–7.

\textsuperscript{171} Crennan and Kiefel JJ make a similar mistake. Their Honours state that s 7(2) has 'an interpretive effect directed to the content of the Charter right rather than the statutory provision in question, which remains unchanged' and that a justified limitation is compatible 'because the Charter allows the right to be viewed as reduced in a case where the limitation is justified', concluding that the Charter right has been rendered compatible with the statutory provision following this adjustment. HCA Monctonovic (2011) 245 CLR 1, 219 [571]–[572]. The first difficulty is that limitations do not impact on the content of the right; rather, they encroach on a fully-constituted right, as noted. The second difficulty is the direction of the adjustment. With rights being a minimum guarantee, the adjustment is usually made to the statutory provision to render it compatible with the rights.

\textsuperscript{172} HCA Monctonovic (2011) 245 CLR 1, 219 [571]–[572]. See further criticism of their Honours' analysis of s 7(2) in above n 171.
no bearing on ss 32(1) and 36(2) — whether a limit is justified or not, 'nothing follows from such a conclusion'.173 Their Honours continue:

Despite the word ‘compatible’ appearing in s 32(1) ... it cannot be concluded that the inquiry and conclusion reached in s 7(2) informs the process to be undertaken by the courts under s 32(1). If some link between ss 7(2) and 32(1) were thought to be created by the use of such terms in s 32, such a result has not been achieved: (a) because the process referred to in s 32(1) is clearly one of interpretation in the ordinary way; and (b) because s 7(2) contains no method appropriate to the ascertainment of the meaning and effect of a statutory provision. The notion of incompatibility inherent in s 32(1) can only refer to an inconsistency found by a process of interpretation and no more. And so far as concerns the Supreme Court’s role under s 36(2), its terms confirm that the concern of the Court is only with the question of whether a provision cannot be 'interpreted consistently' with a human right. There is no suggestion in s 36(2) that the test provided by s 7(2) is to play any part in the making of a declaration....

It is not possible to read s 7(2) so that it operates with s 32(1) or s 36(2). It is not necessary to determine whether it has any other consequences, although it is difficult to discern that it might. It might operate as a statement of principle directed to the legislature ...174

As with French CJ, their Honours’ conclusions flow from their characterisation of compatibility as excluding limitations justification, and s 32(1) as ordinary interpretation. Regarding compatibility, their Honours fail to address structural and textual arguments in favour of compatibility including the justification assessment under s 7(2).175 Moreover, the conclusion that s 32(1) incompatibility arises only via interpretation depends on the conclusion that s 32(1) sanctions only ordinary interpretative processes — a contested characterisation at the crux of the dispute. Further, the use of ‘consistently’ rather than ‘compatibly’ in s 36(2) is not explained in the extrinsic materials.176 However, if the textual difference is used to deny a link between ss 7(2) and 36(2), the same argument can deny a link between ss 32(1) and 36(2).

Regarding s 32(1), it is correct that s 7(2) does not provide a method for ascertaining the meaning and effect of a provision, but how is this problematic? As Crennan and Kiefel JJ acknowledge, s 7(2) is not intended to impact on interpretation; rather, it is relevant to justification. The need to find an interpretative role for

173 Ibid 219 [573].
175 See the critique of French CJ above, and in Debeljuk, ‘Who is Sovereign Now?’, above, n 15.
s 7(2) is because of their Honours’ *mischaracterisation* of s 32(1). Indeed, the problems identified by their Honours dissolve if s 32(1) is characterised remedially. If s 32(1) is activated *after* a right is limited according to pre-Charter interpretive rules and *only if* that limitation is not justified, something does follow — that is, a s 32(1) remedial interpretation follows if it is possible and consistent with statutory purpose. Moreover, the links that were intended to be created between s 7(2), and ss 32(1) and 36(2), would be apparent. Further, compatibility would embody justified limitations, properly reflecting the text and structure of the Charter. Furthermore, s 7(2) would have a discernible role to play, which is important given that the Second Reading Speech states that s 7(2) ‘will assist courts and government in deciding when a limitation … is … justified’.177 The Explanatory Memorandum describes it as ‘one of the key provisions in the Charter’,178 and the general principle that statutory words and sentences are to ‘be given some meaning and effect’.179

The s 7(2) conclusions of the three judges are coherent and logical insofar as their assumptions are concerned. Internally logical arguments based on weak assumptions fail to convince.

### 3 Method

Crennan and Kiefel JJ reject the UK/NZ Method because it incorrectly requires s 7(2) analysis before s 32(1).180 Their Honours also reject the VCA Method for two reasons, both linked to s 7(2) analysis occurring before s 36(2).181 First, s 7(2) cannot be linked to s 36(2) because s 7(2) goes to ‘compatibility’ whereas s 36(2) goes to ‘consistency’.182 Secondly, to link s 7(2) to s 36(2) may turn s 36(2) applications into ‘abstract questions of law’, which is beyond judicial power.

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177 *Victoria, Parliamentary Debates, Legislative Assembly*, 4 May 2006, 1291 (Rob Hulls, Attorney-General) (emphasis added).


179 Pearce and Gridds, above n 108, 49 [2.26].

180 *HCA Moncilovic* (2011) 245 CLR 1, 220 [576]. Their Honours explicitly link this to the approach in *Hansen*: at 220, n 953.

181 In addition to their Honours’ concerns, the ordering of the VCA Method poses challenges. The first step of the VCA Method requires an interpreter to ‘ascertain the meaning of the relevant provision’ using the ‘framework of interpretive rules’: *HCA Moncilovic* (2010) 25 VR 436, 445 [31], 464 [103]. This involves the interpreter exploring ‘all “possible” interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights’: at 464 [103]. From a doctrinal perspective, it is impossible to identify an interpretation that ‘least infringes’ a Charter right without: first, considering the scope of the rights and the legislation, and establishing whether the legislation limits a right; and secondly, considering whether the limitation is reasonable and demonstrably justified. That is, answering step 1 includes full consideration of steps 2 and 3 of the VCA Method. How can an interpretation that ‘least infringes’ a Charter right be identified without any discussion of the scope of the rights said to be ‘breached’ (VCA Method step 2)? Moreover, how can an interpretation that ‘least infringes’ a Charter right be identified without understanding some form of limitations analysis like s 7(2), particularly the less restrictive legislative means assessment under s 7(2)(e) (VCA Method step 3)? The entirety of the VCA methodology is in truth contained in step 1, with steps 2 and 3 becoming superfluous. For a similar analysis regarding the *NZBORA*, see Rishworth, above n 3, 333.

182 *HCA Moncilovic* (2011) 245 CLR 1, 220 [576]. This argument has been critiqued above.
thereby posing constitutional separation of powers problems. Their Honours do not substitute a new method.

French CJ is silent about methodology. However, the VCA Method was ‘tentatively’ drawn from the principle of legality characterisation, including the non-role of s 7(2). This may lend implicit support to the VCA Method from French CJ’s judgment. Implicit support for a ‘tentative’ methodology is, however, far from settled legal doctrine.

4 Section 36(2)

French CJ held that s 36(2) declarations do not involve exercises of judicial power, nor are they incidental thereto. Under federal jurisdiction, s 36(2) lies beyond the limits of Commonwealth judicial power. For state courts, however, his Honour held that declarations are not an invalid exercise of non-judicial power because s 36(2) does not compromise the institutional integrity of the court. However, French CJ held that s 36(2) declarations made by the Victorian courts cannot be appealed to the HCA under s 73 of the Constitution.

Crennan and Kiefel JJ held that, although the s 36(2) declaration power is not a judicial power, it is incidental to an exercise of federal judicial power and thereby valid. Significantly for their Honours, the validity of s 36(2) depends on there being no prior role for s 7(2): if the s 7(2) justification 'process had been required it may well have been said that the Court was being asked to consider an abstract question of law ... which has no legal consequence'.

Considering state courts, Crennan and Kiefel JJ held that the process of reaching a conclusion about inconsistency does not involve functions incompatible with judicial power — '[t]he process involves an ordinary interpretive task'. Accordingly, s 36(2) is not an invalid conferral of non-judicial power on the

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183 Ibid 224 [590]. Were their Honours to alter their opinion on the operation of s 7(2) in later judgments, there would be implications for the validity of s 36(2): see below n 191 and accompanying text.
184 HCA Mountcovic (2011) 245 CLR 1, 64–6 [88]-[91]. In relation to s 36(2) and federal jurisdiction, French CJ further holds that s 36(2) lies beyond the limits of Commonwealth judicial power: at 68–70 [99]-[100].
185 Ibid 68–70 [99]-[100].
186 Ibid 66 [92], 67–8 [95]-[97].
187 Ibid 70 [101]. See generally Bateeman and Stellios, above n 3.
188 HCA Mountcovic (2011) 245 CLR 1, 222–3 [584]-[587]. Section 36(2) ‘is not directed to the determination of a legal controversy and has no binding effect’, nor could it ‘give rise to any “matter” within the meaning of Ch III of the Constitution’: at 222 [584].
189 In undertaking the judicial task of interpreting the Drugs Act, the VCA had to identify any inconsistency between that Act and the Charter, with the drawing of a conclusion on inconsistency being incidental to judicial power: HCA Mountcovic (2011) 245 CLR 1, 223 [589]. ‘This distinguishes such a function from the act of making a declaratory order about a hypothetical matter, which has been observed to be beyond the boundaries of judicial power’: at 223 [589]. As per Bateeman and Stellios, this means that ‘s 36 could be validly picked up by s 79 in federal jurisdiction’: Bateeman and Stellios, above n 3, 19.
190 HCA Mountcovic (2011) 245 CLR 1, 224 [590]. This would be avoided by giving s 32(1) remedial reach.
191 Ibid 227 [600].
state courts.\textsuperscript{192} Curiously, their Honours caution against s 36(2) being used in the criminal context because of its ability to undermine a conviction. Their Honours explicitly deny that declarations in criminal contexts impair institutional integrity, but they state that declarations ‘will rarely be appropriate’, and that ‘prudence dictates that a declaration be withheld’, in criminal contexts.\textsuperscript{193}

5 Avoiding Unconstitutionality?

French CJ’s and Crennan and Kiefel JJ’s narrow interpretations of the key provisions may be justified according to the HCA’s practice of preferring an interpretation that avoids unconstitutionality if such a construction is available.\textsuperscript{194} Indeed, as discussed below, Heydon J invalidated the entire Charter on the basis of broad interpretations of the key provisions. However, there are two difficulties with this.

First, the purpose of reading down a provision to preserve its constitutionality ‘is to give effect so far as possible to Parliament’s intention’, and this depends on a ‘judicial assessment’ of whether the read-down provision ‘is one that Parliament would have intended if the challenged provisions were to fail’.\textsuperscript{195} Provisions expressing the parliamentary intention for validity of statutes by states, such as s 6(1) of the ILA,\textsuperscript{196} may be applied ‘so long as the … [read-down provision] has not been changed so as to make it something different from the law enacted by Parliament’.\textsuperscript{197} Arguably the narrow constructions their Honours gave the key provisions rendered them something different to that intended and enacted, and were thus not available.\textsuperscript{198}

Secondly, in the context of severance, ‘[w]here … the resulting invalidation is substantial and would strike down key provisions of a comprehensive and integrated legislative measure, the invocation of statutory or constitutional

\textsuperscript{192} Passing comment on defects in legislation in the course of a permissible exercise of judicial power is “a function properly regarded as incidental to the exercise of the power”: ibid, quoting Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1, 20 n 68 (‘Wilson’). Declarations are not improperly linked to the executive or legislature and the mandatory notification requirements of the provision do not give rise to incompatibility: at 228 [602]–[603].

\textsuperscript{193} Ibid 229 [605].

\textsuperscript{194} The author wishes to thank an anonymous referee for inspiring this conclusion.


\textsuperscript{196} ILA s 6(1) states:

Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected.


\textsuperscript{198} See Debeljak, ‘Who Is Sovereign Now?’, above n 15.
principles of severance will be inappropriate.\textsuperscript{199} At least for Crennan and Kiefel JJ, one must query reading down s 7(2) so that it has no operation with the key integrated provisions of ss 32(1) and 36(2). Invalidation with severance may be preferred to reading down a provision so that it is of no effect.

\section{Support for the UK/NZ Approach}

The judgments of Gummow J (Hayne J relevantly concurring),\textsuperscript{200} Bell J, and Heydon J more closely reflect the UK/NZ Method. The constitutional implications of ss 7(2), 32(1) and 36(2) have a more explicit influence on these judgments, leading to mixed results. Three of the four judges uphold the validity of ss 7(2) and 32(1), with only one upholding s 36(2).

In brief, Gummow J rejects the \textit{VCA Monecilor}ic characterisation of s 32(1) and adopts the UK/NZ Method, thereby recognising a role for s 7(2). However, his Honour holds s 36(2) invalid for offending \textit{Kable}, but severable from the \textit{Charter}. Bell J recognises a role for s 7(2), envisages a remedial reach for s 32(1), and essentially adopts the UK/NZ Method. Her Honour holds that s 36(2) is a valid conferral of non-judicial power. Heydon J provides the fourth opinion supporting a role for s 7(2) and a strong remedial reach for s 32(1), which sits within the UK/NZ Method. However, the consequence of broadly characterising these provisions is their invalidation for violating \textit{Kable} — indeed, his Honour invalidates the entire \textit{Charter}.

\section{Relationship between Sections 7(2) and 32(1)}

All four judges held that 'compatibility with rights' includes an assessment of s 7(2) limitations. Their Honours rely on statutory interpretation of the \textit{Charter}, rather than constitutional principles.

Gummow J notes the structure of the \textit{Charter}, acknowledging that s 7(2) is in pt 2 which 'identifies and defines the human rights', whilst s 32(1) sits in pt 3 'interpretation of laws'; and notes that pt 2 'operate[s] upon the provisions of Pt 3'.\textsuperscript{201} His Honour quotes with approval McGrath J:

As between ss 5 [limitations] and 6 [interpretation] it will usually be appropriate for a Court first to consider whether under s 5 there is scope for a justified limitation of the right in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment.\textsuperscript{202}

\textsuperscript{199} \textit{Work Choices Case} (2000) 229 CLR 1, 241 [598] (Kirby J).

\textsuperscript{200} \textit{HCA Monecilor}ic (2011) 245 CLR 1, 125 [280].

\textsuperscript{201} Ibid 84 [146]. This point is made above under the examination of French CJ, and Crennan and Kiefel JJ.

\textsuperscript{202} \textit{Hansen} (2007) 3 NZLR 1, 65 [191], quoted in \textit{HCA Monecilor}ic (2011) 245 CLR 1, 91 [106]. Gummow J also notes that "Blanchard J and Tipping J spoke to similar effect": at 91 [166] (citations omitted).
Gummow J held that ‘[s] 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Pt 2, including, where it has been engaged, s 7(2)’; with the ‘relationship between ss 32(1) and 7(2) ... [being] thus similar to that between ss 5 and 6 of the [NZBORAJ].’ 203

Bell J considers the VCA approach to pay ‘insufficient regard to the place of s 7 in the scheme of the Charter’, given its description in the Explanatory Memorandum ‘as one of the “key provisions” of the Charter’. 204 Her Honour notes that pt 2 commences with s 7(2), and held that ‘[t]he rights set out in the succeeding sections of Pt 2 are subject to demonstrably justified limits’, and that ‘[t]he Charter’s recognition that rights may be reasonably limited and that their exercise may require consideration of the rights of others informs the concept of compatibility with human rights’. 205

In supporting her conclusions, Bell J highlights that s 7(2) applies to the s 38 obligations on public authorities. One reason that ‘compatibility’ means ‘compatibility with the rights as reasonably limited under s 7(2) is the improbability that the Parliament intended to make unlawful the demonstrably justified acts of public authorities which happen to reasonably limit a Charter right’. 206 This implicitly supports s 7(2) applying equally across the pt 3 provisions. 207 Moreover, Bell J rejects the argument that proportionality assessment is inconsistent with interpretative processes. Her Honour held that ‘if s 7(2) does not inform the interpretive function, there is no mechanism for the court in interpreting statutory provisions in a rights compatible way to recognise the need for rights to be read together’, and such characterisation ignores that some rights contain internal limitations. 208 Finally, Bell J accepts that ‘s 7(2) is part of, and inseparable from, the process of determining whether a possible interpretation of a statutory provision is compatible with human rights’. 209 This characterisation is consistent with ‘the central place of s 7 in the statutory scheme’, and recognises ‘that rights are not absolute and may need to be balanced against one another’. 210

203 HCA Monashovic (2011) 245 CLR 1, 92 [168].
204 Ibid 247 [678] n 1095.
205 Ibid 247-8 [678]. Indeed, her Honour states that her conclusions are ‘consistent with the statement in the Preamble that human rights come with responsibilities and must be exercised in a way that respects the human rights of others’ and that ‘[i]t accords with the extrinsic material to which the Court was referred’: at 247 [678].
206 Ibid 249 [681].
207 This conclusion is supported by the fact that Bell J discusses how s 7(2) interacts with pt 3 divs 1, 3 and 4. HCA Monashovic (2011) 245 CLR 1, 248–50 [679]–[683]. This is in contrast to the judgements of French CJ, and Crennan and Kiefel JJ.
208 Ibid 249 [682].
209 Ibid 249 [683].
210 Ibid Her Honour quotes the following from Blanchard J:

It would surely be difficult to argue that many, if any, statutes can be read completely consistently with the full breadth of each and every right and freedom in the [NZBORAJ]. Accordingly, it is only those meanings that unjustifiably limit guaranteed rights or freedoms that s 6 requires the Court to discard, if the statutory language so permits.

Ibid 250 [683] (emphasis in original), quoting Hurness [2007] 3 NZLR 1, 27 [59].
Heydon J held that 'in assessing what human rights exist before the s 32(1) process of interpretation is completed, it is necessary to apply s 7(2) to ss 8–27' — that is, '[t]he relevant rights are not those which correspond to the full statements in ss 8–27, but those which have limits justified in the light of s 7(2)'.\textsuperscript{211} This approach sanctions both s 7(2)’s role in assessing the ‘compatibility of rights’ and the UK/NZ Method.

His Honour justifies this interpretation by focusing on the principal operative provisions of the Charter — s 28(1) statements, s 32(1) interpretation and s 38 obligations on public authorities. Were s 7(2) to have no impact on ‘compatibility’, it ‘would have no application to the principal operative provisions of the Charter’, which would be ‘a peculiar result’ given that s 7(2) is the first substantive provision in the first substantive Part of the Charter, and immediately precedes the list of ‘human rights that Parliament specifically seeks to protect’.\textsuperscript{212} Moreover, Heydon J highlights the improbability that the ‘framers of legislation could have intended to insert a provision which has virtually no practical effect’.\textsuperscript{213} His Honour also refers to the Explanatory Memorandum\textsuperscript{214} and the Second Reading Speech, which explicitly states that ‘[w]here a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right’.\textsuperscript{215}

Heydon J then invalidates s 7(2) because it impermissibly imposes legislative tasks on judges:\textsuperscript{216} ‘s 7(2) confers functions on the Victorian courts which could not be conferred on a court’\textsuperscript{217} in the Kable sense. Given ‘s 7(2) is part of the process contemplated by s 32(1)’, s 32(1) is invalid, triggering the invalidity of the entire Charter because ‘the main operative provisions are connected with both ss 7(2) and 32(1)’.\textsuperscript{218}

\section{Section 32(1)}

Gummow J addresses the constitutional issues surrounding s 32(1). Heydon J considers the constitutional issues after the breadth of s 32(1) is established by

\begin{itemize}
  \item \textsuperscript{211} \textit{HCA Moncrieff (2011) 245 CLR 1, 165 [415]} (emphasis added).
  \item \textsuperscript{212} Ibid 166 [417].
  \item \textsuperscript{213} Ibid 168 [423], quoting \textit{Minister of State for Resources v Dover Fisheries Pty Ltd} (1993) 43 FCR 565, 574 (Gummow J).
  \item \textsuperscript{214} Ibid 166–7 [418]. His Honour highlights parts of the Explanatory Memorandum that indicate that rights are not absolute, and the links between s 32(2) and s 7(2) which ‘thus contemplates a linkage between s 32 and s 7(2)’: at 167 [418]. See Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8–9.
  \item \textsuperscript{215} \textit{HCA Moncrieff (2011) 245 CLR 1, 167 [419]}, quoting \textit{Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1251} (Rob Hall, Attorney-General) (emphasis added). His Honour also critiques the arguments put forward by the VCA and the Human Rights Law Centre: \textit{HCA Moncrieff (2011) 245 CLR 1, 167–70} [420]–[426].
  \item \textsuperscript{216} \textit{HCA Moncrieff (2011) 245 CLR 1, 172 [431]}.\textsuperscript{217} Ibid 174 [436].
  \item \textsuperscript{218} Ibid 175 [439]. See also at 172 [431], 174 [436]. For Heydon J, only a constitutional amendment via s 128 of the Constitution would allow an interpretative role to be conferred on the judiciary that violated separation of powers: at 173 [433].
\end{itemize}
statutory interpretation. Bell J’s analysis of s 32(1) and method is intertwined, and is discussed in the ‘Method’ section below.

In rejecting constitutional invalidation because of separation of powers concerns, Gummow J notes that ‘purpose’ in s 32(1) refers ‘to the legislative “intention” revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation’. His Honour then refers to activities that ‘[fall] ... within the constitutional limits of that curial process’ described in Project Blue Sky, being that ‘[t]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have’; but that ‘[i]n the context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.’

Gummow J concludes ‘[t]hat reasoning applies a fortiori where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1).’ His Honour relies on the s 32(1) reference to ‘purpose’ and Project Blue Sky to conclude that s 32(1) does not confer a law-making function on the courts that is repugnant to judicial power.

Exploring these observations, Gummow J acknowledges that various factors ‘may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning’ — that is, ordinary meaning may need to give way to an alternative meaning. This rule applies a fortiori to s 32(1). The question is: to what extent can meaning change to achieve rights-compatibility; or what is the strength of the remedial force of s 32(1)? Gummow J does not mention Ghaidan or other British jurisprudence, however, acknowledgment that a canon of construction may justify a meaning other than the literal or grammatical meaning is not substantially different to the British jurisprudence, as discussed above. That s 3(1) ‘allowed the court to depart from unambiguous statutory meaning’ was the ‘most important premise in Ghaidan’. Abandoning literal and grammatical meaning echoes Lord Steyn’s sentiment that judges could go so far as the ‘subordinat[ion of] the niceties of the language of [the] section’. Lord Steyn has criticised the ‘excessive concentration on

219 Ibid 92 [170]. Gummow J’s expansive reading of ‘purpose’ is to be preferred to VCA Menclovic. See VCA Menclovic (2010) 25 VR 436, 458 [36]. The VCA’s focus on the purpose of the particular statutory provision was open to criticism for, inter alia, eschewing the traditional rules of statutory interpretation, lacking conformity with the text of the Charter and its extrinsic materials, and failing to draw a distinction with Ghaidan; Debeljak, ‘Who is Sovereign Now?’, above n 15, 27–8.

220 HCA Menclovic (2011) 245 CLR 1, 92 [170].


222 HCA Menclovic (2011) 245 CLR 1, 92 [170].

223 Ibid 92–3 [171].

224 See above nn 126–7 and accompanying text.

225 Kavanagh, Constitutional Review, above n 27, 94.

226 R v A (2002) 1 AC 45, 68 [45].
linguistic features, and prefers an approach ‘concentrating ... in a purposive way on the importance of the ... right’.

Moreover, when referring to the canons of construction, Gummow J cites ‘the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights’. Geiringer’s reminder of the ‘long history of common law courts utilising presumptions of interpretation to promote literal or even strained meanings in disregard of statutory purpose’ is apt; with Gummow J confirming this should apply ‘a fortiori where there is a canon of construction mandated ... by ... s 32(1)’.

Heydon J rejects the VCA’s characterisation of s 32(1). After assessing its history, his Honour held that ‘s 32(1) goes well beyond the common law’ — indeed, ‘there would be no point in s 32(1) unless its function was to go further than the common law principle of legality ... The function of s 32(1) evidently is to make up for the putative failure of the common law rules’. Heydon J notes that s 32(1) legitimises:

reliance on a much broader kind of ‘purposive’ interpretation going beyond the traditional search for ‘purpose’ as revealed in the statutory words. ... The language of s 32(1) thus suggests that there is some gap between ‘purpose’ and ‘interpretative meaning’, by which ‘purpose’ controls ‘interpretation’ rather than merely being a reflection of it. In effect s 32(1) permits the court to ‘disregard the express language of a statute when something not contained in the statute itself, called its “purpose”, can be employed to justify the result the court considers proper’ ... Ordinary statutory interpretation does not depend on the ‘purpose’ of the statute, but its ‘scope’. But s 32(1) calls for a different task ... Section 32(1) commands the courts not to apply statutory provisions but to remake them — an act of legislation.

227 Giaidou 2004 2 AC 557, 573 [41].
228 Ibid 573–4 [41]. See also at 577 [49].
231 HCA Monckovic (2011) 245 CLR 1, 92 [170].
232 Ibid 164 [411]. His Honour does, however, warn of the risk in the strategy, ‘for if s 32(1) only does that, it would probably not be invalid, but the more it does, the greater the risk to its validity’.
233 Heydon J considers the Second Reading Speech, the Explanatory Memorandum, the HRCC Report, the ACT Bill of Rights Consultative Committee, ‘Towards an ACT Human Rights Act’ (Report, May 2003) (‘ACTHRA Report’), and the original Human Rights Act 2004 (ACT) equivalent provision and its amendment to bring it into line with the Charter: ibid 178–81 [445]; [449].
234 HCA Monckovic (2011) 245 CLR 1, 181 [450].
Having accepted a broad reading of s 32(1)—indeed, one that appears to sanction a Ghaidan-type analysis—his Honour held it was invalid for impermissibly conferring legislative functions on the judiciary.237

Heydon J’s conclusion that s 32(1) commands ‘an act of legislation’ is problematic. Similarly to other judges, his Honour failed to give any weight to ‘so far as it is possible to do so’. This phrase of limitation differentiates legitimate acts of judicial interpretation from illegitimate acts of judicial legislation. Had this been recognised, his Honour may not have concluded that s 32(1) sanctions acts of legislation.238

3 Methodology

Gummow, Bell and Heydon JJ support the UK/NZ methodology vis-à-vis ss 7(2) and 32(1). This flows from their Honours’ characterisation of ss 7(2) and 32(1). Although Heydon J’s approach sanctions the UK/NZ Method, his Honour invalidated s 7(2) for impermissibly conferring legislative tasks on judges in the Kable sense.239

Gummow J approves the UK/NZ Method, subject to s 36(2) invalidation. His Honour’s structural analysis contemplates s 7(2) analysis before s 32(1). Moreover, Gummow J equates ss 7(2) and 32(1) with ss 5 (limitations) and 6 (interpretation) of the NZBORA, and accepts the majority methodology from Hansen, which is reflected in the UK/NZ Method.240 Finally, Gummow J’s reasoning on the facts employs the UK/NZ Method.241

Bell J had no constitutional problems with the UK/NZ Method. Having held that s 7(2) informs ‘compatibility’, Bell J then accepts the UK/NZ Method, described in Charter language as follows:

If the literal or grammatical meaning of a provision appears to limit a Charter right [Rights Question I], the court must consider whether the

236 Indeed, his Honour suggests that s 32(1) may go further than s 3(1) of the UKHRA: HCA Monoclonic (2011) 245 CLR 1, 182–3 [451]–[452].
237 Ibid 183–4 [454].
238 Moreover, having castigated others for failing to give meaning to s 7(2), his Honour did the same with a key phrase from s 32(1). Reference is made again to the general principle that statutory words and sentences are to ‘be given some meaning and effect’; Pearce and Geddes, above n 108, 49 [2.26].
239 HCA Monoclonic (2011) 245 CLR 1, 172 [431], 174 [436].
240 Gummow J’s references to McGrath, Blanchard and Tipping JJ in Hansen encapsulate the New Zealand judges’ support for the UK/NZ Method. In the paragraph after that which is cited by Gummow J, McGrath J outlines “[a]n approach that better fits the desirability of addressing s 5 before applying s 6” which is the UK/NZ Method: Hansen [2007] 3 NZLR 1, 66 [192]. Moreover, in noting that “Blanchard J and Tipping J spoke to similar effect” to McGrath J, Gummow J cited sections of their judgments which outline the UK/NZ Method: HCA Monoclonic (2011) 245 CLR 1, 91 [166], citing Hansen [2007] 3 NZLR 1, 26–8 [57]–[62] (Blanchard J), 36–7 [88]–[92] (Tipping J).
241 Undertaking ordinary statutory interpretation, his Honour concludes that the s 5 ‘possession’ deeming provision cannot apply to the composite ‘possession for sale’ under s 71AC: HCA Monoclonic (2011) 245 CLR 1, 97–9 [190]–[198]. Accordingly, there was no limitation to the presumption of innocence. His Honour then turns to the s 32(1) ‘method of interpretation’ which ‘provides additional support’ for the traditional interpretation of the provisions: at 99 [199].
limitation is demonstrably justified by reference to the s 7(2) criteria [Rights Question 2]. ... If the ordinary meaning of the provision would place an unjustified limitation on a human right, the court is required to seek to resolve the apparent conflict between the language of the provision and the mandate of the Charter by giving the provision a meaning that is compatible with the human right [Charter Enforcement Question 3] if it is possible to do so consistently with the purpose of the provision [Charter Enforcement Question 4].

Bell J held that the s 7(2) criteria 'are readily capable of judicial evaluation', and that 'the purpose of the limitation, its nature and extent, and the question of less restrictive means reasonably available to achieve the purpose are matters that commonly will be evident from the legislation'. Her Honour recognises that '[p]rovisions enacted before the Charter may yield different, human rights compatible, meanings in consequence of s 32(1)', Her Honour highlights the reinterpretative limit of 'consistency with purpose', which 'directs attention to the intention, objectively ascertained, of the enacting Parliament. The task imposed by s 32(1) is one of interpretation and not of legislation'. Her Honour notes that s 32(1) 'does not admit of "remedial interpretation" of the type undertaken by the Hong Kong Court of Final Appeal as a means of avoiding invalidity'.

Bell J's comments on 'remedial interpretation' must be explored. Her Honour relies on the part of *Lam Kwong Wai* that discusses whether an implied power to make remedial interpretation exists under constitutional law, and the relationship between remedial interpretation and common law principles of interpretation. In relation to modern statutory interpretation, the HKFCA states:

'It is generally accepted that the principles of common law interpretation do not allow a court to attribute to a statutory provision a meaning which the language, understood in the light of its context and the statutory purpose, is incapable of bearing. A court may, of course, imply words into the statute, so long as the court in doing so, is giving effect to the legislative intention ... What a court cannot do is to read words into a statute in order to bring about a result which does not accord with the legislative intention properly ascertained.'

242 Ibid 250 [684].
244 *HCA Mompochron* (2011) 245 CLR 1, 250 [684]. Cf Heydon J at 170–1 [429], 172 [431], 172–3 [433].
245 Ibid 250 [684].
246 Ibid. Bell J fails to consider the role of 'so far as it is possible to do so' in drawing the line between proper judicial interpretation and improper judicial lawmaking, along with other Justices.
248 'That is, the entrenched Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ('Basic Law').
249 The Hong Kong Final Court of Appeal (HKFCA) does not take for granted that a difference exists between remedial interpretation and common law principles of interpretation: *Lam Kwong Wai* (2006) 9 HKCFAR 574, 606 [62] (Mason NPJ).
The HKCFA opines that the ‘very strong common law presumption ... of construction in favour of constitutional validity ... is subject to a similar limitation’. The HKCFA acknowledges that s 3(1) of the UKHRA and s 6 of the NZBORA go further by allowing a rights-compatible interpretation ‘that is strained’ in the sense that it was not an interpretation which the statute was capable of bearing as a matter of ordinary common law interpretation, but that such interpretations are subject to limitations, including that a rights-compatible interpretation must be ‘possible’. Referring to Sheldrake v DPP and Anderson and Bellinger, the HKFCA describes the limits of ‘possible’. This is the discussion that Bell J cited.

In the discussion immediately following that which is cited, in the context of the entrenched Basic Law, the HKFCA ventures that:

[remedial] interpretation involves the well-known techniques of severance, reading in, reading down and striking out. These judicial techniques are employed by the courts of other jurisdictions whose responsibility it is to interpret and pronounce on the validity and compatibility of legislation which is challenged on the ground that it contravenes entrenched or statute-based human rights ...

For the HKFCA, ‘remedial interpretation’ ‘involves the making of strained interpretations’, and it proffers that ‘[t]he justification for now engaging in remedial interpretation is that it enables the courts, in appropriate cases, to uphold the validity of legislation, albeit in an altered form, rather than strike it down’, again referring to the presumption of constitutionality.

It is unclear why her Honour chose to distinguish the Hong Kong jurisprudence, rather than directly tackle the British jurisprudence, which is discussed in Lam Kwong Wai v Ghaidam has not been expressly ruled out or ruled in. Nor is it clear why her Honour cites discussion of ‘remedial interpretation’ ‘as a means of avoiding invalidity’, which is a constitutional issue. Under the Charter, the issue is compatibility not invalidity, and the HKFCA discusses compatibility only in obiter. Nor is the relevance of the decision clear, given that the ratio concerned

251 Ibid 606 [64]. ‘Thus, it has been said that, if the language is not so intractable as to be incapable of being consistent with the presumption, the presumption should prevail’: at 606 [64].

252 Ibid 607 [65] (emphasis added).


254 Lam Kwong Wai (2006) 9 HKCFA 574, 607–8 [66]. The limits of ‘possible’ include ‘an interpretation [that] would be incompatible with the underlying thrust of the legislation, or would go against the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance’: at 608 [66], quoting Sheldrake [2005] 1 AC 264, 304 [28] (Lord Singham).


256 Ibid 610 [77] (emphasis added).

257 HCA Mandiclovic (2011) 245 CLR 1, 250 [684] (emphasis added).
the capacity to invalidate legislation under an entrenched instrument and the presumption of constitutionality.258

Bell J has no issue with ‘modern statutory interpretation’ rules that allow words to be implied or read into a provision provided legislative intention is not undermined. However, her Honour does not favour ‘remedial interpretation’ in the sense of ‘strained’ interpretation, but the difficulty is that the HKFCA spoke of two versions of ‘strained’ interpretation. One version results in invalidity, and is expressly referred to by Bell J, although the Charter does not involve invalidity. Another version goes to compatibility.260 With compatibility, her Honour confronts the same problems as other judges by not acknowledging the brake on judicial legislation imposed by ‘so far as it is possible to do so’. Bell J must clarify.

In any event, the British and Hong Kong jurisprudence may be a distraction. Most of her Honour’s reasoning relies on the NZBORA, including the methodology, and her application of the Charter to the reverse onus provision is consistent with Hansen.261

4 Section 36(2)

Gummow and Heydon JJ depart with Bell J on the constitutionality of s 36(2). Gummow J held that s 36(2) was neither a judicial power, nor incidental thereto.262 His Honour held that s 36(2) declarations do not have dispositive effect, as is apparent under s 36(5),263 and that to characterise s 36(2) as advisory would result in Wilson-style incompatibility.264 Gummow J concludes that s 36(2) ‘is incompatible with the institutional integrity of the Supreme Court and therefore …. invalid’, as are the related ss 33 and 37.265 His Honour severs the invalid provisions, with the remainder of the Charter being valid.266

258 Perhaps it is because statutory and constitutional instruments are not that for apart — as discussed above, each will allow for remedial interpretation up to a point, and then require declarations of incompatibility or invalidity.
259 That is, ‘severance, reading in, reading down and striking out’: Lam Kwong Wai (2006) 9 HKCFA 574, 609 [71].
260 That is, ‘an interpretation which the statute was [not] capable of bearing as a matter of ordinary common law interpretation’, subject to limits including possibility: ibid 607 [65].
261 HCA Moneglovic (2011) 245 CLR 1, 250 [685]. It must be noted that Bell J did not discuss Hansen or Lambert when assessing the reverse onus against the Charter provisions, other than by referring in her footnotes to parts of VCA Moneglovic that did discuss these cases: at 250 n 1108.
262 HCA Moneglovic (2011) 245 CLR 1, 96 [184], 96–7 [187].
263 Ibid 94–5 [178]–[179]. Section 36(5) prevents a declaration from affecting the validity, operation or enforcement of the provision, and does not create any legal right or civil cause of action.
265 To allow an advisory characterisation would ‘[attempt] a significant change to the constitutional relationship between the arms of government’: HCA Moneglovic (2011) 245 CLR 1, 95–6 [183]. Relevantly, for state courts exercising non-Chapter III judicial power, Gummow J highlights that Wainohu (2011) 243 CLR 181 establishes that Wilson applies equivalently to state courts: at 96 [183].
266 Ibid 97 [186].
267 Ibid 97 [189].
Heydon J held that s 36(2) impermissibly conferred non-judicial power on a Chapter III court in violation of separation of powers under *Kable*. His Honour characterised s 36 as 'merely advisory in character', which is not a judicial function or incidental thereto. Accordingly, s 36, and the related ss 33 and 37, were invalidated.

By way of contrast, Bell J agrees with French CJ on s 36(2) — that it confers non-judicial power that does not violate *Kable*, but that declarations cannot be appealed to the HCA.

**E Rationes Decidendi?**

The multiplicity of views on the proper and constitutional operation of the key provisions on rights-compatibility of legislation is complex. On one hand, three VCA judges and French CJ support s 32(1) as a codification of the principle of legality and the VCA Method. Crennan and Kiefel JJ support aspects of this characterisation (s 32(1) as an ordinary rule of statutory construction), but not other aspects (s 7(2)'s role in assessing legislation and the VCA Method).

On the other hand, three individual Supreme Court Justices and four High Court Justices support the essentials of the UK/NZ Method, which includes s 7(2) justifiable limitations within the conception of 'compatibility with rights', and recognises s 32(1) as a special rule of remedial interpretation. However, Heydon J found this conception of the *Charter* to be unconstitutional. Moreover, these judgments are less clear on the strength of the remedial reach of s 32(1), generally not explicitly sanctioning *Ghaidan* and seeming more comfortable with the *NZBORA* and *Hansen*. Within this coalition, three High Court Justices found s 36(2) to be unconstitutional.

One certainty emerges: the majority were comfortable aligning the *Charter* with the *NZBORA*, but not the *UKHRA* — indeed, five judges highlight the textual differences between ss 3(1) and 32(1), and the different constitutional settings. Although textual and constitutional differences also exist between the *Charter*/Australia and the *NZBORA*/New Zealand, a closer analysis of the *NZBORA* and its jurisprudence may prove more fruitful in the future, than debates about *Ghaidan*-radicalism versus Wilkinson-reasonableness.

**IV VICTORIAN JURISPRUDENCE**

Confronted with no clear majority in *HCA Momeciloic*, Victorian superior courts consider *VCA Momeciloic* to not be overruled and, to varying degrees, continue

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268 Ibid 185 [457].  
269 Ibid 241 [661].  
to rely on *VCA Momcilovic.* The reaction of the Victorian superior courts will be analysed, with judgments falling into three categories: first, judgments that follow *VCA Momcilovic* based on French CJ; secondly, a judgment that expands upon the principle of legality characterisation from *VCA Momcilovic*; and thirdly, judgments that suggest s 32(1) reaches beyond a codification of the principle of legality.

A Judgments Following VCA Momcilovic

In *Slavenski,* Warren CJ, Nettle and Redlich JJA summarised the different approaches in *HCA Momcilovic,* searching for a ratio on s 32(1). Their Honours note that all judges except Heydon J held:

that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision ... in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky* ..." Their Honours opine that *HCA Momcilovic* indicated that 'the effect of s 32(1) is limited', and cited from French CJ's opinion that s 32(1) is a codification of the principle of legality. Their Honours summarised French CJ's judgment into four rules. First, ‘if the words of a statute are clear, the court must give them that meaning'; second, ‘[i]f the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question'; third, ‘[e]xceptionally, a court may depart from grammatical rules to give an *unusual or strained* meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment'; and fourth, ‘[e]ven if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.'

Finally, their Honours noted the lack of a clear ratio for s 7(2), but held that ‘[i]t is unnecessary to decide whether ... the Court of Appeal is bound to follow its own decision in *Momcilovic* unless satisfied that it is clearly wrong.’

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271 For the ACT response to the decision, see *Allott* [2012] ACTAD 67 (2 October 2012).
272 (2012) 34 VR 206, 214-15 [20]-[25], especially 215 [23]-[24]. In this case, ss 7(2) and 32(1) issues arose in interpreting the circumstances in which legal assistance may be provided under s 24(1) of the *Legal Aid Act 1978* (Vic).
273 Ibid 214 [20].
277 Ibid 215 [22].
Examing Slavesci, the analysis of HCA Momcilovic highlights the difficulty of identifying any ratio, let alone statutory construction under Project Blue Sky as the s 32(1) ratio. Moreover, Project Blue Sky allows strained interpretation, similar to Ghaidan, which is not adequately explored. Further, it is misleading to discuss s 32(1) in isolation from methodology, which is intimately linked. French CJ implicitly sanctioned the VCA Method, giving s 32(1) no remedial reach. However, the VCA Method was rejected by all other judges. Crennan and Kiefel JJ rejected it without suggesting a replacement method, whilst Gummow (Hayne J concurring), Bell and Heydon JJ all essentially approved of the UK/NZ Method, which gives s 32(1) remedial reach. Finally, and relatedly, the disparate views on the interconnecting provisions must be accounted for. To promote French CJ's characterisation as representative of the HCA ignores the significant differences in opinion amongst the judges on ss 7(2) and 36(2), as does seeking to identify a ratio given such disparity.

In Noone, Warren CJ and Cavanough AJA presented a fuller picture of the divisions in HCA Momcilovic on s 7(2), identifying 'a 4:3 majority in the High Court that s 7(2) informs the s 32(1) interpretative task'. However, their Honours opined that because Hayne and Heydon JJ dissented on the final orders, their judgments 'could not form part of the ratio of Momcilovic and hence there is no ratio on this point in the High Court'.

In contrast to Slavesci, Warren CJ and Cavanough AJA explore whether the VCA is bound to follow its decision in VCA Momcilovic. Their Honours refer to Green v The Queen, where Heydon J 'discussed the principle that an intermediate appellate court should follow its earlier judgments, unless satisfied that the earlier judgment is clearly wrong'. However, Green gave no guidance where there was a non-binding HCA majority opinion against the earlier appellate court, where the HCA overturns the earlier appellate court, and whether it is enough that a majority of the HCA disagrees with the earlier judgment. Their Honours were not required to answer these issues, so took the discussion no further. Similarly, Nettle JA could not discern a majority view on s 7(2) from HCA Momcilovic, but in contrast, his Honour preferred to follow the VCA Momcilovic 'approach until and unless the High Court determines that it is incorrect'.

Given that the s 7(2) issue is an essential aspect of the correct methodology, and that the methodology dictates whether s 32(1) is part of ordinary or remedial

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278 Noone [2012] VSCA 91 (11 May 2012). In this case, the VCA considered the interaction between the misleading and deceptive conduct provisions in the Fair Trading Act 1999 (Vic) and freedom of expression under s 15 of the Charter.

279 Noone [2012] VSCA 91 (11 May 2012) [28].

280 Ibid [29] (citations omitted).

281 Ibid [30], citing Green v The Queen (2011) 244 CLR 462, 490-2 [83]-[87] (Heydon J) ('Green').


283 Noone [2012] VSCA 91 (11 May 2012) [140]-[142].

interpretation, determining the proper operation of s 7(2) is vital. This issue must be resolved as a matter of urgency.

B Section 32 as the Principle of Legality

In *PJB v Melbourne Health*, assuming that the *VCA Momeilovic* decision was correct, Bell J explored the meaning of the principle of legality. This analysis has implications where interpretative choices are available, and for the interactions of rights and limitations. Having traced the history of the principle across British and Australian jurisprudence, his Honour summarises its content:

the principle of legality is a strong presumption that legislative provisions are not intended to override or interfere with fundamental common law rights and freedoms and basic human rights. The presumption is displaced only by express language or necessary implication indicating unambiguously and unmistakably that the legislation was intended to have this effect. The application of the presumption is not triggered by ambiguity in the meaning of the statutory language ...

Applying this principle to legislation which *unmistakably intends some interference* to be authorised but the scope of the permitted interference is in issue, it is first necessary to identify the right or freedom which is said to be infringed and consider the importance of the interests which it protects in the particular circumstances. Then it is necessary to identify the nature and extent of the interference by, and the purposes of, the statutory provisions in question. If the interference complained of goes beyond what is shown to be reasonably necessary to meet a substantial and pressing need or legitimate aim, the proper interpretation will be that the interference is beyond the scope of the provision. In that regard, the more substantial is the infringement with the right or freedom, the more is required to show that the interference is necessary to meet the aims postulated and the interference should be the least necessary for that purpose.286

Bell J highlights that proportionality-type analysis is central to interpretation under the principle of legality.287 Moreover, the factors for assessing the scope of permitted interferences are similar to the s 7(2) factors. If this is correct, it is unclear how s 7(2) factors play no role in ordinary interpretation — based on s 32(1), the *ILA* and common law principles — as per French CJ, Crennan and Kiefel JJ, and *VCA Momeilovic*. Moreover, it requires a rethink of the VCA Method.

286 Ibid [270], [271] (emphasis added).
C Section 32 beyond the Principle of Legality

In *WK*, Nettle JA acknowledges that *HCA Momcilovic* did ‘not yield a single or majority view’ on s 32(1). His Honour considers French CJ, and Crennan and Kiefel JJ to have adopted a view similar to *VCA Momcilovic*, but that Gummow, Hayne and Bell JJ ‘took a broader view of s 32, which attributes greater significance and utility to s 7’. His Honour did not have to choose between the two approaches, and did not express a preference. Yet Nettle JA’s judgment is significant for recognising the impact s 7(2) characterisation has on s 32(1) characterisation — that is, the *HCA Momcilovic* judgments cannot be reduced to one ratio based on one provision.

In *Taha*, Tate JA refers to and cites from French CJ’s judgment, and then states that ‘the proposition that s 32 applies to the interpretation of statutes in the same manner as the principle of legality but with a broader range of rights in its field of application should not be read as implying that s 32 is no more than a “codification” of the principle of legality’. Her Honour notes that ‘this would be to misread the reasoning of the High Court’, and ‘to overlook the ... observation[s] made by Gummow J (with whom Hayne J relevantly agreed), citing the above-quoted passage in which Gummow J discusses legislative intention, *Project Blue Sky*, and departures from the literal or grammatical meaning.*

Tate JA concluded that, although six members of the HCA decided that s 32(1) was not analogous to s 3(1) of the *UKHRA*, and that the statutory construction techniques of *Project Blue Sky* are favoured:

> Nevertheless, there was recognition that compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, might more stringently require that words be read in a manner ‘that does not correspond with literal or grammatical meaning’ than would be demanded, or countenanced, by the common law principle of legality.296

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288 *WK v The Queen* (2011) 33 VR 516 (*WK*).
289 Ibid 530 [55].
290 Ibid. His Honour noted that Heydon J concluded that s 32(1) was invalid. Maxwell P’s judgment was limited to a comment that s 32(1) does not sanction legislation, as opposed to interpretation, and cites *VCA Momcilovic* (his prior judgment), which ‘was emphatically confirmed by six members of the High Court in the subsequent decision on the appeal in that case’: at 524 [28]. Maxwell P’s comments do not take matters further because his discussion does not cast light on whether s 32(1) is ordinary or remedial interpretation, and the line that judicial interpretation improperly crosses into judicial legislation.
291 Ibid 531 [59]. This is because ‘on balance, however, I have concluded that the result in this case is the same under either approach to s 32 of the Charter’.
293 Ibid [189] (emphasis added).
294 Ibid.
295 See above nn 222–3 and accompanying text.
296 *Taha* [2013] VSCA 37 (4 March 2013) [190] (emphasis added) (citations omitted).
Tate JA did not need to take the matter further because it was ‘sufficient to treat s 32 ... as at least reflecting the common law principle of legality’.

Such nuanced observations concerning the Charter are welcome. Deeper analysis of the decisions of Bell and Heydon JJ may take Victorian courts even further from the principle of legality.

**D Assessment**

The reliance by Victorian judges on the ‘tentative views’ in VCA Momicilovic as confirmed by French CJ is understandable given the conflicting multiplicity of views of the HCA, but it is lamentable. The Victorian superior court’s response to HCA Momicilovic fails to acknowledge the significant differences in reasoning between the different judgments, and the differing implications for key provisions and their interaction with other key provisions that flows from the different reasoning. Fortunately, Nettle and Tate JJA have recognised the distinctions of opinion on s 32(1), and numerous judges recognise the difficulties in resolving the operation of s 7(2).

**V CONCLUSION**

The issues before the VCA and its reasoning differed from the HCA — the former focused on the meaning of key provisions based on the intention of the Charter-enacting Parliament, with the latter additionally focussing on the constitutionality of the provisions in possible violation of traditional constitutional relationships and the implied separation of judicial powers under the Constitution. However, both decisions highlight broader tensions between fundamental underpinnings within our constitutional settlements.

In order to avoid perceived judicial acts of legislation, VCA Momicilovic emasculated the reach of s 32(1) such that it merely codifies the principle of legality. This not only denies Parliament’s capacity to design rights legislation beyond rubber-stamping judge-made common law, it arguably was an act of judicial activism by handing back power that Parliament intended the judiciary to have — a blow to parliamentary sovereignty that the Charter was designed to protect.

The decision in HCA Momicilovic also challenges democratic ideals. A democratically-sanctioned attempt to protect rights has been at best undermined, and at worst invalidated, by a mixture of judicially-developed constitutional relationships and judicially-sanctioned implications in our Constitution. Regarding the latter, the judicial development of the implied separation of judicial powers is a welcome bulwark against executive and parliamentary incursions on rights.

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297 ibid [191] (emphasis added). See also at [195].
within the largely rights-unfriendly Constitution. However, its legitimacy must be questioned when a back-door, judicially-sanctioned rights principle invalidates or emasculates a front-door, democratically-sanctioned rights instrument.

This article has promoted the UK/NZ Method and critiqued the VCA Method, both in terms of historical, contextual, textual, structural, and policy arguments, as well as in relation to parliamentary intention, preserving parliamentary sovereignty, and human rights doctrine. Without any further test cases, there is scope for accepting Heydon J as a fourth judgment in favour of the UK/NZ Method, providing a majority in favour of this model. Unlike the VCA, the HCA had the benefit of full argument on these matters, and is thereby a more legitimate judgment to reference.

299 There are a handful of express rights in the Constitution: the acquisition of property on just terms (s 51(xxi)); the right to trial on indictment by jury (s 80); the freedom of religion (s 116); and the right to be free from discrimination on the basis of interstate residence (s 117). There are also two implied limits on the power of the Parliament and executive: the implied separation of judicial power from the executive and Parliament (Boilermakers' Case (1956) 94 CLR 254) and the implied freedom of political communication (Lunge v Australian Broadcasting Corporation (1997) 189 CLR 520).
Who is sovereign now? The Momcilovic Court hands back power over human rights that Parliament intended it to have

Julie Debeljak

The decision of R v Momcilovic concerned the rights-compatibility of a reverse legal burden of proof under drug control legislation. The Victorian Court of Appeal held that the reverse onus provision was an unjustified limit on the right to the presumption of innocence under s 25(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter) and issued a declaration of inconsistent interpretation under s 36(2) of the Charter. This test case sought to resolve many fundamental issues concerning the Charter mechanisms relating to the human rights-compatibility of legislation, including the strength of the s 32(1) interpretation obligation, and the appropriate methodology for the statute-related mechanisms under the Charter. This article will critique the court’s resolution of these broader issues, arguing that the court has sanctioned a rights-reductionist method to the statute-related Charter mechanisms, undermined the remedial reach of the s 32(1) interpretation obligation, and considerably muted the institutional dialogue. Most significantly, however, is the fact that this is all done despite clear parliamentary intention to the contrary.

INTRODUCTION

The decision of R v Momcilovic (Momcilovic) concerned the rights-compatibility of a reverse legal burden of proof under drug control legislation. The Victorian Court of Appeal (Momcilovic Court) held that the reverse onus provision was an unjustified limit on the right to the presumption of innocence under s 25(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter) and issued a declaration of inconsistent interpretation under s 36(2) of the Charter. The magnitude of this decision goes far beyond the outcome of this particular case. Being the first occasion that a majority of the Court of Appeal relied on the Charter, this became a test case on, inter alia, the strength of the s 32(1) interpretation obligation, and the appropriate methodology for the statute-related mechanisms under the Charter. A critique of the Momcilovic Court’s resolution of these issues is the focus of this article.

First, the article will outline the legal and factual matrix of the case. It will also examine the choices presented to the Momcilovic Court in relation to the reach of s 32(1) and the appropriate methodology, and the choices made by it. Secondly, the article will critique the choices made by the Momcilovic Court, with analysis being structured by the judgment. In particular, it will examine the Momcilovic Court’s choice to rely on the narrowest position in the British jurisprudence and

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1 R v Momcilovic (2010) VSCA 50 (Momcilovic).

2 It should be noted that a majority of the Victorian Court of Appeal (Momcilovic Court), consisting of Maxwell P and Weinberg JA, avoided the issue arising under the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter) issue in R v Department of Justice (2008) 21 VR 526 (RJIE). Only Nettle JA based his concurring decision on the Charter.

3 This article is limited to an analysis of the methodology adopted by the Momcilovic Court. Word constraints did not allow for a full deconstruction of the Momcilovic Court’s application of its methodology to the provisions in issue.

(2011) 22 PLR 15 15
thoroughly scrutinise the reasoning behind its opinion that s 32(1) of the Charter did not replicate the equivalent provision in the British human rights instrument. In relation to the latter, discussion will focus on the courts analysis of the language of s 32(1), its construction of the enacting Parliament’s intention, and its tentative conclusions on what is “possible” under s 32(1).

The Mociclovic Court has sanctioned a rights-reductionist method to the statute-related Charter mechanisms, undermined the remedial reach of the s 32(1) interpretation obligation, sidelined the core issue of justification for limitations on rights, and considerably muted the institutional dialogue envisaged under the Charter. Most significantly, this article will demonstrate that this is all done despite clear parliamentary intent to the contrary.

The irony here should not be lost. In considering the scope of the judicial powers in relation to rights-compatibility of legislation under s 32(1) – an issue which goes to the essence of the sovereignty of Parliament – the Mociclovic Court has arguably usurped the sovereignty of Parliament by ignoring the Charter-enacting Parliament’s intentions. Indeed, the tension surrounding the preservation of parliamentary sovereignty was partially resolved by the enacting Parliament’s adoption of a statutory human rights instrument. In an act of sovereign democratic will, parliamentary sovereignty was preserved by the enacting Parliament with the enactment of an instrument based on institutional dialogue between the executive, legislature and judiciary under which the judiciary’s power was limited to interpretation and non-enforceable declaration, rather than the enactment of a constitutional human rights instrument which arguably promotes judicial monologues because of the judicial power to invalidate legislation. To be sure, full resolution of the tension between parliamentary and judicial sovereignty under the Charter requires an articulation of the reach of the s 32(1) interpretation obligation – the greater the remedial reach of s 32(1), the greater the power conferred on the judiciary. The salient question is whether the enacting Parliament considered that the conferral of a strong remedial element under s 32(1) transferred too much power to the judiciary. Much in the legislative history indicates the enacting Parliament did not, but the Mociclovic Court held that it did – thereby arguably usurping the parliamentary sovereignty it sought to maintain.

**R v Mociclovic**

**The issue**

Mociclovic concerned the rights-compatibility of s 5 of the Drugs, Poisons and Controlled Substances Act 1981 (Vic) (Drugs Act). Section 5 is a classic reverse onus provision. Under s 5, a substance is deemed “to be in the possession of a person so long as it is upon any land or premises occupied by him … unless the person satisfies the court to the contrary” (emphasis added). According to pre-Charter interpretation principles, s 5 was considered to impose on a person a legal burden of disproving possession on the balance of probabilities. A failure to discharge this reverse onus has very serious consequences.

First, a person may be exposed to a conviction for drug trafficking. Section 73(2) of the Drugs Act provides that where a person is in possession of a drug of dependence of a trafficfillable quantity, “the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence”. Section 71AC then criminalises drug trafficking, providing that a person who trafficks in a drug of dependence is guilty of an offence punishable by up to 15 years imprisonment. Under s 70, “traffick” includes to “have in possession for sale”. Accordingly, if a person fails to satisfy a court that he or she was not in possession under s 5, there is prima facie

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5 *Mociclovic* [2010] VSCA 50 at [16]-[22].
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evidence of drug trafficking under s 73(2), for which the person will be guilty of a criminal offence under s 71AC. Secondly, a person may be exposed to a conviction of possession of a drug of dependence. Under s 73(1), a person who has "in his possession a drug of dependence is guilty of an indictable offence" which is punishable by up to five years imprisonment and a fine.

Drugs of dependence of a trafficcable quantity were found in an apartment owned and occupied by Vera Momcilovic. Momcilovic shared this apartment with her partner, Velimir Markovski, who himself owned another apartment in the same building. Momcilovic claimed that she had no knowledge of the drugs in her apartment, and Markovski admitted that the drugs were in his possession for the purpose of drug trafficking. Nevertheless, Momcilovic was deemed to be in possession of the drugs under s 5 and charged under s 71AC. Although Momcilovic led some evidence to suggest that she was not in possession of the drugs in her apartment, the legal onus to disprove possession on the balance of probabilities was not discharged and Momcilovic was convicted with one count of trafficking in a drug of dependence.

The Momcilovic Court had to consider whether the reverse legal burden in s 5 imposed an unjustifiable limitation on Momcilovic's right to the presumption of innocence under s 25(1) of the Charter. If it did, it then had to consider whether the rights-incompatibility could be remedied through interpretation under s 32(1), which provides that "[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights". It was argued by three of the four parties, and the amicus curiae, that s 5 should be interpreted under s 32(1) as imposing only an evidentiary onus on the accused to ensure rights-compatibility. An evidentiary burden of proof only requires a person to adduce evidence that the person was not in possession of the drug, at which point the onus shifts back to the prosecution to prove beyond reasonable doubt that the person was in possession of the drug. If such an interpretation was not "possible" and not "consistent[] with [statutory] purpose" under s 32(1), the Momcilovic Court had to consider whether to issue a declaration of inconsistent interpretation under s 36(2) of the Charter.

The choices

The strength of s 32(1)?

One issue to be clarified was the strength of the s 32(1) interpretation obligation. The text of s 32(1) was modelled on s 3(1) of the Human Rights Act 1998 (UK) (UKHRA), leading to much speculation about whether the s 32(1) interpretation power was equally as "radical" as the s 3(1) power under the British jurisprudence. Section 3(1) provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". The similarity between s 32(1) and s 3(1) is striking, with the only relevant difference being that s 32(1) adds the words "consistently with their purpose". By way of contrast, s 6 of the New Zealand Bill of Rights Act 1990 (NZ) (NZBORA) reads "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that

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6 The Victorian Equal Opportunity and Human Rights Commission and the Human Rights Law Resource Centre argued that the latter could be achieved by "reading in" the evidential burden, such that s 5 ought to read "unless the person satisfies the court that there is some evidence to the contrary": Momcilovic [2010] VSCA 50 at [40]. The Attorney-General argued that the latter could be achieved by simply interpreting the phrase "satisfies the court to the contrary" as legally meaning that only an evidentiary burden was imposed. That is, the Attorney-General did not think the Momcilovic Court had to go as far as "reading in" to "save" the provision from being an unjustified limitation on rights (at [42]).

7 Momcilovic may have discharged an evidentiary burden of proof with the evidence that she led.


10 New Zealand Bill of Rights Act 1990 (NZ) (NZBORA).
meaning shall be preferred to any other meaning”. Whether or not s 6 and s 3(1) achieve the same outcome is highly contested;11 regardless, s 32(1) is clearly modelled on s 3(1) by way of comparison to s 6. The parallels between the Charter and the UKHRA continue, with the entire structure of the mechanisms for enforcing rights, both in relation to legislation and the actions of public authorities, being similar.12

A thorough analysis of the British jurisprudence is beyond the scope of this article and has been considered elsewhere.13 For the purposes of discussion, the British jurisprudence is of three categories. The earlier case of R v A14 is considered the “high water mark”15 for s 3(1),16 when a non-discretionary general prohibition on the admission of prior sexual history evidence in a rape trial was interpreted under s 3(1) to allow discretionary exceptions.17 One commentator considered that Lord Steyn’s judgment signalled “that the interpretative obligation is so powerful that [the judicial] need scarcely ever resort to s 4 declarations of incompatibility”,18 suggesting that “interpretation is more in the nature of a ‘delete-all-and-replace’ amendment”.19

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12 The coupling of interpretation with non-enforceable declaration is the same in both instruments (cf Charter, ss 32 and 36 with UKHRA, ss 3 and 4); the obligations imposed on public authorities are similar under both instruments (cf Charter, s 38 and UKHRA, s 6).
14 R v A (No 2) [2002] 1 AC 45 (R v A).
16 In R v A [2002] 1 AC 45, Lord Steyn established some general principles in relation to s 3(1) interpretation. His Lordship confirmed that s 3 required a “contextual and purposive interpretation” and that “it will be sometimes necessary to adopt an interpretation which linguistically may appear strained” (at [44]). His Lordship held that s 3 empowers judges to read down express legislative provisions or read in words so as to achieve compatibility, provided the essence of the legislative intention was still viable (at [44]). Judges could go so far as to the “subordination of the niceties of the language of the section” (at [45]). His Lordship justified this interpretative approach by reference to the parliamentary intention in enacting the UKHRA: Parliament clearly intended that a declaration be “a measure of last resort”, with “a clear limitation on Convention rights [to be] stated in terms” (at [44]) (emphasis in original). Nevertheless, Lord Nicholls qualified any doubts about the breadth of Lord Steyn’s comments in Re S when Lord Nicholls expressly stated that “Lord Steyn’s observations in R v A ... are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise”: Re S (Minors) (Care Order: Implementation of Care Plan) [2002] 2 AC 291 at [40] (Re S).
17 This case addressed the admissibility of evidence in a rape trial. Section 41 of the Youth Justice and Criminal Evidence Act 1999 (UK) prohibited the leading of prior sexual history evidence, without the leave of the court. Accordingly, there was a general prohibition with some narrowly defined exceptions, notably the court could grant leave to lead evidence where the sexual behaviour was contemporaneous to the alleged rape (s 41(3)(b)) or the sexual behaviour is similar to past sexual behaviour (s 41(3)(c)). The House of Lords held that the provision unjustifiably limited the defendant’s right to a fair trial under Art 6 of the European Convention on Human Rights (ECHR) (the common name for the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953)) – although the legislative objective was beyond reproach, the legislative means were excessive. The provision was saved through s 32 “possible” interpretation, with the House of Lords interpreting the provision as being “subject to the implied provision that evidence or questioning which is required to ensure a fair trial … should not be treated as inadmissible” (at [45]). In particular, s 41(3)(b) was interpreted so as to admit evidence of contemporaneous sexual behaviour, only if it was truly contemporaneous to the alleged rape; and s 41(3)(c) was interpreted so as to admit evidence of similar past sexual behaviour, only if it was so relevant to the issue of consent, that to exclude it would endanger the fairness of the trial.
18 Section 4(2) of the UKHRA is the equivalent to s 36(2) of the Charter.
19 Nicoll, n 9 at 442 and 443 respectively. Starmer describes Lord Steyn’s decision in R v A as the “boldest exposition”: Starmer, n 9 at 16. See also Lord Irvine, n 9 at 320. For a not so radical take on R v A, see Kavanagh, n 9.
The middle ground is represented by Ghaidan. In Ghaidan, the heterosexual definition of “spouse” under the Rent Act 1977 (UK) was found to violate the Art 8 right to home when read with the Art 14 right to non-discrimination. The House of Lords “saved” the rights-incompatible provision via s 3(1) by reinterpreting the words “living with the statutory tenant as his or her wife or husband” to mean “living with the statutory tenant as if they were his wife or husband”. Although Ghaidan is considered a retreat from R v A, its approach to s 3(1) is still considered “radical” because of Lord Nicholls obiter comments about the rights-compatible purposes of s 3(1) potentially being capable of overriding rights-incompatible purposes of an impugned law:

[The interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear ... Section 3 may require the court to depart from ... the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires the court to depart from the intention of the enacting Parliament. The answer ... depends upon the intention reasonably to be attributed to the Parliament in enacting section 3.]

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

Focusing on departures from parliamentary intention, Ghaidan, and for that matter Sheldrake, do not state that judges must depart from the legislative intention of Parliament. These cases indicate that judges may depart from legislative intention, but not where to do so would undermine the fundamental features of legislation, would be incompatible with the underlying thrust of legislation, or would go against the grain of legislation. The judiciary gets close to the line of improper judicial

21 Rent Act 1977 (UK), Sch 1, para 2(2).
22 ECHEL AS 8 and 14.
23 Ghaidan [2004] 2 AC 557 at [35]-[36] (Lord Nicholls), [51] (Lord Steyn), [129] (Lord Rodger), [144], [145] (Baroness Hale), Lord Millet dissented. His Lordship agreed that there was a violation of the rights (at [53]), and agreed with the general approach to s 3(1) interpretation (at [69]), but did not agree that the particular s 3(1) interpretation that was necessary to save the provision was “possible” on the facts: see esp at [51], [78], [81], [82], [96], [99], [101].
24 And the cases leading up to Ghaidan, eg R v Lambert [2002] 2 AC 545 (Lambert); Re S [2002] 2 AC 291; R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837 (Anderson); Bellinger v Bellinger [2003] 2 AC 467.
26 Ghaidan [2004] 2 AC 557 at [30] (Lord Nicholls). Prior to this statement, in contemplating the reach of s 3, Lord Nicholls admits that “section 3 itself is not free from ambiguity” (at [27]) because of the word “possible”. However, his Lordship noted that at 3 and 4 read together make one matter clear: “Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant” (at [27]). Given the ambiguity in s 3 itself, Lord Nicholls pondered by what standard or criterion “possibility” is to be adjudged, concluding that “[a] comprehensive answer to this question is proving elusive” (at [27]).
27 Ghaidan [2004] 2 AC 557 at [32].
28 Ghaidan [2004] 2 AC 557 at [33]. Lord Rodger agreed with these propositions (at [121], [124]), as did Lord Millet (at [67]). Lord Nicholls concluded on the facts (at [35]): “In some cases difficult problems may arise. No difficulty arises in the present case.” There is no doubt that s 3 can be applied to Sch 1, paa 2(2) of the Rent Act so it is read and given effect “as though the survivor of such a homosexual couple were the surviving spouse of the original tenant.”
29 Sheldrake v Director of Public Prosecutions [2005] 1 AC 264 at [38] (Sheldrake).
Debeljak

interpretation (read judicial legislation) only where a s 3(1) reinterpretation is compatible with the fundamental features, the underlying thrust and the grain, but is incompatible with the legislative intent. But it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation would clash with parliamentary intention; that is, it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation were compatible with an interpretation, but the interpretation was incompatible with the parliamentary intention.30 In effect, these obiter comments place boundaries around the judicial interpretation power, and indicate that s 3(1) does not sanction the exercise of non-judicial power — being acts of judicial legislation — by the judiciary.31

Moreover, as numerous Law Lords have indicated,32 more instructive than the obiter comments of judges is analysis of the ratio of the cases. The ratio of Ghaidan was grounded in a s 3(1) reinterpretation that was expressly demonstrated to be consistent with the purposes of the statutory provision in question.33 Further, it is questionable whether the reinterpretation of the legislation in Ghaidan was that “radical”. In the pre-UUKRA equivalent case of Fitzpatrick,34 Ward LJ “was able to interpret the words ‘living together as his or her husband’ to include same-sex couples”.35 As Kavanagh notes, this demonstrates that the Ghaidan reinterpretation “was possible using traditional methods of statutory interpretation even before the UKHRA came into force”.36 Unfortunately, these points of moderation are rarely acknowledged in the debate.

The “narrowest”37 interpretation of s 3(1) was proposed by Lord Hoffman in Wilkinson.38 Lord Hoffman describes s 3(1) as “deem[ing] the Convention to form a significant part of the

30 See further Kavanagh, n 9.
31 See further Debeljak J, Submission to the National Consultation on Human Rights (15 June 2009) pp 51-57.
32 Indeed, as Lord Bingham states in Sheildake [2005] 1 AC 264 at [28], after giving a similar exposition on s 3 to that of Lord Nicholls: “All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple text enacted in the Act: ‘so far as it is possible to do so.” Similar sentiment was earlier expressed by Woolf CJ in Popular Housing & Regeneration Community Association Ltd v Donoghue [2002] QB 48 at [176] (Donoghue), when he acknowledged that “it would be a most difficult task which courts face in distinguishing between legislation and interpretation”, with the “practical experience of seeking to apply section 3 ... provid[ing] the best guide”. The lesson from these statements is not to angst too much in the abstract about the meaning of s 32(1) of the Charter, and to simply understand it through its applications in particular cases.
33 See Ghaidan [2004] 2 AC 557 at [35], where Lord Nicholls explicitly bases his s 3(1) reinterpretation on the social policy underlying the impugned statutory provision:

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

34 Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 23 (Fitzpatrick).
36 Kavanagh, n 35. See further Debeljak, n 31, pp 51-57.

Lord Hoffman’s articulation of a narrower and more text-bound rationale for disposing of Ghaidan does not necessarily entail that he endorses “a rather less bold conception of the role of s 3(1)” as a general matter. The most important premise in Ghaidan which led the majority to the “inescapable” conclusion that the language of the statute was not, in itself, determinative of the interpretative obligation under s 3(1), was that it allowed the court to depart from unambiguous statutory meaning. This premise is shared by Lord Hoffman in Wilkinson. As Lord Nicholls pointed out in Ghaidan, once this foundational point is accepted, it follows that some departure from, and modification of, statutory terms must be possible under s 3(1). Moreover, Lord Hoffman acknowledged that s 3(1)
background against which all statutes ... had to be interpreted, drawing an analogy with the principle of legality. His Lordship introduces an element of reasonableness, describing interpretation under s 3(1) as "the ascertainment of what, taking into account the presumption created by s 3, Parliament would reasonably be understood to have meant by using the actual language of the statute." Although the reasoning of Lord Hoffman was accepted by the other Law Lords in that case, Wilkinson has failed to materialise as the leading case on s 3(1); rather, Ghaidan remains the case relied upon.

The methodology

Another issue to be confirmed in the case was the appropriate methodology to be used in assessing whether a law unjustifiably limited a right and the Charter's response to such violation. The word "confirm" is used because under the two most relevant comparative statutory rights instruments – the UKHRA43 and the NZBORA45 – the methodology adopted is similar and, by and large, settled. This method gives the interpretation power a remedial reach and focuses on two classic "rights questions" and two "Charter questions", and can be summarised in Charter language as follows (Preferred Method):

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

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

The Conclusion ...

Section 32(1): If the s 32(1) rights-compatible interpretation is "possible" and "consistent[] with [statutory] purpose", this is a complete remedy to the human rights issue.

interpretation can legitimately depart from the legislative purpose behind the statutory provision under scrutiny ...
So it is far from clear that Wilkinson adopts a weaker or narrower conception of s 3(1) as a general matter.

37 Wilkinson (2005) UKHL 30 at [17].
39 Wilkinson (2005) UKHL 30 at [1] (Lord Nicholls); [32] (Lord Hope); [34] (Lord Scott); [43] (Lord Brown).
40 See, eg Reasen J, Grosz S, Hickman T, Singh R and Palmer S, Human Rights: Judicial Protection in the United Kingdom (Sweet & Maxwell, London, 2008) at 5-64-5-127; Kavanagh, n 37, p 28; "In what is now the leading case on s 3(1), Ghaidan;"
41 This article critiques the Mricolicov decision as against British and New Zealand (NZ) authority. It has not been considered necessary to address any arguments based on the Basic Law of Hong Kong because under this instrument the alternative to a remedial reinterpretation is the invalidity of a rights-incompatible law. In the context of considering the legal methodology under a legislative instrument that contains a remedial reinterpretation provision, coupled with the power to issue declarations of inconsistent interpretation, and which establishes a dialogue about human rights, the Basic Law of Hong Kong is of limited assistance.
42 The methodology under the UKHRA was first outlined in Donoghue (2002) QB 48 at [75], and has been approved and followed as the preferred method in later cases, such as R v A [2002] 1 AC 45 at [58]; International Transport Roth GmbH v Secretary of State for the Home Department (2003) QB 728 at [149] (Roth); Ghaidan [2004] 2 AC 557 at [24].
43 The current methodology under the NZBORA was outlined by the majority of judges in R v Hansen [2007] 3 NZLR 1 (Hansen). This method is in contradiction to an earlier method proposed in Morwen v Film & Literature Board of Review (2000) 2 NZLR 9.
44 Debeka, "Parliamentary Sovereignty and Dialogue", n 13 at 28, 32.
Section 36(2): If the s 32(1) rights-compatible interpretation is not “possible” and not “consistent[] with [statutory] purpose”, the only option is a non-enforceable declaration of inconsistent interpretation under s 36(2).

The Momcilovic Court had to decide between accepting the weight of this earlier authority, or rejecting it and creating a unique method. The Momcilovic Court did the latter, as will be discussed below, seeking some support for its decision on a sole dissenting opinion in respect of the NZBORA. By rejecting the Preferred Method, the Momcilovic Court undermined the remedial reach of s 32(1).

The Momcilovic Court decision

The issues of whether s 32(1) of the Charter replicated s 3(1) of the UKHRA and the appropriate methodology had already been considered by three Supreme Court justices. In R v E, Nettle JA followed the Preferred Method and used s 32(1) to achieve a rights-compatible interpretation of s 11 of the Serious Sex Offenders Monitoring Act 2005 (Vic), but did not consider it necessary to determine whether s 32(1) replicated Ghaidan to dispose of the case. Similarly, in Das, Warren CJ in essence followed the Preferred Method and used s 32(1) to achieve a rights-compatible interpretation of s 39 of the Major Crime (Investigative Powers) Act 2004 (Vic), but did not need to determine the applicability of Ghaidan to dispose of the case. In Krakke, Bell J adopted the Preferred Method and held that s 32(1) codified s 3(1) as interpreted in Ghaidan.

The Momcilovic Court eschewed this earlier Victorian authority, and the R v A and Ghaidan approaches, and chose to align its judgment most closely with the Wilkinson approach. The Momcilovic Court unanimously held that s 32(1) “does not create a ‘special’ rule of interpretation [in the Ghaidan sense], but rather forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision in question”. It then outlined a three-step methodology for assessing whether a provision infringes a Charter right, as follows (Momcilovic Method):

1. Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the Interpretation of Legislation Act 1994 (Vic).

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

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

47 See n 57.
48 See the judgment of Elias CJ in Hansen (2007) 3 NZLR 1.
51 Re Application under the Major Crime (Investigative Powers) Act 2004 (2009) 24 VR 415 at [50]-[53] (Das). Warren CJ refers to Nettle JA’s endorsement of the approach of Mason NPI in HKSAR v Lam Kwong Wui [2006] HKCPR 84 and applies it; see Das (2009) 24 VR 415 at [53]. Nettle JA indicates that the Hong Kong approach is the same as the UKHRA approach under Donoghue, and expressly follows the Donoghue approach; see R v E (2008) 21 VR 526 at [116]. This is why Warren CJ’s approach is described as essentially following the UKHRA approach.
52 Das (2009) 24 VR 415 at [172]-[175].
53 Krakke v Mental Health Review Board (2009) 29 VAR 1 at [52]-[65] (Krakke).
54 Krakke (2009) 29 VAR 1 at [65], [214].
55 Momcilovic [2010] VSCA 50 at [56]. For a critique of the Momcilovic Court’s reliance on Wilkinson, see below.
56 Momcilovic [2010] VSCA 50 at [35]. This is in contrast to Lord Walker’s opinion that “[t]he words ‘consistently with their purpose’ do not occur in s 3 of the HRA but they have been read in as a matter of interpretation”: Walker R, “A United Kingdom Perspective on Human Rights Judging” (Paper presented at “Counting Change: Our Evolving Court”, Supreme Court of Victoria 2007 Judges’ Conference, Melbourne, 9-10 August 2007) p 4.
57 Momcilovic [2010] VSCA 50 at [35].
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In applying this methodology, the Mocnicovic Court held that, first, the proper meaning of s 5 is the imposition of a reverse legal onus, and that it was not possible consistently with its purpose to construe s 5 as imposing an evidential onus. Secondly, it held “that the combined effect of s 5 and s 71AC is to limit the presumption of innocence”. Thirdly, it held that the limitation was not reasonable or demonstrably justified under s 7(2). Although a rights-compatible interpretation of s 5 was not available, s 5 remained valid and enforceable under s 32(3) of the Charter. The only remedy available under the Mocnicovic Method was the making of a declaration under s 36(2), which the Mocnicovic Court did issue.

In its effort to avoid the assumed “judicial activism” associated with s 32(1) replicating s 3(1) as interpreted by Ghaidan, the Mocnicovic Court rejected a strong remedial methodology as well. The

58 It should be noted that the Mocnicovic Court’s language changes between its statement of the general rule under step 2 (“breach”) and its application of the rule under step 2 (“limit”). The latter is the correct language, whereas the former demonstrates a fundamental misunderstanding about the operation of rights.

59 Mocnicovic [2010] VSCA 50 at [35]. The Mocnicovic Court held that “the purpose of s 5 is unambiguously clear from the statutory language”, the purpose being the imposition of a reverse legal onus, and that “[s] 32(1) prohibits any interpretation of the provision which would be inconsistent with the purpose” (at [113]). “It follows that it is not possible to interpret s 5 of the DPCS Act [Drugs, Poisons and Controlled Substances Act 1981 (Vic)] other than as imposing a legal onus of proof” (at [119]). This adherence to a traditional interpretation is hardly the renewal of the statute book envisaged under the Charter.

60 Mocnicovic [2010] VSCA 50 at [123]. The Mocnicovic Court stated that the provisions are (at [135]):

a substantial infringement of the presumption of innocence, in our view. It means that – subject always to the reverse onus – proof merely of occupation of relevant premises operates (by means of s 5 and s 73(2)) to establish a prima facie case of trafficking against an accused … [A] person in the position of the applicant comes before the jury not as a person presumed to be innocent but as a person presumed to have a case to answer.

61 The Mocnicovic Court held that the arguments advanced to justify the reverse onus in connection to the trafficking offence did not “come close to justifying the infringement” and that the reverse onus in connection to the possession offence was “not so much an infringement of the presumption of innocence as a wholesale subversion of it”: Mocnicovic [2010] VSCA 50 at [151] and [152] respectively. “In our view, there is no reasonable justification, let alone any ‘demonstrable’ justification, for reversing the onus of proof in connection with the possession offence” (at [152]).

62 Mocnicovic [2010] VSCA 50 at [154].

63 Mocnicovic [2010] VSCA 50 at [155]-[157]. Lambert [2002] 2 AC 545 is the equivalent British case. The Misuse of Drugs Act 1971 (UK) contained a reverse legal burden of proof. Under s 28, in order to establish a defence, the accused had to “prove” that he did not know of some fact – the fact here being that alleged by the prosecution and being a necessary element of the offence. The defence, according to the Mocnicovic Court, is an element of the offence, and the accused argued that the burden for elements of an offence should be on the Crown to prove it beyond reasonable doubt, rather than on the defendant to disprove it on the balance of probabilities as per s 28. A majority of the House of Lords held that the reverse legal burden of proof under s 28 violated the presumption of innocence under Art 6(2) of the ECHR. Although the reverse legal burden was objectively justified (that is, the alleviation of difficulties faced by police and prosecuting authorities in prosecuting drug smugglers, couriers and dealers), it was a disproportionate response: “A transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence that the creation of an evidential burden on the accused”: at [37] (Lord Steyn); see also at [16]-[17] (Lord Slynn), [35]-[41] (Lord Steyn), [77]-[78] (Lord Hope), [18]-[18] (Lord Clyde). The majority was, however, able to “save” the provision through a s 3(1) “reinterpretation”. The majority retained the original words used by the legislator, but altered the meaning of the words: at [17] (Lord Slynn), [142] (Lord Steyn), [94] (Lord Hope), [157] (Lord Clyde) (Lord Hutton dissented at [198]). Rather than reading the legislative words as imposing a legal burden of proof on the defendant in violation of Art 6(2), the majority read the legislative words as imposing only an evidential burden of proof on the defendant which the prosecution had the legal burden of rebutting: at [17] (Lord Slynn), [42] (Lord Steyn), [84], [81], [93]-[94] (Lord Hope), [157] (Lord Clyde). Note that Lambert did not get the benefit of this interpretation, however, because the majority held that the relevant provisions of the UKHRA had not come into operation at the time of this trial: at [6]-[14] (Lord Slynn), [95]-[117] (Lord Hope), [135]-[148] (Lord Clyde), [176] (Lord Hutton). The solution in Lambert was first suggested, in obiter, in R v Director of Public Prosecutions; Ex parte Keblene [2000] 2 AC 326 (Keblene). Lambert has been followed in R v Forsyth [2001] EWCA Crim 2926 (Forsyth) and R v Lang [2002] [2002] EWCA Crim 959 at [23]-[26] (Daniel), to the effect that reverse legal burdens are not automatically incompatible; rather the imposition of a reverse legal burden must be justified and its imposition shown to be necessary.

64 Although the issues of s 32(1)/s 3(1) replication and methodology are related, the methodology is not dictated by the strength of s 32(1). Indeed, throughout the British jurisprudence, and in the decisions of Warren CJ, Nettle J and Bell J, the methodology did not dictate the strength of the remedial force of any of s 3(1) and 32(1) respectively.
result is a very narrow construction of s 32(1) and a rights-reductionist methodology which, in turn, deliver a much weaker rights instrument than that intended by Parliament. This article will demonstrate that in avoiding Ghaidan and rejecting a strong remedial methodology, it is the Mencilovic Court that is arguably “judicially sovereign” in handing back power that Parliament intended it to have.

**THE CRITIQUE: WAS S 32(1) INTENDED TO REPLICATE S 3(1) OF THE UKHRA?**

Being a test case, the Mencilovic Court sought to establish a method for the statute-related Charter mechanisms. As part of this, it had to consider whether s 32(1) established a “special” rule of statutory interpretation similar to s 3(1) of the UKHRA. The Mencilovic Court held that “the Victorian Parliament did not intend s 32(1) to be a ‘special’ rule of interpretation in the Ghaidan sense” such that s 32(1) was not intended to replicate s 3(1). This section of the article will analyse the reasoning of the Mencilovic Court. Some preliminary remarks on the Mencilovic Court’s discussion of the British jurisprudence, particularly the Wilkinson case, will be followed by a detailed critique of its reasoning on the s 32(1)/s 3(1) replication issue. The structure of this section follows the structure of the Mencilovic Court’s judgment.

**Reliance on Wilkinson**

The Mencilovic Court began its substantive analysis of the issues with a review of the comparative authority. In terms of the British jurisprudence, the Mencilovic Court chose to align itself most closely with the Wilkinson case. In particular, it relies on the explicit parallel drawn between the principle of legality and s 3(1) in Wilkinson to support its conclusions about s 32(1).

This reliance on Wilkinson must be examined. First, that Wilkinson narrows Ghaidan in terms of the judicial power to modify statutory terms and to depart from the purpose of a statutory provision is convincingly disputed by Kavanagh:

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

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65 The term “rights-reductionist” is used because the Mencilovic method decreases the remedial reach of the Charter, particularly the remedial reach of the judiciary. Reducing the remedies available to judges will reduce the protection of rights within Victoria because, by design, the judiciary is considered more likely to protect the rights of the vulnerable, the minority and the unpopular, than the democratically motivated, executive-legislator and Parliament. To illustrate the point, one need look no further than the RJE decision, which was rights-protective of serious sex offenders (RJE [2008] 21 VR 526), and Parliament’s swift response to it, which reinstated the rights-incompatible meaning of the legislative provision in issue (Sex Offenders Monitoring Amendment Act 2009 (Vic)).

66 The Charter establishes two mechanisms of “enforcement”. The first is the statute related mechanisms under Div 3, Pt 3 of the Charter. The second is the obligations imposed on public authorities under Div 4, Pt 3 of the Charter.

67 The Mencilovic Court referred to interpretation under s 3(1) of the UKHRA as “a ‘special’ or extraordinary rule of interpretation” (Mencilovic [2010] VSCA 50 at [37]), following the lead of Bell J in Kracke (2009) 29 VAR 1 at [215]. The British jurisprudence does not use this terminology in relation to s 3 of the UKHRA.

68 Mencilovic [2010] VSCA 50 at [69].


70 Wilkinson [2005] UKHL 30 at [56]-[57].

71 Wilkinson [2005] UKHL 30 at [56].
Who is sovereign now? The Momcilovic Court hands back power over human rights

So it is far from clear that Wilkinson adopts a weaker or narrower conception of s 3(1) as a general matter.72

Secondly, the reasons the Momcilovic Court provides for preferring Wilkinson must be examined. The Momcilovic Court relies on two sources to bolster its assertion that Wilkinson’s link to the principle of legality ought to be preferred to Ghaidan and Sheldrake. The first source is obiter comments of Tipping J in the New Zealand (NZ) case of Hansen.73 The NZ judge’s obiter is purely speculation about the state of British jurisprudence. More problematically, Tipping J’s obiter comment focuses on where Wilkinson draws the line between permissible interpretation and impermissible legislation under s 3(1), not on whether Wilkinson sanctions a radical rethink of the legal method under s 3(1) – the latter being the purpose for which the Momcilovic Court seeks to rely on both Wilkinson and Tipping J.74

The second source relied upon is academic commentary. The Momcilovic Court refers to a NZ commentator, Claudia Geiringer, who speculates that Wilkinson may reflect “an implicit repudiation“ of Ghaidan.75 The “implicit repudiation of the Ghaidan approach” is based on Lord Nicholls’ concurrence with Lord Hoffman in Wilkinson which, added to Lord Steyn’s retirement, leads Geiringer to suggest this “might well tempt one to conclude that the strong interpretative approach in Ghaidan has had its day. On the other hand, the intuition that s 3(1) is an obligation of unprecedented character and far-reaching implication does appear to be shared by a number of Law Lords.”76 Geiringer herself professes that these are very tentative conclusions.

The Momcilovic Court’s reliance on the conclusions of Geiringer, which were not raised in written or oral argument, is problematic. Wilkinson has not changed the British approach to s 3(1) or to the legal methodology associated with s 3(1) – indeed Geiringer acknowledges that the potency of s 3(1) interpretation propounded in Ghaidan continues post-Ghaidan.77 Remarkably, the Momcilovic Court concludes that “[o]ur researches have revealed no subsequent consideration by the English courts of the apparent change of approach in Wilkinson.“78 The logical conclusion to draw from this is that Wilkinson did not change the law in Britain.

The language of s 32(1)

Turning to the s 32(1)/s 3(1) replication issue, the Momcilovic Court began by reviewing Kracke.79 In Kracke, Bell J held that s 32(1) and s 3(1) “express the same special interpretative obligation and are of equal force and effect”.80 His Honour held that the additional phrase of “consistently with their purpose” contained in s 32(1) “was intended to put into s 32(1) the approach to s 3(1) adopted by the House of Lords in Ghaidan v Godin-Mendoza (which had been decided before the Charter was

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72 Kavanagh, n 37, pp 94-95.
74 Momcilovic [2010] VSCA 50 at [57].
75 Geiringer, n 11 at 82, as cited in Momcilovic [2010] VSCA 50 at [57].
76 Geiringer, n 11 at 82.
77 Geiringer, n 11 at 80.
78 Momcilovic [2010] VSCA 50 at [57].
80 Kracke (2009) 29 VAR 1 at [215].
enacted). His Honour approved statements from Ghaidan and Sheldrake, suggesting that s 32(1) was a "very strong and far-reaching" obligation and may even require "the court to depart from the legislative intention of Parliament." 32

The Moncivage Court also referred to the report of the Victorian Human Rights Consultation Committee (Victorian Committee). 33 The Victorian Committee recommended the insertion of "consistently with their purpose" to the s 3(1) formula, 34 explaining that the additional words would provide the courts:

with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question. This is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured. In the United Kingdom House of Lords decision in Ghaidan v Godin-Mendoza, Lord Nicholls of Birkenhead said: "the meaning imported by application of s 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must ... go with the grain of the legislation." Or as Lord Rodger of Earlsferry stated: "It does not allow the Courts to change the substance of the provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen." 35

The Moncivage Court disagreed with Bell J's conclusions. It was of the opinion that "consistently with their purpose" were "words of limitation" and:

stamped s 32(1) with quite a different character from that of s 3(1) of the UKHRA, which was said in Ghaidan to require the court where necessary to "depart from the intention of the Parliament which enacted the legislation." In our opinion the inclusion of the purpose requirement made it unambiguously clear that nothing in s 32(1) justified, let alone required, an interpretation of a statutory provision which overrode the intention of the enacting Parliament. 36

One must query the Moncivage Court's understanding that Ghaidan "required" the court to depart from parliamentary intention. Lord Nicholls at most indicated that that s 3(1) "may require" 37 departure from parliamentary intent, and his Lordship's comments must be understood in the broader context as discussed above. Unfortunately, the Moncivage Court falls into the trap that Kavanagh warns against, and fails to appreciate the "centrality" of "express terms and legislative intent" 38 evident in Ghaidan, as follows:

Unfortunately, some of the dicta in Ghaidan have given credence to the view that Ghaidan presents a "dissmissive view as to the centrality of the statutory test in evaluating whether a Convention-compatible interpretation is possible" and that their Lordships rejected "both a focus on text and a focus on [legislative] purpose" as possible constraints on the application of s 3(1). These natural misunderstandings are due to the unfortunately over-stated judicial dicta in Ghaidan. The valid point which the Lordships sought to make in Ghaidan was that statutory language alone was not determinative or

81 Kracke (2009) 29 VAR 1 at [214] (citations omitted). Bell J opined that (at [216]): [the] boundaries identified in Ghaidan v Godin-Mendoza, on which the requirement [in s 32(1)] is based, provide an adequate balance between giving the special interpretative obligation full force and proper scope on the one hand and safeguarding against its impermissible use on the other. Adopting narrower boundaries would weaken the operation of s 32(1) in a way that was not intended.

82 Kracke (2009) 29 VAR 1 at [218].


84 Note, slightly different language is used to express this concept in the body of the report and the draft Charter attached to the report (Victorian Committee, n 83, p 82) and the Draft Charter of Human Rights and Responsibilities, s 32 (Victorian Committee, n 83, p 191). These differences in language are of no consequence to this analysis, being grammatical changes due to the way in which the applicable law was described; that is, the phrase "all statutory provisions" was ultimately enacted rather than the suggested "Victorian law."

85 Victorian Committee, n 83, pp 82-83.


88 Kavanagh, n 57, p 59.
conclusive on the question of whether they should adopt a s 3(1) interpretation, not that it was of no significance whatsoever. If anything, Ghaidan endorses the importance and centrality of going with the grain of the impugned statute, including its express terms and legislative intent.89

In any event, in coming to its conclusion, the Memonovic Court relied on a number of arguments, which require close critique. First, it focused on the distinction between the purpose of a particular statutory provision and the purpose of legislation as a whole, highlighting that s 32(1) embodied the former, while s 35 of the Interpretation of Legislation Act 1984 (Vic) (ILA) embodied the latter. The Memonovic Court held that “this must be taken to have been a deliberate choice of language.”90 It is not clear how this “deliberate choice of language” allowed the Memonovic Court to differentiate between s 32(1) and s 3(1). How does a difference between s 32(1) and the ILA influence a decision on whether s 32(1) differs from s 3(1)?91 Moreover, how can the purpose of a particular provision be determined without reference to the purpose of the statute as a whole?92 Traditional rules of statutory interpretation require provisions to be interpreted according to their terms and by reference to statutory purpose and context.93 The Memonovic Court’s focus on the purposes of the provision does not conform to this; indeed, a requirement to focus only on the purpose of the provision being interpreted itself departs from traditional interpretation.94 Furthermore, “statutory provision” under the Charter means “an Act ... or a provision of an Act”.95 It is not clear that the s 3(1) reference to “consistently with their purpose” is exclusively to the purpose of the very statutory provision being interpreted and not the Act as a whole. The Explanatory Memorandum refers both to the purpose of the statute and the purpose of the provision. Thus, both the text and the Explanatory Memorandum suggest that the Memonovic Court’s singular focus on the purpose of the provision is not warranted.96

89 Kavanagh, n 37, p 59 (citations omitted) (emphasis in original).
90 Memonovic [2010] VSCA 50 at [76]. It must be noted that the Memonovic Court went on to hold that this distinction had no bearing on the case at hand (at [76], [114]). Given that the Interpretation of Legislation Act 1984 (Vic) (ILA) applies unless the contrary intention appears in the legislation being interpreted, the “deliberate choice of language” may have been Parliament’s attempt to manifest its intention to exclude the operation of the ILA: see Pearce DC and Geddes R, Statutory Interpretation in Australia (LexisNexis, Australia, 2006) at [6.1].
91 The fact that Ghaidan is referring to statutory purpose in its broad sense, and the Memonovic Court considers s 32(1) to be referring to the statutory purpose of a particular provision, does not resolve the issue. For the sake of argument, assuming that the Memonovic Court is correct, a reasonable argument is that s 32(1) was intended to embody the obiter notion in Ghaidan that the overall statutory purpose may be overridden in favour of the UKHRA purposes, but that the specific statutory purpose of the provision must be adhered to (that is, in the unusual situation where the statutory purpose of a particular provision would be interpreted to be in opposition to the broader statutory purposes, rather than tempered by the broader statutory purposes).
92 Pearce and Geddes, n 90 at [2.5], [4.2], “When the purposive approach was applied, the purpose was usually deduced by looking at the statute as a whole” (at [2.5]). “[T]o read the section in isolation from the enactment which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context”: Mason J in K & S Lake City Freighters Pty Ltd v Gordon & Gutch Ltd (1985) 60 ALR 509 at 514, cited by Pearce and Geddes, at [4.2].
93 Pearce and Geddes, n 90 at [2.3]-[2.5], [2.8]-[2.9]. In Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ describe the common law rule as follows: “The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute, or the common or construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning” (at 384).
94 In Mills v Meeking (1990) 169 CLR 214 at 235, in the context of s 35(a) of the ILA, Dawson J describes the statutory rule of interpretation as follows:

The literal rule of construction, whatever the qualification with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act ... The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible to as a matter of construction to repair the defect, then this must be done.

95 Pearce and Geddes, citing Edwards v Attorney-General (2004) 60 NSWLR 667, note that “[i]n the interpretation of an Act a balance sometimes has to be struck between the purposes that are general and those that are specific to particular provision”: see n 90 at [2.11].
96 Charter, s 3.
97 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), pp 1 and 20 respectively.
Further, a focus on the purposes of the particular statutory provision in question does not necessarily differentiate s 32(1) from s 3(1) as interpreted in Ghaidan. The House of Lords in Ghaidan explicitly considered whether its “reinterpretation” of the heterosexual definition of statutory tenant to include cohabiting homosexual couples in para 2 of Sch 1 was “consistent[] with the social policy underlying paragraph 2”.79

Secondly, the Moncovic Court’s conclusion can be tested by considering an alternative approach to identifying statutory purpose under s 32(1), such as that suggested by Evans and Evans.80 Rather than identifying statutory purpose from the plain, natural and literal meaning of the legislation, Evans and Evans argue that the judiciary should look to the purpose, or the mischief, that the legislation sought to achieve when attributing statutory purpose.81 This approach has much to commend it, not least because it embodies the non-controversial purposive approach to interpretation.82 This approach is supported by Ghaidan83 which, in turn, was clearly before the Victorian Parliament when it enacted s 32(1).84 If one accepts that s 32(1) is intended to capture the ideas that flow from Ghaidan,85 “purpose” is to be identified at a high level of generality, with the words “consistently with their purpose” directed to the “mischief” of the statutory provision and the statute as a whole.

Indeed, in testing its conclusions, the Moncovic Court did consider whether its conclusions would be different if s 32(1) were accepted as a codification of Ghaidan. The Moncovic Court admits that s 5 could be interpreted as imposing an evidential onus if the reference to purpose was identified at the “underlying purpose” level of abstraction. However, it holds that the “statutory language would preclude such an interpretation”86 by reference to the ILA and the following passage of Dawson J in Mills v Meeking:

[If] the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not rewrite it, in the light of its purposes.

The ILA and Mills v Meeking may not be the appropriate guide to interpretation under the Charter. The Charter has changed the ground rules of statutory interpretation, so pre-Charter understandings of the ILA and the application of Mills v Meeking require reconsideration.

In any event, it is not clear why attaching a legal meaning to “the wording otherwise adopted by the draftsman”87 (that is, an evidential onus meaning rather than a legal onus meaning) is considered judicial rewriting, rather than an act of construction. In the British jurisprudence, to attach a different

79 Ghaidan [2004] 2 AC 557 at [33]. Lord Millett generally agreed with the majority of the court on the interpretation of s 3(1) but his Lordship disagreed on its application to the impugned legislation. In doing so, his Lordship considered the object of the specific statutory provision (at [78]): “both the language of paragraph 2(2) and its legislative history show that the essential feature of the relationship which Parliament had in contemplation was an open relationship between persons of the opposite sex.”
81 Evans and Evans, n 98 at [3,33].
82 See n 93.
83 Lord Nicholls opines that too much emphasis has been placed on the “language of a statute, as distinct from the concept expressed in the language” under s 3 analysis: Ghaidan [2004] 2 AC 557 at [31]; see also at [41] and [49] (Lord Steyn). This obsession with the form of words chosen by a draftsman is nonsensical “once it is accepted that s 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear” (at [31]). Indeed, Lord Nicholls describes the natural outcome of a linguistic obsession as making “the application of s 3 something of a semantic lottery” (at [31]). Similarly, Lord Steyn lamens the “excessive concentration on linguistic features” of legislation (at [41]).
84 Victorian Committee, n 83, pp 82-83; Explanatory Memorandum, n 96, p 23.
85 For example, going with the grain, not undermining the fundamental features: see discussion above.
legal meaning to the words used by Parliament is considered interpretation under s 3(1). In *Lambert*, the equivalent reverse onus provision case, the majority of the House of Lords retained the original words used by the legislator, but altered the meaning of the words. Rather than reading the legislative words "to prove" and "if he proves" as imposing a legal burden of proof on the defendant in violation of Art 6(2), the majority read the legislative words as imposing only an evidential burden of proof on the defendant which the prosecution had the legal burden of rebutting. The solution in *Lambert* was first suggested in obiter in *Kebeline*, and has been followed in *Forsyth* and in *Lang*. Another example of altering the legislative meaning of words is the case of *R v O’Brien*. To rely on the ILA and to fail to address *Lambert*, which is the equivalent reverse onus case from Britain, weakens the *Moscionie* Court's reasoning.

Moreover, it is within the range of "possible" that the words "unless the person satisfies the court to the contrary" under s 5 mean the imposition of an evidential onus. The concept of "possibility" is not a rigorous standard, and is less rigorous than a "reasonableness" standard. The difference between "possibility" and "reasonableness" was discussed in the British Parliament during debate on the Human Rights Bill. A proposed amendment to adopt the NZ "reasonable" interpretation approach was rejected by the British Parliament, with the difference between "reasonable" interpretations and "possible" interpretations being fully recognised and the latter preferred. This debate preceded the enactment of the Charter and the Victorian Parliament chose to model s 32(1) on s 3(1) of the UKHRA rather than s 6 of the NZBORA. Accordingly, the reasonableness of a s 32(1) interpretation has no place under the Charter, nor *Wilkinson* for that matter.

Thirdly, the *Moscionie* Court focused on the concept of "interpretation" embodied in s 32(1) to distinguish it from s 3(1). It notes that interpretation is "what courts have traditionally done", such that "it seems improbable that Parliament would have used the word 'interpret' in s 32(1) if it had intended to require courts to do something quite different". This does not withstand scrutiny. It is equally as "improbable" that Parliament would have chosen to so closely replicate s 3(1), including accepting the insertion of "consistently with their purpose" on the recommendation of the Victorian Committee that the phrase codified *Ghaidan*, if it had intended the courts to do something remarkably different. Had Parliament intended to enact a unique statutory rights instrument, surely parliamentary draftsperson and Parliament could have chosen language which clearly differentiated the Victorian obligation from the pre-existing British obligation and its jurisprudence. The lack of differentiation is strong evidence that Parliament intended to replicate s 3(1).

Moreover, the *Moscionie* Court's focus on "interpretation" per se is misleading. Section 32(1) establishes a task of interpretation, but this is no ordinary task of interpretation. Section 32(1) requires

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107 *Lambert* [2002] 2 AC 545 at [17] (Lord Slynn), [42] (Lord Steyn), [94] (Lord Hope), [157] (Lord Clyde). Lord Hutton dissented at [198].

108 *Lambert* [2002] 2 AC 545 at [17] (Lord Slynn), [42] (Lord Steyn), [84], [91], [93]-[94] (Lord Hope), [157] (Lord Clyde).

109 *Kebeline* [2000] 2 AC 326.

110 *Forsyth* [2001] EWCA Crim 2926; *Lang* [2002] EWCA Crim 298. For a discussion of other relevant cases, see Starmer, n 9 at 18.


112 See United Kingdom, House of Commons, Parliamentary Debates (3 June 1998) cols 421-423 (Mr Jack Straw). Mr Straw, the Home Secretary, stated "[i]f we used just the word 'reasonable', we would have created a subjective test. 'Possible' is different. It means, 'What is the possible interpretation? Let us look at this set of words and the possible interpretations'" (cols 422-423). This was confirmed in *R v A* [2002] 1 AC 45 at [44] (Lord Steyn) and *Ghaidan* [2004] 2 AC 557 at [44] (Lord Steyn).

113 *Moscionie* [2010] VSCA 50 at [77].

114 Section s 3(1) of the UKHRA uses the words "read and given effect to", as did the Draft Charter of Human Rights and Responsibilities, s 32 in Victorian Committee, n 83, p 191. The NZBORA uses the phrase "given a meaning". The Charter uses "interpreted". Commentators have failed to attribute any significance to these differences in terminology: Hettiaratchi P, "Some Things Borrowed, Some Things New: An Overview of Judicial Review of Legislation under the Charter of Human Rights and Responsibilities" (2007) 7 *Oxford University Commonwealth Law Journal* 61 at 83; Geiringer, n 11 at 66. For a discussion of the significance of these phrases, see *Ghaidan* [2004] 2 AC 557 at [107] (Lord Rodger).
interpreters of statutory provisions "to exercise effort to ensure compliance with human rights so far as it is possible to do so". The Explanatory Memorandum states that the "object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to give effect to human rights". Traditional statutory and common law rules of interpretation do not impose such obligations. The fact that s 32(1) did not embody the traditional interpretative role under statutory and common law rules of interpretation, and hence required especial legislative fiat under the Charter to expand the interpretative role, further supports the conclusion that s 32(1) goes beyond the traditional interpretative role.

Fourthly, the Moncovic Court fails to acknowledge the limitations on interpretation imposed by the concept of "possibility". Indeed, it fails to give any meaning or effect to the concept of "possibility", a failure which itself eschews the traditional interpretative obligation to give all words some meaning and effect. In terms of limiting potential, the British jurisprudence indicates that "possible" limits judicial power: what is "possible" is interpretation; what is not "possible" is legislation. The former includes interpreting legislative language restrictively or expansively, "read[ing] in words which change the meaning of the enacted legislation", "modify[ing] the meaning, and hence the effect" of legislation, and implying words provided they "go with the grain of the legislation". The latter prevents courts "adopt[ing] a meaning inconsistent with a fundamental feature of legislation" or "the underlying thrust of the legislation being construed", and "mak[ing] decisions for which they are not equipped". The Charter adopts the composite limit of "possible" and "consistently with their purpose". If one accepts that the phrase "consistently with their purpose" was intended to codify the British jurisprudence, this phrase encapsulates the notion that an interpretation that is inconsistent with statutory purpose (that is, the underlying thrust or a fundamental feature) is not a possible interpretation.

Even if one does not accept the codification of Ghaidan argument, the text of the Charter itself reinforces the co-equal nature of "possible" over "consistently with their purpose", if not the superior status of the former over the latter. The co-equality, if not the superiority, is clear from a traditional

115 Evans and Evans, n 98 at [3.17] (emphasis added).
116 Explanatory Memorandum, n 96, p 23 (emphasis added).
117 If s 32 is simply codifying traditional statutory or common law interpretation, why would the Explanatory Memorandum state that "clause 32 provides for certain rules of statutory interpretation under the Charter"? Explanatory Memorandum, n 96, p 23 (emphasis added). According to the Oxford Dictionary, "certain" means "specific but not explicitly named or stated": see http://www.oxforddictionaries.com/view/entry/m_en_gb0134520&m_en_gb0134520 viewed 6 October 2010. It would have been straightforward to explicitly state the traditional statutory and common law rules of interpretation in the Explanatory Memorandum, had that been the parliamentary intent. Instead, the more amorphous term of "certain" was chosen.
118 See Pearce and Geddes, n 90 at [2.22].
119 For example, Woolf CJ in Durrani [2001] EWCA Civ 595 emphasised that when the court decides whether a reinterpretation of a legislative provision is "possible", the courts "task is still one of interpretation" (at 751). If the court must "radically alter the effect of the legislation" to secure compatibility, "this will be an indication that more than interpretation is involved" (at 761). See also Adan v Newham London Borough Council [2001] EWCA Civ 1916 at [42]; Roth [2002] EWCA Civ 158 at [156].
120 Ghaidan [2004] 2 AC 557 at [32]-[33] (Lord Nicholls). Lord Rodger agreed with these propositions (at [121], [124]), as did Lord Millet (at [67]).
121 Ghaidan [2004] 2 AC 557 at [33]. Lord Rodger agreed with these propositions (at [121]), as did Lord Millet (at [67]). This has been confirmed by Bell J in Krocz (2009) 29 VAR 1 at [218]:

Because the obligation is to make legislation conform to transcendent human rights principles wherever possible, the role of the courts is fundamentally different to their role under the standard principles of interpretation. However, that role is still interpretation, not amendment. In consequence, there is a "limit beyond which a [rights-compatible] interpretation is not possible".

122 See n 166.
123 For example, inconsistency with a fundamental feature of the legislation or the underlying thrust of the legislation being construed: see n 120. See further Debeljak, "Parliamentary Sovereignty and Dialogue", n 13 at 40-56.
purposive interpretation of s 32(1). The purposes of the Charter as stated in s 1(2)(b) refer to the obligation to interpret “so far as is possible in a way that is compatible with human rights” without any reference to “consistently with their purpose”. This suggests a predominant parliamentary interest in “possibility” as the limit on the judicial interpretation power under s 32(1) or, at the very least, that “possible” is of greater significance than consistency. Accordingly, the Mocilovic Court ought to have given greater consideration to the limiting nature of “possibility”, rather than focusing predominantly (indeed, exclusively) on “consistently with their purpose”. Moreover, Pearce and Geddes note that “where an interpretation has been adopted that does not fit readily with [an objects] clause, it has had to be explained” – a task the Mocilovic Court fails to do.

Fifthly, the Mocilovic Court also supports its focus on interpretation by reference to Kentridge JA in the Zuma case: “If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation, but divination.” The comments miss the point. Neither s 32(1) nor s 3(1) requires the language of the statute to be ignored. The language of the statute plays a central role when considering the “rights questions”; it also plays a central role when considering a rights-compatible reinterpretation under s 32(1). Moreover, under s 32(1) and s 3(1) there is not a “general resort to ‘values’”; rather, there is resort to the democratically-sanctioned guaranteed rights, which have a high degree of specificity under international, regional and comparative jurisprudence and the common law.

Finally, the Mocilovic Court fails to address the Victorian Committee’s report (Victorian Report). The insertion of “consistently with their purpose” was suggested by the Victorian Committee and was explicitly linked to Ghaidan. This very same wording was adopted by Parliament which had the Victorian Report before it. This legislative history was not adequately dismissed by the Mocilovic Court.

124 Purposive interpretation is the traditional interpretation technique which is favoured by statutory and common law rules of interpretation: see, eg s 35(1) of the ILA.

125 This is clear from a purposive interpretation of s 32(1) which, given that s 1(2)(b) refers to the obligation to interpret “so far as is possible in a way that is compatible with human rights” without any reference to “consistently with their purpose”. See further below.

126 This point is reinforced by the comments of Dawson J with respect to s 35(a) of the ILA in Mills and Mocking (1990) 169 CLR 214 at 235 (emphasis added): “[T]he literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially when that purpose is set out in the Act.” Pearce and Geddes, n 90 at [2.8]-[2.9], make similar observations in relation to s 15AA of the Acts Interpretation Act 1907 (Cth), which is the equivalent of s 35(a) of the ILA.

127 Section 15AA, however, requires the purpose or object to be taken into account even if the meaning of the words, interpreted in the context of the rest of the Act, is clear. When the purpose or object is brought into account, an alternative interpretation of the words may become apparent. And if one interpretation does not promote the purpose or object of an Act and another interpretation does so, the latter interpretation must be adopted.

128 State v Zuma 1995 (4) BCLR 401, as cited in Mocilovic [2010] VSCA 50 at [77].

129 At this juncture, it is appropriate to observe that throughout the entire debate about the propriety of judges exercising a reinterpretation power democratically allocated to it by the Parliament, no commentator has dared to contrast the democratic pedigree of the s 32(1) creative task compared with the undemocratic pedigree of the creative task of judges discovering, extending and renewing the common law.

130 Victorian Committee, n 83, pp 82-83.
Debeljak

What did Parliament intend?

Another basis relied upon by the Moncilovic Court to differentiate s 32(1) from s 3(1) was the intention of the Parliament in enacting s 32(1). The Moncilovic Court’s discussion here fails to convince, particularly because of its selective nature, its tendency to misconstrue and misapply fundamental issues, and its failure to address the weight of extrinsic material opposing its view.

The Second Reading Speech

The Moncilovic Court quotes from the Second Reading Speech, as follows:

Clause 32 of the bill recognises the traditional role for the courts in interpreting legislation passed by Parliament.

While this bill will not allow courts to invalidate or strike down legislation, it does provide for courts to interpret statutory provisions in a way which is compatible with the human rights contained in the Charter, so far as it is possible to do so consistently with their purpose and meaning.

The Moncilovic Court then proffers numerous arguments based on this to differentiate s 32(1) from s 3(1), which are open to critique.

First, the Moncilovic Court relies on a “striking … absence of any suggestion that s 32(1) would establish a new paradigm of interpretation” which required courts “to depart from the ordinary meaning of a statutory provision and hence from the intention of the Parliament which enacted that provision”. It insists that if a fundamental departure from traditional interpretation had been contemplated, the “Minister would have been obliged to say so”, supported by specific comments “about the nature and extent of the departure, presumably by drawing on examples from the UK jurisprudence”.

If one accepts this very stringent and prescriptive requirement, one can point to the text of s 32(1) in satisfaction of the requirement. The obligation to interpret laws compatibly with human rights “so far as is possible to do so consistently with their purpose” is not commanded by traditional interpretative rules. This choice of language, in and of itself, evinces the intention of Parliament to enact something other than what had gone before. In addition, the modelling of s 32(1) on s 3(1) evinces the requisite parliamentary intention. Moreover, the historical link to s 3(1) and the codification of Ghaidan are not absent. These are explicitly outlined in the Victorian Report, and the Explanatory Memorandum acknowledges them through the use of the same concepts and phraseology adopted from the British jurisprudence. Further, the British courts did not require such stringent evidence in relation to s 3(1). During debate on the Human Rights Bill, the Home Secretary stated that “it is not our intention that the courts, in applying [s 3], should contort the meaning of words to produce implausible or incredible meanings”. Rather, s 3(1) is supposed to enable “the courts to find an interpretation of legislation that is consistent with Convention rights, so far as the

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133 The Moncilovic Court cites Dawson J in Mills v Meeking (1990) 169 CLR 214 at 234, who states that “[t]he collective will of the legislature must therefore be taken to have been expressed in the language of the enactment itself”: see Moncilovic [2010] VSCA 50 at [79]. The Moncilovic Court acknowledges “that resort may be had to Parliamentary debates for such assistance as they may properly provide” (at [80]) (emphasis added).

134 Victoria, Legislative Assembly, Parliamentary Debates (4 May 2006) p 2,293 (Mr Hulls). It should be noted that the Moncilovic Court cites the quotation in a single paragraph, when it was in fact in two paragraphs as per this article: Moncilovic [2010] VSCA 50 at [81].

135 Moncilovic [2010] VSCA 50 at [82].

136 Moncilovic [2010] VSCA 50 at [82].

137 Victorian Committee, n 83, pp 82-83.

138 Explanatory Memorandum, n 96, p 23. See further below.

139 United Kingdom, n 112, col 421 (Mr Jack Straw).
Who is sovereign now? The Momeclovic Court hands back power over human rights

plain words of the legislation allow”.138 Neither of these statements explicitly suggests “a new paradigm of interpretation”, yet this did not prevent the British courts recognising the true intent behind s 3(1).139

Secondly, the Momeclovic Court relies on the Minister’s reference to “purpose and meaning” in the Second Reading Speech.140 The Momeclovic Court opines that the use of the word “meaning” “makes it even clearer that Parliament had no intention of authorising (or requiring) interpretations which would depart from the meaning of a provision arrived at by ordinary principles of interpretation”,141 and states that s 32(1) was enacted by Parliament in the wake of this ministerial explanation that “courts would be constrained both by the purpose of the provision being interpreted and by the meaning of the words in the provision”.142 If “meaning” was so crucial to differentiating s 32(1) from s 3(1), why was it not expressly included in the text of s 32(1), the s 1(2) purposes provision of the Charter, or the Explanatory Memorandum? Why would Parliament leave this fundamental issue to the Second Reading Speech? In addition, if “consistently with their purpose” was so crucial to differentiating s 32(1) from s 3(1), one might expect it to be explicit in the s 1(2) purposes provision; yet s 1(2)(b) omits this phrase, merely stating that rights are protected by “ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights”.143 Moreover, it is not apparent why the word “meaning” is limited to that which is derived from ordinary principles of interpretation, rather than the new parliamentary instruction to interpret laws compatibly with human rights “so far as is it possible to do so”.

Further, it is unclear why the Momeclovic Court focused on the reference to “meaning” in the Second Reading Speech, yet failed to focus on the following reference in the Explanatory Memorandum: “The object of s 32(1) is to ensure that courts and tribunals interpret legislation to give effect to human rights.”144 It is more challenging for the Momeclovic Court to explain away the reference to “give effect”. It is more difficult to argue that an obligation to “interpret legislation to give effect to human rights” demonstrated parliamentary intent to sanction ordinary principles of interpretation because there is no ordinary principle of interpretation that obliges courts to interpret statutes so as to “give effect” to human rights. The failure to acknowledge and explain away “give effect” in the Explanatory Memorandum, particularly in the context of reliance on “meaning” from the Second Reading speech, weakens the Momeclovic Court’s analysis. It also bears mentioning that the words “give effect” are directly lifted from s 3(1) of the UKHRA, which states that “[s]o far as it is possible to do so”, “legislation must be read and given effect in a way which is compatible with the Convention rights”.145 Again, this ought to have been recognised and addressed by the Momeclovic Court.

138 United Kingdom, n 112, col 421 (Mr Jack Straw).
139 Moreover, when it comes to other differences between the Charter and the UKHRA (such as courts not being public authorities, and the absence of an independent cause of action and free-standing right to damages), the Explanatory Memorandum does not contain the level of detail in differentiating the Victorian position from the British position that the Momeclovic Court is requiring for the s 32(1) versus s 3(1) distinction. Does this mean that litigators should start to argue in favour of courts as public authorities, an independent cause of action and a free-standing right to damages?
140 Victoria, n 132, p 1,293 (Mr Hills), as cited in Momeclovic [2010] VSCA 50 at [81].
141 Momeclovic [2010] VSCA 50 at [84].
143 That is, there is not even a reference to “consistent with their purpose” in s 1(2)(b) of the Charter, let alone a reference to “consistent with their purpose and meaning”.
144 Explanatory Memorandum, n 96, p 23.
145 Commentators have failed to attribute any significance to these differences in terminology; see n 114.
Debeljak

The Explanatory Memorandum

The Momcilovic Court’s view

In terms of the Explanatory Memorandum, the Momcilovic Court refers only to the paragraph directly considering s 32(1), which states:

The object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to give effect to human rights. The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.146

The Momcilovic Court contrasts this statement with the British position, stating that “not only does s 3(1) UKHRA permit a ‘strained interpretation’ [R v A] but it has been held to go much further, requiring the court where necessary to depart entirely from the plain meaning of the provision in question”.147

This is an unfortunate misconstruction of the parliamentary intent. Numerous commentators have highlighted the provenance of these statements in the Explanatory Memorandum.148 The precise wording of s 32(1), the explicit references to Ghaidan in the Victorian Report, and the explicit reference to concepts that have been explored in the British jurisprudence (eg “not strained” and not avoiding “the object”) in the Explanatory Memorandum, were all deliberate choices to ensure that s 32(1) contained the more “purposive” approach to interpretation from Ghaidan and to avoid the more “radical” earlier interpretations from R v A.149 The Momcilovic Court ought not have used R v A as a contrast to the Explanatory Memorandum; in fact, the choice of the opposite wording to R v A in the Explanatory Memorandum was a very deliberate choice to contrast R v A and to sanction Ghaidan.150

Moreover, it is not clear how the Momcilovic Court’s comment about departing from the plain meaning of a provision contrasts with the references in the Explanatory Memorandum to the displacement of Parliament’s intended purpose or the avoidance of the object of the legislation. Even under ordinary rules of statutory interpretation, a court is empowered to depart from the plain (ie literal) meaning of a provision where to do so promotes the purpose of the provision.151 To depart from the plain meaning is not necessarily coupled with the displacement of parliamentary intent or the avoidance of the achievement of the object of legislation; in fact, departure

146 Regarding other relevant material from the Explanatory Memorandum, see discussions below linked to nn 153 and 154.


149 Pamela Tate SC, the Solicitor-General, further explains that the focus on the Ghaidan decision and the more purposive approach to interpretation was to avoid judicial interpretations, such as R v A (2002) 1 AC 45: Tate, “The Charter”, n 149, pp 19-20. See further Tate, “Some Reflections”, n 149 at 28; Williams, n 149 at 902; Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 51; n 251.

150 In any event, a “strained” interpretation of legislation is not a foreign concept to Australian courts. McHugh J noted in Newcastle City Council v GIO General Ltd (1997) 191 CLR 85 at 113, “when the purpose of a legislative provision is clear, a court may be justified in giving the provision ‘a strained construction’ to achieve that purpose provided that the construction is neither unreasonable not unnatural”. See generally Pearce and Geddes, n 90 at [2.12]

151 See nn 92 and 93. See generally Pearce and Geddes, n 90 at [2.3]-[2.5]. McHugh, Gummow, Kirby and Hayne JJ describe the rule as follows in Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 384:

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

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from plain meaning may be necessary to achieve intent or object. Further, the *Momcilovic* Court fails to acknowledge the opening sentence on s 32 in the Explanatory Memorandum, which states that “[c]lause 32 provides for certain rules of statutory interpretation under the Charter”. Why use the non-definitive adjective “certain” if the reference to “rules” was intended to replicate the well-known traditional statutory and common law rules of interpretation?

**The Explanatory Memorandum and the British Jurisprudence**

At this juncture, although it has been addressed elsewhere, a review of the Explanatory Memorandum and its link to the British jurisprudence is salient. Recall that the Explanatory Memorandum is concerned about the displacement of parliamentary intention and avoidance of legislative objectives. As was highlighted in the Victorian Report, these concerns are drawn from the British jurisprudence, which acknowledges displacement of parliamentary intention and avoidance of legislative objectives as examples of interpretations that are not possible.

In relation to preserving parliamentary intention, British jurisprudence indicates that a displacement of parliamentary intention would not constitute a possible interpretation. Indeed, in *R v A*, Lord Steyn recognised the need to ensure the viability of the essence of the legislative intention under s 3(1). Lord Hope in *R v A* emphasised that a s 3(1) interpretation was not possible if it contradicted express or necessarily implicit provisions in the legislation because express language or necessary implications thereto are the “means of identifying the plain intention of Parliament”. Lord Hope further highlighted in *Lambert* that interpretation involves giving “effect to the presumed intention” of the enacting Parliament. Lord Nicholls in *Re S* identified a clear parliamentary intent to give the courts threshold jurisdiction over care orders with no continuing supervisory role, which the s 3(1) interpretation of the lower court improperly displaced. Even the *Ghaidan* decision was based on preserving parliamentary intention. Lord Nicholls explicitly referred to “the social policy underlying” the statutory provision in question (being the heterosexual definition of spouse) and noted that the social policy “is equally applicable” to the survivor of cohabiting heterosexual couples as it is to cohabiting heterosexual couples. His Lordship held that to eliminate the discrimination between cohabiting heterosexual and cohabiting homosexual couples, by reading and giving effect to para 2 to include cohabiting homosexual couples, “would eliminate the discriminatory effect of paragraph 2 and would do so consistently with the social policy underlying paragraph 2”. In relation to preserving legislative objects, the British jurisprudence indicates that s 3(1) interpretation will not allow displacement of the fundamental features of legislation. This is clear in

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153 Explanatory Memorandum, n 96, p 23 (emphasis added).


155 Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 49-56.

156 Explanatory Memorandum, n 96, p 23. The parliamentary debate was silent on the matter.


158 *R v A* [2002] 1 AC 45 at [44]-[45]. Having read an implied proviso into the rape shield provisions to ensure their rights-compatibility, Lord Steyn stated that “[i]f this approach is adopted, s 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in s 3 of the 1998 Act” (at [45]).


160 *Lambert* [2002] 2 AC 545 at [81].

161 *Re S* [2002] 2 AC 291 at [25], [28].

162 The impugned provision was para 2(2) of Sch 1 of the *Rent Act 1977* (UK): “a person who was living with the statutory tenant as his or her wife or husband shall be treated as the spouse of the statutory tenant.”

163 *Ghaidan* [2004] 2 AC 557 at [35].

164 *Ghaidan* [2004] 2 AC 557. Accordingly, para 2(2) of Sch 1 of the *Rent Act 1977* (UK) was to be “reinterpreted” as follows: “a person who was living with the statutory tenant as if they were his or her wife or husband shall be treated as the spouse of the statutory tenant.”

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Re S and in R v Anderson. Indeed, in Ghaidan, Lord Nicholls stated, inter alia, that s 3 interpretation “must be compatible with the underlying thrust of the legislation being construed”; Lord Millet required an interpretation to be “consistent with the fundamental features of the legislative scheme”; and Lord Rodger stated that s 3 “does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen”.165

In conclusion, the Victorian Report and Explanatory Memorandum clearly indicate that the insertion of “consistently with their purpose” was intended to codify the British jurisprudence, both by referring to that jurisprudence by name167 and lifting concepts from that jurisprudence in explaining the effect of the inserted phrase.168

The parliamentary debate

The Mnicelovic Court also relied on the parliamentary debate. Parliamentary debates are notoriously difficult for use as a guide to parliamentary intention: how does one differentiate political posturing from intended legal meaning; how does one attribute a single identifiable intention from the disparate musings of individual representatives; how can a body that is not sentient form an intention?169

Given the Mnicelovic Court’s significant reliance on the parliamentary debates and the difficulty of establishing parliamentary intent from them, this aspect of the decision is questionable. The Mnicelovic Court’s selective referencing, coupled with the misconstruction and misapplication of the references, further weaken its reasoning.

Unacceptable transfer of power: The ACT and Victorian reports

The Mnicelovic Court states that the parliamentary debate demonstrates that the “Government was at pains to dispel any concerns that the enactment of the Charter would involve an unacceptable transfer of power to the judiciary.”170 Whether this is a fair summary of the debate will be addressed in turn. But first a major unarticulated assumption underlying this claim needs to be tested — that s 32(1) involves an unacceptable transfer of power to the judiciary. It can be said that much of the debate about rights instruments in Australia has centred on the transfer of power to the judiciary. This is usually driven by a fear of constitutional rights instruments that confer power on the judiciary to invalidate legislation, which arguably results in a judicial monologue about rights. Statutory rights instruments directly respond to this concern by limiting the power of judges to that of interpretation and non-enforceable declaration in preference to invalidation, and establishing a dialogue about rights between the executive, Parliament and the judiciary. To claim that statutory rights instruments involve an “unacceptable” transfer of power is highly contentious and this assumption must be approached with circumspection.

165 Re S [2002] 2 AC 291 at [40]-[44]. In Anderson [2003] 1 AC 837, the imposition of a sentence, which includes the tariff period, was held to be part of the trial such that the involvement of the Home Secretary in tariff setting violated the convicted murderer’s Art 6(1) right (at [20]-[29]) (Lord Bingham), [49], [54]-[57] (Lord Steyn), [67], [78] (Lord Hutton). The House of Lords then concluded that the legislative provision on tariff setting could not be interpreted compatibly with Convention rights under s 3 of the HRA. Under legislation “the decision on how long the convicted murderer should remain in prison for punitive purposes is the Home Secretary’s alone” (at [30] (Lord Bingham), [81] (Lord Hutton)). To interpret the legislation “as precluding participation by the Home Secretary ... would not be judicial interpretation but judicial vandalism” (at [30] (Lord Bingham)), giving the provision a different effect from that intended by Parliament. See also at [59] (Lord Steyn), [81] (Lord Hutton). The House of Lords issued a declaration of incompatibility.

166 Ghaidan [2004] 2 AC 357 at [33] (Lord Nicholls), [67] (Lord Millet), [100] (Lord Rodger). See further Tate, “The Charter”, n 149, pp 19-20; Tate, “Some Reflections”, n 149 at 28. See also Williams, n 149 at 902.

167 Victorian Committee, n 83, p 82-83.

168 Victorian Committee, n 83, p 83; Explanatory Memorandum, n 96, p 23: “The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.”

169 Geiringer, n 11 at 71-72; Pearce and Goddes, n 90 at [1.3]. The stated intent of one individual does not reliably represent the intent of all participants in the law-making process. It is doubtful that one shared intention exists within a collective decision making body: see Beatty D, Talking Heads and the Supreme: The Canadian Production of Constitutional Review (Carswell, Toronto, 1990) pp 20-21.

170 Mnicelovic [2010] VSCA 50 at [88].
Moreover, the *Momiclovic* Court refers to the Australian Capital Territory (ACT) Bill of Rights Consultative Committee (ACT Committee) and the Victorian Committee to support its assertion about unacceptable transfers of power.171 Neither reference fairly supports the assertion. In claiming that concerns about unacceptable transfers of power have been “prominent in the public discourse,”172 the *Momiclovic* Court refers in a footnote to seven paragraphs out of a 12-paragraph section173 in one Chapter of the ACT Bill of Rights Consultative Committee report (ACT Report).174 Of those seven paragraphs referred to, only one paragraph actually addressed the issue of transferring power to the judiciary, while two other paragraphs suggested alternative rights models that side-stepped the judiciary. Of the five paragraphs from the same section not referred to by the *Momiclovic* Court, four paragraphs were in favour of a constitutional or statutory rights instrument with a role for the judiciary. In addition to such selective referencing, the *Momiclovic* Court fails to acknowledge that the recommendations from the ACT Committee were in favour of a statutory rights instrument largely modelled on the UKHRA.175 The *Momiclovic* Court failed to acknowledge such statements in support of statutory rights instruments:

> [The Consultative Committee considers that a model that preserves a balance between the legislature, the executive and the judiciary in relation to the protection of rights is preferable to one that defers almost completely to the legislature and the executive (as in the current Australian legal system) or one that allows the judiciary to effectively trump the legislature and to invalidate laws (as in the United States Bill of Rights).]176

Similar criticisms can be made about the use of the Victorian Report. The *Momiclovic* Court refers to “submissions received by the [Victorian Committee] argue[ing] that ‘enacting a Charter would take power away from the Parliament and give unelected judges too much power’”.177 In the introductory chapter of the Victorian Report,178 the Victorian Committee canvassed the arguments in favour of a charter across nine pages,179 and against a charter across five pages.180 Some submissions were concerned about the transfer of power to the judiciary, with the Victorian Committee directly citing two such submissions.181 However, the *Momiclovic* Court fails to note the Victorian Committee’s direct response to these submissions:

> Rather than handing over power to judges, as does the United States Bill of Rights, modern human rights laws like that now operating in the United Kingdom do not give judges the power to strike down laws made by Parliament. Instead, the judges can be directed to open up debate about how law and policy is made, casting a powerful lens over the day-to-day work of Government. As we set out in later Chapters, the Committee is recommending a model that gives the final say to the Parliament and not the courts. This is very different to places like the United States.182

171 Momiclovic [2010] VSCA 50 at [86], nos 143 and 144. It should be noted that the *Momiclovic* Court cites James Allan (see fn 143), a vigorous anti-bill of rights academic. Similarly to its approach to the Australian Capital Territory (ACT) Report (see n 174) and the Victorian Report (see n 83), the *Momiclovic* Court fails to acknowledge the weight of contrary academic opinion.

172 Momiclovic [2010] VSCA 50 at [86].


174 The Chapter is entitled “Is a Bill of Rights Appropriate and Desirable for the ACT” and the section is entitled “Is a Bill of Rights Consistent with Democratic Governance in the ACT?” See ACT Bill of Rights Consultative Committee (ACT Committee), *Towards an ACT Human Rights Act* (2003) pp 17, 41-43 (ACT Report).

175 ACT Committee, n 174, Recommendations 3 and 9, [3.48]-[3.55], Ch 4.

176 ACT Committee, n 174 at [3.50].


178 The introductory Chapter addressed whether change is needed in Victoria to better protect human rights: Victorian Committee, n 83, Ch 1.

179 Victorian Committee, n 83, pp 4-13.


181 Victorian Committee, n 83, p 15.

182 Victorian Committee, n 83, p 15.
The Victorian Committee’s conclusion should not come as a surprise to those familiar with the Statement of Intent issued by the Victorian Government at the beginning of the consultation process. The Statement of Intent clearly demonstrates that the “unacceptable transfer of power” debate centred on the adoption of the United States Constitution. The Muncilovic Court has incorrectly applied the debate between constitutional and statutory rights instruments, to help resolve the distinct issues of the correct method and the strength of s 32(1) under a statutory instrument. The latter issues are not well informed by the former debate.

Neither the ACT Report, nor the Victorian Report, provides support for the Muncilovic Court’s claim that statutory rights instruments involve an unacceptable transfer of power to the judiciary. The Muncilovic Court has selectively and somewhat misleadingly quoted from these extrinsic aids to interpretation, in order to reverse-engineer an argument that is simply not there on the legislative history.

The Victorian Parliament debate
The Muncilovic Court seeks support for a number of propositions in the parliamentary debate: that the Charter would be an unacceptable transfer of power to the judiciary; that the traditional nature of interpretation was embodied in s 32(1); and that the judicial power to issue declarations under s 36(2) was the tool for dialogue under the Charter. These propositions cannot be sustained.

First, in terms of unacceptable transfers of power, the Muncilovic Court quotes from the Shadow Attorney-General, Mr McIntosh. The quotations are curious because Mr McIntosh clearly states that the proposed charter “will shift power to the judiciary ... to involve itself in all sorts of political issues” and that the Parliament “will be devolving those political questions to the judiciary”. The Muncilovic Court also relies on the interjections of the Shadow Treasurer, Mr Clark, who considers that the proposed charter would “transfer legislative power from the Parliament to the judiciary”. It is not clear how these statements support a parliamentary intention that the Charter did not create an “unacceptable” shift in power to the judiciary and that s 32(1) did embody a traditional judicial interpretative role.

Secondly, in terms of proving that s 32(1) was intended to codify traditional methods of judicial interpretation, the Muncilovic Court again relies on curious aspects of the debate. For example, Mr Clark’s interjection pertains solely to the changes to judicial interpretation under the proposed charter and reinforces the importance of s 32(1) to the scheme of the proposed charter. Indeed, interpretation being “a new wildcard” is far from a codification of the traditional interpretative method; the “diminish[ment] of the system of our common law background” highlights that s 32(1) was not intended as a codification of the common law principle of legality; and the transfer of “de facto legislative power” with an “enormous scope for judicial discretion in interpretation” clearly indicates that the proposed charter was intended to transfer some power to the judiciary. If anything, Mr Clark’s speech supports s 32(1) as a codification of s 3(1) as propounded in Ghaidan, and certainly does not suggest that s 36(2) was intended as the tool of institutional dialogue.

183 Muncilovic [2010] VSCA 50 at [87], citing Victoria, Legislative Assembly, Parliamentary Debates (13 June 2006) pp 1,978-1,980 (Mr McIntosh) (emphasis added).
184 Muncilovic [2010] VSCA 50 at [90], citing Victoria, n 184, p 2,000 (Mr Clark) (emphasis added). It ought to be noted that neither Opposition member describe the shift in power as “unacceptable”.
185 Although some transfer of power was suggested, it was not necessarily unacceptable levels or types of power being transferred to the judiciary.
186 Muncilovic [2010] VSCA 50 at [90], citing Victoria, n 184, p 2,000 (Mr Clark) that the proposed charter:
will throw a new wild card into the interpretation of every statute on our books. It will force legislation to be interpreted against this collection of untried and untested verbiage and therefore diminish the strength of our common law background ... It is also going to transfer de facto legislative power from the Parliament to the judiciary by granting an enormous scope for judicial discretion in interpretation.
Thirdly, primarily in terms of the alleged focus on s 36(2) declarations and secondarily the s 32(1) issue, the Menclovic Court seems to misconstrue or acontextualise its various quotations. For example, the first quotation from Ms D’Ambrosio considers the issue of whether judges can invalidate laws – the answer being in the negative, with an emphasis on the judicial power of non-enforceable declaration.188 This tells us very little about what the proposed charter was intended to create, and a great deal about what it was not intended to create – the issue being addressed by Ms D’Ambrosio was how the proposed charter differed from the United States Constitution, not whether judicial declarations are the tool of dialogue. Moreover, her interjection directly acknowledges that a judicial declaration is only available once the “Supreme Court ... finds that a statutory provision cannot be interpreted consistently with a human right”.189 This indicates that judicial declarations work in tandem with the s 32(1) interpretative power, such that no single Charter mechanism, let alone s 36(2), can be considered the dialogue mechanism.190

The second quote from Ms D’Ambrosio explicitly acknowledges that the proposed charter is “similar in operation to the NZBORA and the UKHRA in that the Courts ... cannot invalidate primary legislation”.191 This quote is directed at comparing statutory models that do not empower judges to invalidate legislation (the NZ and British models) with those models that do (the United States model), rather than the particular operation of a particular statutory model. It also directly acknowledges that the Charter is based on the NZ and British models rather than being a codification of the principle of legality.192

The quotations from Mr Wynne fail to bolster the Menclovic Court’s argument. Mr Wynne suggests that the proposed charter “accords with a Parliamentary-based model of human rights protection” and that “[w]e understand that Parliament remains the final and sovereign institution”.193 Both of these sentiments are aimed at differentiating the Victorian statutory model from the United States constitutional model.194 The comments are not directed at the dialogue issue or s 32(1) issue. Another example of the same criticisms can be found in the Menclovic Court’s quotation from Mr Lupton.195

The UK parliamentary debate

The Menclovic Court then compares the Victorian parliamentary debate to that which preceded the UKHRA,196 drawing numerous propositions from the comparison. First, it contrasted the British

188 Menclovic [2010] VSCA 50 at [88], citing Victoria, n 184, p 1,984 (Ms D’Ambrosio): “The Supreme Court will not be able to invalidate a Victorian law when a statutory provision is deemed by it to be inconsistent with the Charter, although the Supreme Court will be able to make a declaration of inconsistent interpretation if it finds that a statutory provision cannot be interpreted consistently with a human right.”

189 Victoria, n 184, p 1,984 (Ms D’Ambrosio).

190 This is contrary to what the Menclovic Court later suggests. “[T]he making of a declaration of inconsistent interpretation which is seen as the delimiting feature of the so-called 'dialogue model': Menclovic [2010] VSCA 50 at [95].

191 Victoria, n 184, p 1,985 (Ms D’Ambrosio), cited by Menclovic [2010] VSCA 50 at [88].

192 This is contrary to the Menclovic Court’s tentative views about what is “possible” under s 32(1), particularly in relation to the codification of the principle of legality: Menclovic [2010] VSCA 50 at [102]-[104].

193 Menclovic [2010] VSCA 50 at [89], citing Victoria, n 184, p 1,993 (Mr Wynne).

194 The United States Constitution is a judiciary-focused model under which the Parliament is no longer sovereign. This does not necessarily mean the judiciary is sovereign; rather, it is the Constitution itself, as interpreted by the judiciary, that is sovereign.

195 Menclovic [2010] VSCA 50 at [89], citing Victoria, n 184, pp 1,999-2,000 (Mr Lupton): [The Charter] finds the right balance, because it sets out the rights and responsibilities of Victorians but sets them out in a way that maintains Parliamentary sovereignty and allows the Courts in appropriate circumstances to make declarations about whether legislation meets the standards of human rights but does not allow the Court to invalidate those laws.

196 Rather than reviewing the record of the actual British debate, the Menclovic Court relies on a summary of the debate from Lord Steyn’s judgment in Ghaidan – a questionable choice in and of itself, given the seriousness of the issues at stake in Menclovic and the Menclovic Court’s reliance on parliamentary intention to justify its conclusions: Menclovic [2010] VSCA 50 at [91].

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objective of “bringing rights home”, claiming that “the Victorian legislature was not impelled by the objective of ‘bringing home’ rights already enforceable under an international convention”. An absence of a “bringing rights home” political slogan in Victoria is explicable by the fact that Victoria does not have international legal personality. If Municilovic concerned a federal rights instrument, a judicial conclusion based on the lack of a government-stated intention to “bring rights home” to be decided within the domestic, rather than an international or regional, setting may have some resonance. It does not fit the context of a provincial jurisdiction within a federated state.

The more appropriate point of reference is the fact that the Victorian government and Parliament wanted to improve human rights performance and accountability within the domestic (albeit provincial) jurisdiction, as did the British. The Statement of Intent acknowledges the important role of the Victorian courts in “interpreting the law and enforcing rights”, similarly to the British mantra of “bringing rights home”. The Statement of Intent also squarely places the debate in the context of “the basic rights found in the ICCPR [the International Covenant on Civil and Political Rights]”, noting that “[t]hese essential features of a democracy are often taken for granted but are not clearly expressed or fully protected in our system of government”. If reference back to political intent is necessary, these comments reflect the sentiment of “bringing rights home”. Moreover, the Victorian Committee preferred to embed the relevant international obligations within the Victorian jurisdiction rather than shape a “home grown” set of rights, and the Explanatory Memorandum links each right guaranteed under the Charter back to its ICCPR equivalent. Again, both of these facts reflect the desire to bring the international into the domestic.

Secondly, the Municilovic Court referred to the Lord Chancellor’s statement that “in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility”, and the Home Secretary’s expectation “that, in almost all cases, the courts will be able to interpret legislation compatibly with the Convention” but that “we need to provide for the rare cases where that cannot be done.” From such statements, Lord Steyn (in his judicial capacity) surmised that “this is the remedial scheme which Parliament adopted”. In contrasting the Charter from the UKHRA, the Municilovic Court began by noting that the Victorian Parliament never indicated that s 32(1) would be the prime remedial measure. Nothing should turn on this because technically nor did the British Parliament; rather, the “remedial” classification was Lord Steyn’s judicial conclusion drawn from the actual parliamentary debates. In any event, the Victorian Parliament adopted the interpretative and declaratory mechanisms from the UKHRA after Lord Steyn’s assessment of the interpretation provision as the remedial measure, a fact that the Victorian Parliament can be taken to have been

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197 Municilovic [2010] VSCA 50 at [91].
198 “May” is used because the persuasive weight of a politically-motivated slogan is not known.
199 Victorian Government, n 183 at [12].
200 Victorian Government, n 183 at [16] (emphasis added). The “essential features” are the basic rights found in the International Covenant on Civil and Political Rights (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), with the Statement of Intent explicitly referring to equality before the law, a fair trial, freedom of expression, and freedom of thought, conscience and religion as examples (at [16]).
201 Victorian Committee, n 83, pp 31-33.
202 Explanatory Memorandum, n 96, pp 8-19. The only right not linked back to the ICCPR is the right to property under s 20 (p 15). This is because the ICCPR does not protect property rights.
203 United Kingdom, House of Lords, Parliamentary Debates (5 February 1998) col 840 (Lord Irvine).
204 United Kingdom, House of Commons, Parliamentary Debates (16 February 1998) col 780 (Mr Jack Straw) (emphasis added).
205 Ghaidan [2004] 2 AC 557 at 466.
206 Municilovic [2010] VSCA 50 at [92]. In contrast to the Municilovic Court’s assumption about silence from the Victorian Parliament indicating a rejection of the British position, it is equally arguable that the Victorian Parliament was silent on this issue because it assumed that the wording in s 33(1) was to have the same effect as s 3(1). It is reasonable to assume that if the Victorian Parliament did not want to achieve the same effect as s 3(1), it should have chosen different language for s 32(1) or explicitly stated this in the Explanatory Memorandum or the Second Reading Speech.
Who is sovereign now? The Mocnicovic Court hands back power over human rights

Moreover, it is the structure of the UKHRA, as much as anything said in parliamentary debate, that supports a remedial characterisation of s 3(1), and the Charter mimics this structure. Further, the Explanatory Memorandum does state, in the context of declarations of inconsistent interpretation, that “[i]n some cases a statutory provision may not be able to be interpreted consistently with human rights”. 208 Although “some” does not equate to terminology like “99%” or “rare”, it does indicate that s 32(1) was intended as a remedy – that is, that declarations were only intended to be needed “in some cases”, not in cases generally.

The Mocnicovic Court then claims that the Victorian “debate focused almost exclusively on the function of the court in identifying legislative inconsistency with human rights and then making a declaration which – it was repeatedly emphasised – would not affect the validity of the legislation”, such that in comparison with Britain, declarations were not envisaged as a “last resort” but rather the “epitom[yl] of the intended relationship between the courts and the legislature”. 209 This must be challenged.

Part of “the function of the court in identifying legislative inconsistency” requires an application of s 32(1) – “legislative inconsistency” occurs once it is not “possible” “consistently with their purpose” to find a rights-compatible interpretation of a law that is otherwise an unjustified limitation on rights. In other words, the use of “legislative inconsistency” language in parliamentary debate does not denote s 32(1) and promote s 36(2). Moreover, the focus in the debate on “validity of legislation” is explicable as a contrast between statutory and constitutional rights instruments, rather than a contrast between different types of dialogue under statutory rights instruments or differences between s 32(1) and s 3(1). Further, one must query the Mocnicovic Court’s reliance on Lord Steyn in this context. Lord Steyn was in fact using these aspects of the parliamentary debate to bolster the remedial strength of s 3(1), yet the Mocnicovic Court uses the very same passage to justify undermining the remedial strength of s 32(1).

In any event, one must query how much reliance can be placed on the British parliamentary debate as evidencing s 3(1) as a remedial measure. For example, Lord Steyn relied on the statements of the Lord Chancellor and Home Secretary to argue that the jurisprudential statistics indicated that the declaration power was being used more than the interpretation power, 211 which thereby revealed “a question about the proper implementation” 212 of the UKHRA, given that interpretation was supposed to be the primary remedial mechanism. Such use of the parliamentary debate is flawed. As Klug and Starmer highlight, the statements of the Lord Chancellor and the Home Secretary are not “statement[s] of law, nor … actuarial prediction[s]”, but rather “political assertion[s]” that British law at the commencement of the UKHRA was generally rights-compatible, and that neither interpretation nor declaration would be needed often. 213 In terms of drawing conclusions for the Charter, British parliamentary comments about the rights-compatibility of its statute book at a single point in time cannot be morphed into evidence of Victorian parliamentary intent not to give s 32(1) full remedial force.

207 Section 32 itself indicates the strength of the “obligation” of interpretation. The obligation is to interpret “so far as it is possible to do so”. The fact that it was captured as “99%” of the cases in the British debate but not in the Victorian debate does not water down the strength of the obligation under s 32(1) – the words “so far as it is possible to do so” are capable of supplying the 99%.

208 Explanatory Memorandum, n 96, p 20 (emphasis added).

209 Mocnicovic [2010] VSCA 50 at [92].

210 Ghaidan [2004] 2 AC 557 at esp [46], [49], [50].

211 In the first couple of years, the British judiciary focused more heavily on interpretations than declarations. In contrast, statistics from across the first four years highlighted that the interpretative power was used in 10 cases, and the declaration power was used in 15 cases, of which five were reversed on appeal: Ghaidan [2004] 2 AC 557 at [39] and Appendix (Lord Steyn). By 2005, 17 declarations of incompatibility had been issued, with seven being reversed on appeal: Klug F and Starmer K, “Standing Back From the Human Rights Act: How Effective Is it Five Years On” [2005] Public Law 716 at 721.

212 Ghaidan [2004] 2 AC 557 at [39].

213 Klug and Starmer, n 211 at 722.
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The dialogue

The Menclovic Court turns to the concept of dialogue, stating that Parliament’s focus on judicial declaration at the expense of judicial interpretation “is not surprising … given that the Charter is said to exemplify the ‘dialogue model’ of human rights legislation”. Not only is the Menclovic Court’s reliance on the extrinsic aids to interpretation to establish a narrow concept of dialogue open to critique, but its discussion of dialogue fails to comprehend the interconnectedness of the declaration power and many other dialogic mechanisms under the Charter (especially s 7 and 32(1)).

In relation to the extrinsic aids criticism, the Menclovic Court refers to the Second Reading Speech which states that the proposed charter was based:

... on human rights laws that now operate successfully in the Australian Capital Territory, the United Kingdom and New Zealand. Importantly, it is nothing like the United States Bill of Rights. This Bill promotes a dialogue between the three arms of the government — the Parliament, the executive and the courts — while giving Parliament the final say. Unlike the United States, courts will not have the power to strike down legislation.215

It then notes that the Victorian Committee drew the same distinction between the “United States Bill of Rights” and “modern human rights law like that now operating in the United Kingdom”.216 It then quotes a passage from the ACT Report highlighting that the “the legislature is assigned the ‘last say’” and that under the dialogue the “judiciary should not be able to invalidate legislation”.217

At the risk of labouring a point, these aspects of the Second Reading Speech, the Victorian Report and the ACT Report are aimed at different matters to that which the Menclovic Court lays claim. The speech and the reports are primarily aimed at highlighting the similarities between the Victorian, British and NZ statutory rights instruments; and differentiating those instruments from the United States constitutional rights instrument — that is, differentiating models based on an institutional dialogue, from those based on a judicial monologue. The speech and reports do not differentiate the dialogue established under the Charter statutory model from the dialogue established under the UKHRA and NZBORA statutory models; nor do they suggest that the judicial declaration power is the crux of the dialogue.

The Menclovic Court concludes the discussion of the extrinsic aids by claiming that the Victorian Committee “evidently concurred” that the judicial declaration power was the defining feature, having described such declarations as “a channel through which the dialogue between the courts and the parliament takes place … [T]hey are significant both as a trigger for Parliamentary

214 Menclovic [2010] VSCA 50 at [93].
215 Menclovic [2010] VSCA 50 at [93], citing Victoria, Legislative Assembly, Parliamentary Debates (4 May 2006) 1,290 (Mr Hulls).
216 Menclovic [2010] VSCA 50 at [93], citing Victorian Committee, n 83, p 15:
Rather than handing over power to judges, as does the United States Bill of Rights, modern human rights laws like that now operating in the United Kingdom do not give judges the power to strike down laws made by Parliament. Instead, judges can be directed to open up debate about how law and policy is made, casting a powerful lens over the day-to-day work of Government. As we set out in later Chapters, the Committee is recommending a model that gives the final say to Parliament and not the courts. This is very different to places like the United States.
217 Menclovic [2010] VSCA 50 at [95], citing the ACT Committee, n 174 at [4.5]:
The Consultative Committee was impressed by the concept of creating a dialogue ... on human rights issues between the three arms of government and the community. However, the dialogue proposed is not an open-ended one and, after debate, the legislature is assigned the “last say” in relation to human rights issues. To create a dialogue, the judiciary should not be able to invalidate legislation but rather be able to give its opinion that a law is incompatible with the Human Rights Act. It should then be a matter for the legislature to determine whether or not to amend the legislation so that it conforms to the Human Rights Act.

The Menclovic Court ought to have acknowledged that the ACT Report summarised the nine main features of dialogue, which included pre-enactment scrutiny, the judicial interpretation power and the judicial declaration power (at [4.8]). The ACT Committee concluded that “these features will combine to produce an appropriate balance between the legislature, the executive and the judiciary in relation to human rights issues” (at [4.9]) (emphasis added). None of this suggests that judicial declarations were intended to be the tool for dialogue.
reconsideration and as a means of holding the executive to account". This does not withstand scrutiny. A reference to judicial declarations as "a" channel for dialogue does not support a claim that judicial declarations are "the" channel for dialogue. In addition, the words omitted from this quote by the Montecilovic Court are significant: "a channel through which the dialogue between the courts and the parliament takes place. While declarations of incompatibility have been used infrequently in the United Kingdom, they are significant both as a trigger for Parliamentary reconsideration and as a means of holding the executive to account." The omitted reference to the infrequency of the declarations does not support the Montecilovic Court's conclusion that judicial declarations are the dialogic tool. This deliberate omission helped to reverse-engineer an argument that is not supported by the legislative history.

Moreover, this quotation forms part of the Victorian Report's Chapter on the "Institutions of government", and more specifically on "What should be the role of the courts?" This 10-page part of the Victorian Report canvasses judicial interpretation powers, judicial invalidation powers, and judicial declaration powers. The 10 pages also include Recommendation 17 that "[a]ll Victorian Courts and tribunals should be required to interpret legislation in a way that is compatible with the Charter ... taking into account the purpose of the legislation", and Recommendation 19 that "[i]f the Victorian Supreme Court is satisfied that an Act ... cannot be interpreted in a way that is consistent with the human rights listed in the Charter, it may make a Declaration of Incompatibility". Nowhere across the 10 pages is there any explicit suggestion that declarations are more important than interpretations per se or in establishing a dialogue. Indeed, the opposite is true. Read as a whole, the 10 pages outline an integrated range of obligations and powers given to the judiciary, starting with an obligation of interpretation and ending with a power of declaration, with both interpretation and declaration being essential. If anything, the interpretation power could have been viewed as predominant given that a declaration is only available once a rights-compatible interpretation is shown not to be possible – a fact that was acknowledged on numerous occasions in the Victorian Report. Finally, the Explanatory Memorandum fails to support the Montecilovic Court's conclusions as well.

In relation to the failure to comprehend the interconnectedness between judicial declarations and the other dialogic mechanisms, the Montecilovic Court's focus on judicial declarations at the expense of ss 7(2) and 32(1) must be critically examined. It held that:

"the making of a declaration of inconsistent interpretation accords more closely with this conception of dialogue, and in particular with the avowed purpose of "giving Parliament the final say", than would an

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218 Montecilovic [2010] VSCA 50 at [96], citing Victorian Committee, n 83, p 86 (emphasis added).
219 Victorian Committee, n 83, p 86 (emphasis added).
220 Victorian Committee, n 83, p 66-90.
221 Victorian Committee, n 83, p 81-90.
222 Victorian Committee, n 83, Recommendations 17 and 19 (pp 83 and 88 respectively).
223 See Recommendation 19 and the introductory paragraph to section 4.5.3 on declarations of incompatibility in the Victorian Report (Victorian Committee, n 83, pp 85-86), as opposed to the concluding paragraph of the same section which the Montecilovic Court selectively quotes. The introductory paragraph states (at 85) (emphasis added):

"Many submissions expressed support for the courts having the power to make a Declaration of Incompatibility where the court is unable to interpret legislation in a way that is consistent with the Charter. It was pointed out that this is a good compromise between the power of declaring legislation invalid and allowing government institutions to simply ignore the Charter. It preserves the sovereignty of Parliament, yet still encourages dialogue between the courts, Parliament and the executive."

This quotation again highlights the preoccupation with parliamentary monologues about/more monopolies over rights on the one hand (as was the status quo in Victoria), and judicial monologues about/more monopolies over rights on the other (as illustrated by the United States Constitution).
224 See the anodyne discussion of cl 36(2): Explanatory Memorandum, n 96, p 26. Nothing in this discussion suggests that s 36(2) is of greater importance than, or should be used more frequently than, s 32(1).
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expanded view of "interpretation" which allowed courts to depart from the plain meaning of a statutory provision and the intent of Parliament thereby conveyed.225

First, it is not clear what the Menclovic Court means by "this conception of dialogue". It may have been referring to the dialogue established under the ACT, British or NZ models, given the reference to these models in the preceding paragraph of the judgment.226 This answer is unsatisfactory because, at the very least, the British model adopts "an expanded view of 'interpretation'"227 which the Menclovic Court’s conception of dialogue rejects. Moreover, the NZ model essentially adopts the Preferred Method and, given the Menclovic Court’s close link between the Menclovic Method and s 32(1), it is unlikely to be referring to the NZ model.

Alternatively, the Menclovic Court cites academic commentary of this author to "exemplify the "dialogue model" of human rights".228 The concept of dialogue explored in that commentary does not favour the Menclovic Method or place judicial declarations at the centre of the dialogue.229 As outlined above,230 the concept of dialogue is based on the Preferred Method to statutory interpretation, which was later adopted by Nettle J in RJE,231 in Krakce232 and in Das.233 This Preferred Method favours a central position for s 7(2) proportionality analysis and a remedial use for s 32(1).234 Moreover, the dialogue clearly relies on the contributions and responses of each arm of government: the contributions of the executive to the "rights questions"; via the s 28 statements of (in)compatibility;235 the contributions of the Parliament to the "rights questions" via the reports of the Scrutiny of Acts and Regulations Committee under s 30 and the broader parliamentary debate;236 the contributions of the judiciary to the "rights questions" through its assessment of the justifiability of any limits on rights,237 and its contribution to the "Charter questions" through rights-compatible interpretations under s 32(1) and, if needed, any declarations under s 36(2);238 and the representative response mechanisms to judicial contributions under both s 32(1) and s 36(2),239 being the option to "do nothing", the option to respond through the enactment of ordinary legislation, or the option of using the override provision under s 31.240 This conception of dialogue relies on many more mechanisms than just judicial declarations under s 36(2), with each mechanism being interconnected and of equal importance.

225 Menclovic [2010] VSCA 50 at [94] (emphasis added). The Menclovic Court also suggests that the "final say" is embodied in the obligation for a relevant minister to provide a formal response to a declaration under s 37.
226 The preceding paragraph of the judgment sees the Menclovic Court quoting from the Second Reading Speech: Menclovic [2010] VSCA 50 at [93].
227 Menclovic [2010] VSCA 50 at [94].
230 See n 46.
232 Krakce (2009) 29 VAR 1 at [65], [67]-[235].
233 Das (2009) 24 VR 415 [50]-[53].
234 Debeljak, "Parliamentary Sovereignty and Dialogue", n 13 at 28, 32.
236 Debeljak, "Parliamentary Sovereignty and Dialogue", n 13 at 29.
238 Debeljak, "Parliamentary Sovereignty and Dialogue", n 13 at 31-33.
239 It should be noted that the executive and legislature may decide to respond to a s 32(1) judicial interpretation, but must respond to a s 36(2) judicial declaration: Charter, s 37.
240 Debeljak, "Parliamentary Sovereignty and Dialogue", n 13 at 33-35. The "do nothing" option entails leaving the s 32(1) rights-compatible interpretation in place, or the s 36(2) rights-incompatible law in operation. The "legislative" option in relation to s 32(1) rights-compatible interpretations may entail the Parliament re-enacting more expressly its rights-incompatible law or retaining but refining the rights-compatible interpretation given by the judiciary. The "legislative" option in relation to a s 36(2)
Secondly, the Mocilovic Court’s focus on “giving Parliament the final say”244 does not justify its conception of dialogue. To acknowledge that Parliament was intended to have the “final say” over rights does not dictate that the judicial declaration power is the tool of institutional dialogue, and it is not inconsistent to recognise that Parliament was intended to have the “final say” over rights and to simultaneously vest s 32(1) with remedial reach. In relation to both points, neither s 32(1) nor s 36(2) undermine Parliament having the “final say” under the Charter because representative response mechanisms exist in relation to both.245 Further, “final say” language is utilised to distinguish statutory rights instruments where the judiciary does not get the “final say” from constitutional rights instruments under which the judiciary arguably does get the “final say” when it invalidates legislation. How this distinct debate about the competing statutory and constitutional models justifies an elevation of judicial declarations and an undermining of the remedial power of judicial interpretations under one of the competing models evades reason.246

Thirdly, the Mocilovic Court’s preoccupation with the impact of the “intent of Parliament”247 has led it to throw out the baby with the bath water. In deciding the import of the words “consistently with their purpose”, the Mocilovic Court could simply have adopted the British or NZ methodology, and separately decided whether s 32(1) resembled the “high water mark”248 of s 3(1) interpretation under R v A, the middle ground as represented by Ghaidan and explicitly referred to in the legislative history of the Charter, the more minimalist decision of Wilkinson decided after the Charter came into force, or indeed something else.249 This would have retained the intended remedial features of s 32(1), but drawn a clear line between what s 32(1) regards as possible/legitimate judicial interpretation and impossible/ illegitimate judicial legislation. Whether the line was to be drawn at Wilkinson, Ghaidan, R v A, or elsewhere did not dictate a rejection of the accepted methodology – the Preferred Method.250

Instead, the Mocilovic Court has relied on the debate between constitutional and statutory human rights models in order to improperly elevate the role of judicial declarations under one statutory rights model. In the paragraph preceding the “conception of dialogue” and “final say” discussion, the Mocilovic Court relies on a quotation from the Second Reading Speech which distinguishes the ACT, British and NZ models, from the United States model.251 If the question before the Mocilovic Court concerned whether judges had the power of invalidation or merely declaration, every argument constructed and all extrinsic aids employed would be of relevance and persuasive. If the question before the Mocilovic Court concerned whether the Charter adopted a judicial monologue/monopoly model rather than an institutional dialogue model, again the arguments and aids would be salient. However, these questions had already been answered by the sovereign Parliament with the enactment declaration may entail the legislature redrafting the law to account for the rights deficiency identified by the judiciary. The override option may be in response to either s 32(1) rights-compatible interpretation or s 36(2) declaration, thereby allowing the legislature to suspend both powers for five years.

244 Mocilovic [2010] VSCA 50 at [94].

245 See n 240.

246 Furthermore, the use of the so-called “final say” argument throughout the parliamentary debate, and the court’s reliance on this in its reasoning, is bound to mislead. The notion that “Parliament gets the final say” is not true; it is really political-speak for saying the “judiciary does not get the final say”. Under institutional dialogue models, interactions between the arms of government are ongoing. To be sure, the judiciary does not have the final say; but nor does the Parliament or the executive, because any representative responses to the judicial contribution to the dialogue are themselves subject to the dialogue mechanisms under the Charter, as outlined in the preferred UKHRA-based methodology discussed above: see Debjani, “Parliamentary Sovereignty and Dialogue”, n 13 at 35. Hogg and Bushell refer to the representative responses as “legislative sequels”, terminology which helps to illustrate this point: Hogg PW and Bushell AA, “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.

247 Mocilovic [2010] VSCA 50 at [94].

248 Waitham, n 15 at 638.


250 See n 64.

251 Mocilovic [2010] VSCA 50 at [93], citing Victoria, n 215, p 1,290 (Mr Hulls).
of the Charter – the Charter is a statutory model establishing an institutional dialogue. The question before the Moncilovic Court concerned the proper construction of s 32(1) given the adoption of a statutory model establishing an institutional dialogue, which has nothing to do with the judicial power of invalidation under the United States Constitution and its consequential judicial monologue. Again, the Moncilovic Court focuses on the wrong debate, which leads it to adopt an unduly restrictive “conception of dialogue”, which in turn justifies the elevation of judicial declarations and the undermining of the remedial strength of the interpretation power.

The Moncilovic Court does recognise Parliament’s capacity to reverse judicial interpretations that the representative arms disagree with, but refuses to acknowledge that this is an aspect of dialogue.249 This refusal is so, even though examples of dialogue driven from s 32(1) interpretations have occurred in Victoria under the Charter.250 The Moncilovic Court does not explain why such interactions between judges and Parliament do not represent dialogue; nor does it explain why such interactions are any less of a “distinguishing feature” than judicial declarations. There is certainly nothing in the Moncilovic Court’s analysis that dictates this result. It seems that it can only reach this conclusion because of its misapplication of the “models” debate when deciding the meaning of s 32(1), which in turn led it to misidentify the conception of dialogue and its distinguishing features.251

In conclusion, it is appropriate to note that the Moncilovic Court’s misapplication of arguments from constitutional models was not confined to its discussion of the s 32(1)/s 3(1) replication issue.252

249 “But this is not what is meant when the concept of a ‘dialogue’ between courts and Parliament is described as the distinguishing feature of this legislative model of human rights protection”: Moncilovic [2010] VSCA 50 at 94.

250 The prime example is RJE (2008) 21 VR 526 (Nettle JA particularly) and Parliament’s response to it (Serious Sex Offenders Monitoring Amendment Act 2009 (Vic)): see further n 65.

251 The Moncilovic Court also uses certainty of interpretation and representative democracy to support its narrow reading of s 3(1). Word restrictions do not allow a full consideration of this discussion, but the following points are salient. The Charter is a major change to our representative democracy and was years in the making. The government initiated the process by issuing a Justice Statement (n 266), followed by an exhaustive community consultation driven by a governmental Statement of Intent (n 183), followed by extensive parliamentary debate on the proposed charter, followed by a long and staggered transitional period allowing all arms of government to prepare for this fundamental shift in governance (see s 2 of the Charter). Moreover, this “significant change” in the interpretation rules was “signalled in the clearest of terms” by Parliament: Moncilovic [2010] VSCA 50 at 99. Parliament had before it the Statement of Intent, the Victorian Report, the proposed Charter, the Explanatory Memorandum and the Second Reading Speech. These documents clearly outlined the choice between a constitutional and a statutory model of rights protection. Having preferred the statutory model, these documents curtailed the judicial role under the statutory models from NZ, Britain and the ACT. The proposed charter was clearly modelled on the UKHRA, not the NZ or ACT models. Further, it is curious that the Moncilovic Court refers to Lord Millett in Ghaaidan in order to bolster this argument about “significant change”. Lord Millett did not dissent in respect of the broad scope given to s 3(1) of the UKHRA, but rather dissented only on the application of s 3(1) to the particular fact situation (Ghaaidan [2004] 2 AC 557 at 691, 703). Arguably, Lord Millett’s obiter regarding the scope of s 3(1) is the most “radical” interpretation of s 3(1) in the judgment (see esp at 59, 60, 676). If the Moncilovic Court’s reasoning is applied to Lord Millett’s judgment, it might be found that Lord Millett accepts that s 3(1) is a “departure of the Ghaaidan kind from the ‘ordinary’ rules of interpretation”; that this is a major change to representative democracy; and that such a change was deliberately brought about by the British Parliament.

252 Having rejected the methodology in Britain and NZ (the Preferred Method), the Moncilovic Court offered additional justifications for the Moncilovic Model (Moncilovic [2010] VSCA 50 at [105]-[110]). Focusing on its discussion based on the dissenting opinion of Elias CJ in Hussen [2007] 3 NZLR 1, the Moncilovic Court bolsters its position by, inter alia, referring to Elias CJ’s reliance on the Canadian Charter in order to highlight that the limitations question is a “distinct and later enquiry” (at [109]). Referring to the Canadian Charter, Elias CJ states in Hussen at [92], as cited in Moncilovic at [109] (emphasis added):

[the first question is the interpretation of a right. In ascertaining the meaning of a right, the criteria for justification are not relevant. The meaning of the right is ascertained from the “cardinal values” it embodies. Collapsing the interpretation of the right and s 1 justification is insufficiently protective of the right. This reasoning is in my view equally compelling in the context of s 5 of the NZBORA. Straining to graft s 5 into the interpretative direction under s 6 is not necessary to give it work to do in the NZBORA containing s 4.

It is not clear why the Moncilovic Court relies on this statement; indeed, such reliance indicates a misunderstanding of what is being discussed by Elias CJ. Elias CJ is discussing the “meaning of the right” in this passage, not the meaning of the statutory provision in question. A discussion about the meaning of a right and its interaction with a limitations provision has been conflated with a discussion about the meaning of s 32(1) and its interaction with a limitations provision. The Canadian discussion about issues concerning the “rights questions” only cannot be morphed by the Moncilovic Court into a discussion about the interaction between the “rights questions” (ie s 7(2) limitation) and the “Charter questions” (ie s 32(1) interpretation).
What is possible under s 32(1)?

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

This conclusion is most unsatisfactory, given the choices before Parliament, the extensive legislative history to the Charter, and the broader context within which this conclusion sits.

The framework of interpretative rules

If s 32(1) was intended to be part of a "framework of interpretative rules", it is unclear why the Parliament chose to adopt language similar to s 3(1) rather than s 30 of the Human Rights Act 2004 (ACT) (ACTHRA). At the time the Charter was enacted, s 30(1) of the ACTHRA stated that "[i]n

Moreover, there are insurmountable difficulties with using the Canadian Charter to support this aspect of the Monclovic Court's reasoning. The Canadian Charter and the Victorian Charter do share the same "rights questions"; however, the Canadian Charter mechanisms differ from the Victorian Charter mechanisms. The Victorian Charter is a statutory instrument employing remedial mechanisms of judicial interpretation and judicial declaration. In contrast, the Canadian Charter is a constitutional rights instrument, employing the remedial mechanism of judicial invalidation. It is not clear how the Monclovic Court can legitimately use the approach to the "rights questions" under the Canadian Charter, to bolster an approach to the "Charter questions" under the Victorian Charter, when the Canadian Charter and the Victorian Charter employ different Charter mechanisms. Indeed, Warren CJ has confirmed that "the jurisprudence from these [constitutional] jurisdictions may be of assistance in determining comparable principle" (Dar 2009) 24 VR 415 at [97]). As Warren CJ suggests, "the only difference of importance between [constitutional] instruments and the Victorian Charter is in the remedial powers of the courts under such instruments" (Dar 2009) 24 VR 415 at [97]). In the Chief Justice's words, the Monclovic Court is not using Canadian Charter jurisprudence to "assist[] in determining comparable principle".

The Monclovic Court only provided its "tentative views" because "[n]o argument was addressed to the Court on this question". Monclovic [2010] VSCA 50 at [101]. Indeed, three of the four parties sought the adoption of the preferred UKHRA-based methodology as propounded by Bell J in Kracke (2009) 29 VAR 1 at [65], [67]-[235].

Monclovic [2010] VSCA 50 at [102].

Monclovic [2010] VSCA 50 at [103]. It is merely "part of the body of rules governing the interpretative task" (at [102]).

For sound and persuasive arguments about why s 32(1) creates a stronger obligation than the common law presumptions, being arguments that are contrary to this conclusion of the Monclovic Court, see Evans and Evans, n 98 at [3.11]-[3.17].

Monclovic [2010] VSCA 50 at [103].

Monclovic [2010] VSCA 50 at [104].

Monclovic [2010] VSCA 50. It is also unsatisfactory when then nature of the common law principles is considered. The common law principles are no more than assumptions which give way to contrary parliamentary intention, whether that intention is express or necessarily implied. To classify s 32(1) as a codification of the principle of legality denotes it from a strong and far reaching rule of interpretation, to an assumption that is readily displaced by contrary parliamentary intent. See generally Pearce and Geddes, n 90 at [5.3]-[5.3].

Section 30 of the Human Rights Act 2004 (ACT) (ACTHRA), at the time the Charter was adopted, read:
(1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.
(2) Subsection (1) is subject to the Legislation Act, section 139.
(3) In this section:
working out the meaning of a Territory law means—
(a) resolving an ambiguous or obscure provision of the law; or
(b) continuing or displacing the apparent meaning of the law; or
(c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or

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working out the meaning of Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred”.262 Section 30(2) then stated that “subsection 1 is subject to the Legislation Act, section 139”, with the statutory note indicating that “s 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test)”.263 Section 30 of the ACTHRA could be characterised as establishing a “framework of interpretative rules”, yet s 3(1) of the UKHRA could not. The Parliament had both provisions to choose from and it chose to model s 32(1) on s 3(1). This clear choice undermines the Moncikovic Court’s conclusion.

Codifying the principle of legality?

Moreover, if s 32(1) was intended to codify the principle of legality, Parliament could have achieved this in much more simple language and in much less complicated legislation. For example, Parliament could have easily taken the language from Plaintiff S157,264 which predated the Charter, and simply amended the ILA by inserting a provision stating “that the legislature is not intended to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakeable and unambiguous language or necessary implication”.265 The same wording could have been adopted in s 32(1) of the Charter. Moreover, the intention to codify the principle of legality would have been a simple message to convey in the Justice Statement,266 the Statement of Intent that launched the Community Consultation,267 the Victorian Report, and the ensuing Charter, Explanatory Memorandum and Second Reading Speech. The truth is that such a message is not conveyed; rather, all of these sources preceded on the basis that the Charter was adopting a statutory rights instrument, modelled the most closely on the UKHRA.

In coming to its conclusions on s 32(1), the Moncikovic Court relies significantly on Geiringer’s analysis of the 2007 NZ decision of Hansen,268 in which she suggests that the s 6 mandated interpretive obligation under the NZBORA is a codification of the principle of legality.269 The Moncikovic Court states that her comments “can be applied equally to s 32(1)”.270 Both its claim of applicability and its reliance on Geiringer require examination. First, the Moncikovic Court does not explain why Geiringer’s theory is equally applicable to s 32(1). No question would arise if s 32(1) had adopted the text of s 6;271 nor would a question arise if Hansen was decided before the Charter was enacted. But neither is true. Given this, the Moncikovic Court ought to explain how a theory about s 6 relates to the textually distinct s 32(1), and how Hansen which post-dates the Charter, and any theories

(d) finding the meaning of the law in any other case.

262 This is a combination of both s 3(1) the UKHRA (“as far as possible”) and s 6 of the NZBORA (“to be preferred”).

263 Section 30 of the ACTHRA was amended as a consequence of its mandated review process, and the new s 30 is closely modelled on the Charter. If the ACT parliamentary intention was to secure a “framework of interpretative rules”, this amendment is taking it further away from that intention than its original incarnation of s 30. The amended s 30 states: “So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.”


266 Attorney-General, Justice Statement (May 2004). The Justice Statement prioritised the need to recognise and protect human rights in Victoria, and committed the government to a community consultation on how best to protect and promote human rights in Victoria.

267 Victorian Government, n 183.


269 Geiringer, n 11 at 73, 75, 77. In particular, Geiringer suggests “that the New Zealand case law ... envisages the Bill of Rights Act as a legislative manifestation of (as opposed to departure from) common law approaches to value-oriented interpretation” (at 73).

270 Moncikovic [2010] VSCA 50 at [104].

271 The language of s 32(1) is borrowed from the text of s 3(1), not s 6: see above. Indeed Geiringer herself refers to Lord Cooke’s remarks that s 3(1) “read as a whole conveyed ‘a rather more powerful message’ than its New Zealand counterpart”: n 11 at 66.
Who is sovereign now? The Morsiclovic Court hands back power over human rights

living from Hansen, are of assistance in identifying Parliament’s intention in enacting s 32(1) in 2006. Rather than relying on the British jurisprudence explicitly referred to by name and concept in the extrinsic aids to the Charter,272 the Morsiclovic Court discovers273 Parliament’s intention in 2006 from a NZ case decided in 2007 and academic commentary written in 2008.

Secondly, of greater concern is the selective and acontextual reliance on the passage quoted by the Morsiclovic Court. Beyond the Morsiclovic Court’s focus, Geiringer draws some well-considered conclusions about methodology. She acknowledges that Hansen establishes a two-phase approach to interpretation, which is similar to the “rights questions” and “Charter questions” under the Preferred Method.274 Geiringer then concludes that a two-phase approach is appropriate if the interpretation obligation is distinct from ordinary interpretation at common law, such that it is “not surprising that the House of Lords has adopted a similar methodology under s 3(1) of the UKHRA”.275 However, if the interpretation obligation codifies the common law principle of legality, Geiringer concludes that the phase-two inquiry is redundant. This conclusion does not progress the Morsiclovic Court’s argument because it relies on an assumption, and it is that assumption which is at the heart of the case – the assumption being that s 32(1) merely codifies the common law, and is to be considered the same as (rather than distinct from) ordinary interpretation under the common law. Surely this assumption cannot be made by the Morsiclovic Court without justification.276

More importantly, the Morsiclovic Court fails to acknowledge the conclusions Geiringer draws from conceptualising s 6 as a codification of the principle of legality. Immediately after the passage quoted by the Morsiclovic Court,277 Geiringer states:

there is surely a respectable argument to be made that s 6 of the NZBORA may on occasion entitle the courts to adopt constructions that are at odds with statutory purpose. As Lord Steyn put it in Ghaidan with reference to the UKHRA, the question of whether the adoption of a s 6-mandated meaning would “ought the will of Parliament as expressed in the statute under examination ... cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the [NZBORA]”.278

Indeed, Geiringer’s central thesis – “that s 6 may on occasion entitle the courts to adopt constructions that are at odds with statutory purpose”279 – and her conclusion “that in an appropriate case, even quite strong legislative indications of ‘purpose’ must yield to the statute only mandated

272 The Victorian Report refers to the British jurisprudence by name and the Victorian Report and the Explanatory Memorandum lift concepts from that jurisprudence in explaining the effect of the inserted phrase: see Victorian Committee, n 83, pp 82-83; Explanatory Memorandum, n 96, p 23. For example, the Explanatory Memorandum states that “[t]he reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to place Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation” (p 23).
273 “In view of our conclusion that s 32(1) was not intended to create a “special” rule of statutory interpretation, we should state briefly how we consider the provision was intended to operate”: Morsiclovic [2010] VSCA 50 at [101] (emphasis added).
274 See n 46. Geiringer notes that phase one requires a provision to be given its ordinary meaning, and then assessed against protected rights and justifiable limitations; if a provision violates a protected right in an unjustifiable manner, phase two requires consideration of whether a provision can be given a meaning that is more consistent with the right: n 11 at 83.
275 Geiringer, n 11 at 83-84.
276 Indeed, Geiringer builds her thesis “both by reference to the New Zealand case law and, as a point of contrast, by reference to the position in the United Kingdom under the UKHRA” (n 11 at 73). The conclusions that flow from such contrast are interesting, but give little insight into what Parliament intended under s 32(1) of the Charter, particularly if one is of the very reasonable opinion that s 32(1) was modelled on s 3(1) of the UKHRA and codified Ghaidan.
277 Morsiclovic [2010] VSCA 50 at [104], citing Geiringer, n 11 at 89.
278 Geiringer, n 11 at 89 (emphasis added). Geiringer points out that the intention behind the NZBORA will not prevail every time there is a clash of statutory intentions. She outlines a range of factors that will be balanced in each case of conflict, including the right in issue, the legislation in question, the nature of the breach, the force with which the countervailing purpose is expressed, and the legislative history (at 89-90). Geiringer also notes that any “democratic objection[s]” to such interpretative techniques are “significantly ameliorated by the codification of a bill of rights” (at 65).
imperatives set out in the NZBORA— are based on the common law: “[w]here fundamental values are perceived to be threatened, there is a long history of common law courts utilising presumptions of interpretation to promote literal or even strained meanings in disregard of statutory purpose.”

This broader and central analysis of Geiringer’s does not sit comfortably with the Moncilovic Court’s reasoning. The specific question being answered in this part of its judgment is whether s 32(1) replicates s 3(1). Quite correctly, considerable significance is attached to the additional words “consistently with their purpose”. The Moncilovic Court is at pains to create a picture of s 32(1) in contradistinction to s 3(1) and particularly to Ghaidan, and to identify a conceptual analysis of s 32(1) that places the statutory purpose of the legislation being interpreted under the Charter above the statutory purposes contained within the Charter. The answer to both conundrums presented itself to the Moncilovic Court in conceptualising s 32(1) as a codification of the principle of legality, relying heavily on Geiringer’s musings for the NZBORA. Unfortunately, Geiringer’s principle of legality does not support fundamental elements underpinning the Moncilovic Court’s conclusion— to envisage s 32(1) as a codification of the common law does not avoid Ghaidan-type interpretative analysis, and does not put to rest the tension between competing parliamentary intentions (indeed, it does not automatically elevate the statutory purpose of the impugned provision over the statutory purpose of the rights instrument).

CONCLUSION

This article has critiqued the choices made by the Moncilovic Court in relation to the reach of s 32(1) and the appropriate methodology for s 32(1) analysis. It questioned the Moncilovic Court’s reliance on Wilkinson, and scrutinised its decision to reject s 32(1) as a replication of s 3(1). In relation to the latter, the article criticised the Moncilovic Court’s understanding of Ghaidan, and the reasoning behind its decision that the language of s 32(1) was of a different character to s 3(1). It also criticised the Moncilovic Court’s discussion of parliamentary intent because of its selective nature, its tendency to misconstrue and misapply fundamental issues, and its failure to address the weight of extrinsic material opposing its view. Finally, the characterisation of s 32(1) as being part of a framework of interpretative rules and codifying the common law principle of legality was criticised against the choices available to Parliament, the legislative history of the Charter, and the broader context within which the Moncilovic Court’s conclusion sits.

Some general conclusion can be drawn from the specific analysis. The Moncilovic Court chose to reject and hand back powers that Parliament clearly intended it to have. The Moncilovic Court appears to subvert, if not usurp, the sovereignty of Parliament by refusing to acknowledge and accept the intended remedial reach of s 32(1). Instead, the Moncilovic Court interpreted s 32(1) to embody a mere codification of what the judiciary had already decided it had power to do under the common law – that is, to abide by the principle of legality. At best, this amounts to the Moncilovic Court reneging on a fundamental aspect of our constitutional settlement – that being, the supremacy of Parliament. At worst, some may argue that this is an act of judicial supremacy, with the judiciary considering itself free to decide whether or not it wishes to accept a power that Parliament clearly intended it to have.

It is rather ironic that, by adopting a statutory rights instrument in order to avoid the allegations of judicial supremacy levelled under constitutional rights instruments, one is now querying whether the judiciary has become supreme. As argued elsewhere, perhaps the least problematic rights instrument is a constitutional instrument where judges are empowered to invalidate laws. Under a constitutional instrument, the judicial task is to decide whether a law unjustifiably limits rights, with

280 Geiringer, n 11 at 91.
281 Geiringer, n 11 at 63.
282 That is, even if the highly contestable claim that s 6 analysis that post-dates the adoption of s 32(1) was accepted as applicable.
invalidation flowing from this. The “creative” decision about whether or not to re-enact the invalidated rights-incompatible law subject to an override provision, or to amend the rights-incompatible law to achieve a valid legislative objective in a less rights-restrictive manner, or to let the rights-incompatible law go by allowing the invalidation to stand, is the choice of the representative arms of government. These roles of the judiciary and legislature reflect traditional understandings of judicial and legislative power. In contrast, statutory rights instruments ask of judges an unenviable task — that being, to “fix” rights-incompatibility where possible, but to not act as judicial legislators.284 This formula exposes judges to allegations of judicial activism and judicial supremacy, whether well-founded or not. The Mancilovic Court, having undermined the reach of s 32(1) and adopted a rights-reductionist methodology, may (or may not) have avoided the prospect of such allegations arising in future judgments under s 32(1), but the very decision itself raises questions about judicial usurpation of parliamentary intent.

The solution? In order to secure its intention, Parliament should delete the words “consistently with their purpose” from s 32(1) at the four-year mandated review of the Charter,285 thereby removing any doubt that s 32(1) replicates s 3(1) as propounded in Ghaidan which, in turn, will trigger a revision of the appropriate methodology. Alternatively, if the Charter experiment to date has exposed an unacceptable risk in relation to judicial acts of legislation, Parliament must give judges the power to invalidate rights-incompatible laws, coupled with an override provision based on the ICCPR.286

284 The following statement from Lamont J of the Canadian Supreme Court in Sleight Communications v Davidson [1989] 1 SCR 1038 at 1078 (emphasis added), highlights that constitutional rights instruments do not place judges in an unenviable position of being asked to “reinterpret” laws without becoming law makers:

Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.

285 Charter, s 44.

INTRODUCTION

SUMMARY

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

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

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

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

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Question 2: Are human rights sufficiently protected and promoted?

At the federal level, Australia does not have comprehensive and formal recognition of human rights within its domestic laws. The domestic law of Australia lacks effective human rights protections. The representative arms of government have an effective monopoly over the protection and promotion of human rights. The judiciary has a limited role in protecting and promoting rights. In essence, change is needed to better protect human rights within Australia.

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

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

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

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

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

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

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

If the Canadian Charter model – whether fully entrenched or enacted subject to a manner and form provision – is not supported, the next best alternative would be to protect and promote human rights via an ordinary statute. If the statutory protection route is taken, it should be modelled on the Human Rights Act 1998 (UK) (the ‘UK HRA’). This model has essentially been adopted by, and in some respects improved in, Victoria under the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the “Victorian Charter”) and the ACT under the Human Rights Act 2004 (ACT) (the ‘ACT HRA’). Where there are differences between the UK HRA, the Victorian Charter and the ACT HRA, they will be noted and an indication of the preferred alternative indicated.

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

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

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4 Canadian Bill of Rights, SC 1960, c 44.

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

**THIS SUBMISSION**

This submission to the National Human Rights Consultation is in two parts: (a) the first part addresses the substance of the three questions posed under the Terms of Reference of the National Human Rights Consultation; and (b) the second part appends my past research and publications that form the basis of the submission and more fully explore the issues. The first part is intended as a detailed overview of the relevant matters, with the second part providing the National Human Rights Consultation Committee (the ‘Consultation Committee’) with further elaboration and discussion where considered necessary. For ease of reference, in the first part I direct the Consultation Committee to specific page references in the second part.
QUESTIONS 1: WHICH HUMAN RIGHTS (INCLUDING RESPONSIBILITIES) SHOULD BE PROTECTED AND PROMOTED?

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

NATIONAL HUMAN RIGHTS CONSULTATION BACKGROUND PAPER AND TERMS OF REFERENCE

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

AUSTRALIA’S INTERNATIONAL OBLIGATIONS

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

- *International Covenant on Civil and Political Rights* (1966) (“ICCPR”),
- *Convention on the Elimination of all Forms of Discrimination against Women* (1979) (“CEDAW”),
- *Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment* (1987) (“CAT”),

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

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

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

**DOMESTIC RECOGNITION OF AUSTRALIA’S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS**

Australia must guarantee within our domestic jurisdiction the full range of civil, political, economic, social and cultural rights. This is for a number of reasons. First and foremost, to avoid a hypocritical situation where Australia has guaranteed one set of rights at the international level and another at the domestic level, all rights protected at the international level must also be recognised in the domestic setting – that is, civil, political, economic, social and cultural rights.

Secondly, if the purpose of protecting and promoting human rights is to ensure ‘that basic safeguards for equality and fairness are in place so that we can prevent the violation of rights, and provide remedies when a violation does occur’,\(^9\) at a minimum economic, social and cultural rights, in addition to civil and political rights, must be protected.

Thirdly, under the Australian Constitution, the Federal Parliament must have a head of power enabling it to legislate on human rights. Presumably, the external affairs power\(^10\) will be relied upon to embed human rights into domestic law. Ratification of both the ICCPR and ICESCR enliven the external affairs power, providing the Federal Parliament with the authority to embed civil, political, economic, social and cultural rights in the domestic jurisdiction.

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

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\(^9\) For example, CERD, CEDAW, CROC, CRPD.


\(^11\) *Australian Constitution* 1901, s 51(29).
environmental and other group rights. This was recently confirmed, as a major outcome, at UN World Conference on Human Rights in Vienna. Any domestic human rights package must comprehensively protect and promote all categories of human rights for it to be effective. 

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

**Economic, Social and Cultural Rights**

Two arguments are often rehearsed against the domestic incorporation of economic, social and cultural rights. The two arguments are: (a) that Parliament rather than the courts should decide issues of social and fiscal policy; and (b) that economic, social and cultural rights raise difficult issues of resource allocation unsuited to judicial intervention.

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

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

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.\textsuperscript{16} Let us consider some examples.

The right to life – a classic civil and political right – is a right in point. Assessing this right in line with the Maastricht principles,\textsuperscript{17} first, States have the duty to respect the right to life, which is largely comprised of negative, relatively cost-free duties, such as, the duty not to take life. Secondly, States have the duty to protect the right to life. This is a duty to regulate society so as to diminish the risk that third parties will take each other’s lives, which is a partly negative and partly positive duty, and partly cost-free and partly costly duty. Thirdly, States have a duty to fulfil the right to life, which is comprised of positive and costly duties, such as, the duty to ensure low infant mortality and to ensure adequate responses to epidemics.

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

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

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


\textsuperscript{17} The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).
measures taken by the government to protect the right to adequate housing were reasonable.\textsuperscript{16} This type of judicial supervision is well known to the Australian legal system, being no more and no less than what we require of administrative decision makers – that is, a similar analysis for judicial review of administrative action is adopted.

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

In Soobramoney v Minister of Health (KwaZulu-Natal) (1997),\textsuperscript{17} Soobramoney argued that a decision by a hospital to restrict dialysis to acute renal/kidney patients who did not also have heart disease violated his right to life and health. The Constitutional Court rejected this claim, given the intense demand on the hospitals resources. It held that a ‘court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.’ In particular, it found that the limited facilities had to be made available on a priority basis to patients who could still qualify for a kidney transplant (i.e. those that had no heart problems), not a person like the applicant who was in an irreversible and final stage of chronic renal failure.

In Government of the Republic South Africa & Ors v Grootboom and Ors (2000),\textsuperscript{18} the plight of squatters was argued to be in violation of the right to housing and the right of children to shelter. The Constitutional Court held that the Government’s housing program was inadequate to protect the rights in question. In general terms, the Constitutional Court held that there was no free-standing right to housing or shelter, and that economic rights had to be considered in light of their historic and social context – that is, in light of South Africa’s resources and situation. The Constitutional Court also held that the Government need not go beyond its available resources in supplying adequate housing and shelter. Rather, the Constitutional Court will ask whether the measures taken by the Government to protect the rights were reasonable. This translated in budgetary terms to an obligation on the State to devote a reasonable part of the national housing budget to granting relief to those in desperate need, with the precise budgetary allocation being left up to the Government.

Finally, in Minister of Health v Treatment Action Campaign (2002),\textsuperscript{19} HIV/AIDS treatment was in issue. In particular, the case concerned the provision of a drug to

\textsuperscript{16} See further Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1696 (CC); Government of South Africa v Grootboom 2000 (11) BCLR 1169 (CC); Minister of Health v Treatment Action Campaign (2002) 5 SA 721 (CC).

\textsuperscript{17} Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1696 (CC).

\textsuperscript{18} Government of the Republic South Africa & Ors v Grootboom and Ors 2000 (11) BCLR 1169 (CC).

\textsuperscript{19} Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC).
reduce the transmission of HIV from mother to child during birth. The World Health Organisation had recommended a drug to use in this situation, called nevirapine. The manufacturers of the drug offered it free of charge to governments for five years. The South African Government restricted access to this drug, arguing it had to consider and assess the outcomes of a pilot program testing the drug. The Government made the drug available in the public sector at only a small number of research and training sites.

The Constitutional Court admitted it was not institutionally equipped to undertake across-the-board factual and political inquiries about public spending. It did, however, recognise its constitutional duty to make the State take measures in order to meet its obligations – the obligation being that the Government must act reasonably to provide access to the socio-economic rights contained in the Constitution. In doing this, judicial decisions may have budgetary implications, but the Constitutional Court does not itself direct how budgets are to be arranged.

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

[the] government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving [the drug] at the time of the birth…
A potentially lifesaving drug was on offer and where testing and counselling faculties were available, it could have been administered within the available resources of the State without any known harm to mother or child.22

The increasing acceptance of the justiciability of economic, social and cultural rights has led to a remarkable generation of jurisprudence on these rights. Interestingly, this reinforces the fact the economic, social and cultural rights do indeed have justiciable qualities – the rights are becoming less vague and more certain, and thus more suitable for adjudication. Numerous countries have incorporated economic, social and cultural rights into their domestic jurisdictions and the courts of these countries are adding to the body of jurisprudence on economic, social and cultural rights.23

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

Moreover, the clarity of economic, social and cultural rights is being improved by the United Nations Committee on Economic, Social and Cultural Rights currently through its concluding observations to the periodic reports of States’ Parties and through its General Comments. This is only set to improve, given the recent adoption of the United Nations (by consensus) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008), which allows individuals to submit complaints to the Committee about alleged violations of rights under ICESCR. Once the Optional Protocol comes into force, there will be even greater clarity of the scope of, content of, and minimum obligations associated with economic, social and cultural rights. This ever-increasing body of jurisprudence and knowledge will allow Australia to navigate its responsibilities with a greater degree of certainty.

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

**Specific Rights of Indigenous Australians**

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

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


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

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

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

**Property rights**

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

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

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

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

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29 See also Human Rights Committee, General Comment 15: The Position of Aliens under the Covenant (11 April 1986).
QUESTION 2: ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?

At the federal level, Australia does not have comprehensive and formal recognition of human rights within its domestic laws. The domestic law of Australia lacks effective human rights protections. The representative arms of government have an effective monopoly over the protection and promotion of human rights. The judiciary has a limited role in protecting and promoting rights. In essence, change is needed to better protect human rights within Australia.

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

THE PAUCITY OF CONSTITUTIONALLY PROTECTED HUMAN RIGHTS GUARANTEES

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

Moreover, the few rights that are constitutionally protected have most often been interpreted narrowly by the courts, giving greater freedom to the representative arms of government in their creation and enforcement of Commonwealth law.\(^{30}\) For


\(^{31}\) Not surprisingly, the two economic rights in the Constitution, ss 51(XXXI) and 92, have been interpreted more expansively than the human rights: see, eg, Zines, The High Court, above n 30, 402; Charlesworth, ‘The Australian Reluctance about Rights’, above n 30, 24.
example, let us consider s 116 which prohibits the Commonwealth making any law that establishes a religion, imposes religious observance, prohibits the free exercise of religion, or imposes religious tests as a qualification for any office or public trust under the Commonwealth.

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

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

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33 Krygger v Williams (1912) 15 CLR 366.

34 In other words, s 116 only prevents the Commonwealth making a law which prohibits religious practice.


37 I have two concerns about the implication of a bill of rights into the Constitution. My first concern is based on the public perception of the proper role of the judiciary. Judicial introduction of human rights standards, for instance via administrative law, will cause (and has caused) controversy and may be considered an improper exercise of the judicial function. Moreover, I am concerned that judicial introduction of human rights standards will be piecemeal and incomplete, with some rights being readily compatible with our existing legal regime and others not being so. I would prefer a constitutional bill of rights to be introduced via the s 128 amending provisions of the Constitution. See also Winterton,
the fact remains that the *Australian Constitution* does not provide comprehensive protection of human rights.8 This enhances the monopoly the representative arms of government have over the protection and promotion of human rights in Australia.

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

See further:


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

Commonwealth and State laws provide statutory protection of human rights. These statutory regimes, in part, implement the international human rights obligations successive Australian governments have voluntarily entered into.9

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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.\(^4\) The disadvantages are, \textit{inter alia}, as follows:

\begin{itemize}
  \item[a)] the scope of the rights protected by statute is much narrower than that protected by international human rights law;\(^1\)
  \item[b)] there are exemptions from the statutory regimes, allowing exempted persons to act free from human rights obligations;\(^2\)
  \item[c)] the interpretation of human rights statutes by courts and tribunals has generally been restrictive;\(^3\)
  \item[d)] the human rights commissions established under the statutes are only as effective as the representative arms of government allow them to be\(^4\) (or fund them to be)\(^5\); and
\end{itemize}

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


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


A case in point is the indirect methods of enforcement given to commissions under human rights legislation. The indirect methods of enforcement include the investigation and conciliation of a complaint, followed by an inquiry by a specialist body. At the Commonwealth level, due to the separation of judicial powers doctrine implied in the \textit{Constitution}, HREOC (an administrative body), not being a Chapter III court, does not have the power to enforce decisions flowing from the hearing process because enforcement is a judicial function: \textit{Brandy} (1995) 183 CLR 245. This is not the case for the State specialist bodies. See generally Charleston, ‘The Australian Reluctance about Rights’, above n 30, 38; O’Neill and Handley, above n 30, 105; Bailey and Devereux, above n 42, 306, especially n 68;
e) these are only statutory protections – parliament can repeal or alter these protections via the ordinary legislative process.

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

See further

THE DOMESTIC IMPACT (OR LACK THEREOF) OF OUR INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

The representative arms of government enjoy a monopoly over the choice of Australia’s international human rights obligations, and their implementation in the domestic legal regime. In terms of choice, the Commonwealth Executive decides which international human rights treaties Australia should ratify (s 61 of the Australian Constitution). In terms of domestic implementation, the Commonwealth Parliament controls the relevance of Australia’s international human rights obligations within the domestic legal system. The ratification of an international human rights treaty by the executive gives rise to international obligations only. A treaty does not form part of the domestic law of Australia until it is incorporated into domestic law by the Commonwealth Parliament. No international human rights treaty has been fully and comprehensively incorporated into domestic law.

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

a) there are rules of statutory interpretation that favour interpretations of domestic laws that are consistent with our international human rights obligations;

b) our international human rights obligations influence the development of the common law;

c) international human rights obligations impact on the executive insofar as the ratification of an international treaty alone, without incorporation, gives rise to

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

HREOC is semi-independent: see generally HREOC Act 1986 (Cth) and HREOC, ‘Australian Human Rights and Equal Opportunity Commission: About the Commission’ (2002) <http://www.hreoc.gov.au/about_the_commission/index.html> at 19 February 2004. HREOC is funded by the executive, but it is free to criticise the executive. The amount of funding impacts on the quantity and quality of the work HREOC can undertake. A funding cut to HREOC in the late 1990s resulted in fewer commissioners, staff and resources to undertake its work. For example, although HREOC has six main areas of interest, there are only three Commissioners, all of whom have responsibility for two portfolios.
a legitimate expectation that an administrative decision-maker will act in accordance with the treaty, unless there is an executive or legislative indication to the contrary (Teoh decision).

Basically, Australia’s international human rights obligations offer very little protection within the domestic system. In particular, the rules of statutory interpretation are weak, especially because clear legislative intent can negate them. Moreover, reliance on the common law is insufficient, especially given that judges can only protect human rights via the common law when cases come before them, which means that protection will be incomplete. The common law can also be overturned by statute. Furthermore, the decision of Teoh offers only procedural (not substantive) protection, and its effectiveness and status is in doubt — successive Executive statements have sought to undermine any legitimate expectation that may arise from the ratification of a treaty; the Commonwealth legislature may override the Teoh principle by legislation, and a majority of judges on the High Court of Australia have recently questioned the correctness of the decision in Teoh.

See further:


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

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

It is important to note that the representative monopoly over the protection and promotion of human rights results in problematic consequences. First, human rights in Australia are under-enforced. The Commonwealth has signed most of the major international human rights treaties. Despite this international commitment to the promotion and protection of human rights, there are insufficient mechanisms to enforce these basic human rights within the domestic system.

Secondly, and consequently, aggrieved persons and groups are denied an effective non-majoritarian forum within which their human rights claims can be assessed and remedied. This, in turn, has led to increasing recourse to the judiciary, placing pressures on the judiciary which ultimately test the independence of the judiciary and the rule of law. In particular, when individuals turn to the judiciary as a means of final recourse to resolve human rights disputes, the judiciary is often accused of illegitimate judicial law-making or judicial activism. See further Julie Debeljak, Human Rights and Institutional Dialogue, pp 37 to 48.

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

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90 The domestic fora have limited rights jurisdictions only and are vulnerable to change; the international fora are non-binding and increasingly ignored.
QUESTION 3: HOW COULD AUSTRALIA BETTER PROTECT
AND PROMOTE HUMAN RIGHTS?

INTRODUCTION AND SUMMARY OF POSITION

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

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

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

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

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

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53 Canadian Bill of Rights, SC 1960, c 44.
entrenchment is via a manner and form provision, not constitutional amendment, and (b) any laws that cannot be interpreted to be rights-compatible will be able to be judicially declared inoperative rather than invalid. Accordingly, the main focus of discussion below will be on the Canadian Charter, with discussion of the Canadian BoR only when constitutionality under the Australian Constitution is discussed.

If the Canadian Charter model – whether fully entrenched or enacted subject to a manner and form provision – is not supported, the next best alternative would be to protect and promote human rights via an ordinary statute. If the statutory protection route is taken, it should be modelled on the UK HRA. This model has essentially been adopted by, and in some respects improved in, Victoria (under the Victorian Charter) and the ACT (under the ACT HRA). Where there are differences between the UK HRA, the Victorian Charter and the ACT HRA, they will be noted and an indication of the preferred alternative indicated.

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

HUMAN RIGHTS AND LEGISLATION

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

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

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Traditional Approaches to the Role and Interactions of the Institutions of Government

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

1) Australia:

In Australia, as discussed above in Question 2, the representative arms of government – the legislature and executive – have an effective monopoly on the promotion and protection of human rights.

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

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

These problems undermine the protection and promotion of human rights in Australia. Despite Australia’s commitment to the main body of international human rights norms, there is no domestic requirement to take human rights into account in law-making and governmental decision-making; and, when human rights are accounted for, the majoritarian-motivated perspectives of the representative arms are not necessarily challenged by other interests, aspirations or views.

Moreover, the effective representative monopoly over human rights tends to 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.
2) **Human Rights vs Democracy**

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

Human rights and democracy are often characterised as irreconcilable concepts — the protection of the rights of the minority is supposedly inconsistent with democratic will formation by the process of majority rule. In particular, judicial review of the decisions of the representative arms against human rights standards is often characterised as anti-democratic — allowing the unelected judiciary to review and invalidate the decisions of the elected arms supposedly undermines democracy.

These arguments assume that a judicially enforceable human rights instrument replaces a representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); or, more simply, that a judicially enforceable human rights instrument replaces parliamentary supremacy with judicial supremacy.

3) **United States of America:**

This brings us to the United States. The anti-democratic concerns relating to judicial enforcement of human rights are grounded in this model. The United States adopted the traditional model of domestic human rights protection, which relies heavily on judicial review of legislative and executive actions on the basis of human rights standards. Under the *United States Constitution* (*US Constitution*), 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. Alternatively, the representative arms can attempt to limit human rights by controlling the judiciary. This can be attempted through court-stacking and/or court-bashing. Court-stacking and/or court-bashing are inadvisable tactics, given the potential to undermine the independence of the

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55 *United States Constitution* (1787) (*US Constitution*).

judiciary, the independent administration of justice, and the rule of law—all fundamental features of modern democratic nation States committed to the protection and promotion of human rights.

Given the difficulty associated with representative responses to judicial invalidation, the US Constitution essentially gives judges the final word on human rights and the limits of democracy. Hence, the perception that comprehensive protection of human rights: (a) transfers supremacy from the elected arms of government to the unelected judiciary; (b) replaces the representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); (c) and results in illegitimate judicial sovereignty, rather than legitimate representative sovereignty.

At this stage, proponents of human rights guarantees may be wondering why the representative arms should be able to respond to a judicial invalidation—the answer to this question lies in the features of human rights and democracy, a discussion to which we now turn.

Modern Approaches to the Role and Interactions of the Institutions of Government

The traditional models discussed either support a representative monopoly (Australian) or a judicial monopoly (American), both of which pose problems. Rather than adopting an instrument that supports a representative monopoly or a judicial monopoly over human rights, I propose Australia pursues a model that promotes an inter-institutional dialogue about human rights. This brings us to the Canadian Charter and the UK HRA.

These modern human rights instruments establish an inter-institutional dialogue between the arms of government about the definition, scope and limits of democracy and human rights. Each of the three arms of government has a legitimate and beneficial role to play in interpreting and enforcing human rights. Neither the judiciary, nor the representative arms, have a monopoly over the rights project. This dialogue is in contrast to both the representative monologue that we have in Australia, and the judicial monologue that exists under the US Constitution.

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

1) Human Rights and Democracy – reconcilable?

First, human rights and democracy are not irreconcilable ideals. There certainly are tensions between modern notions of democracy and human rights, with human rights constituting and limiting democracy, and democratic values being capable of justifiably limiting human rights under modern human rights instruments. However, tensions between human rights and democracy are healthy and constructive ones that are necessary in diverse, inclusive, modern polities.
2) **Features of Human Rights and Democracy?**

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

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

See further:


**The Canadian Charter**

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

The Canadian Charter is contained within the Canadian Constitution. Section 1 guarantees a variety of essentially civil and political rights; however, under s 1, limits

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

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

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

The UK HRA

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

In relation to the institutional question, s 3 imposes an interpretative obligation on the judiciary. The judiciary must interpret primary legislation, so far as it is possible to do so, in a way that is compatible with the incorporated Convention rights. However, under s 4, the judiciary is not empowered to invalidate legislation that cannot be read compatibly with Convention rights. Rather, primary incompatible legislation stands and must be enforced. All the judiciary can do is issue a ‘declaration of incompatibility’. A declaration is supposed to be the warning bell to parliament and the executive that something is wrong. It is up to the parliament or executive to then act.

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63 Human Rights Act 1998 (UK) c 42, s 3. See also United Kingdom, Rights Brought Home: The Human Rights Bill (1997) [2.7].
The *ACT HRA* and the *Victorian Charter* basically mimic these provisions of the *UK HRA*: both documents incorporate rights largely based on the *ICCPR* into domestic law; impose similar interpretative obligations; and allow the judiciary to issue declarations of incompatibility.

**The Inter-Institutional Dialogue approach**

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

1) **Specification of Human Rights**

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

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

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

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

   At this juncture, it is important to discuss pre-legislative scrutiny measures. Whilst I support the use of pre-legislative scrutiny measures, there are difficulties in their practical application that must be considered.
In Canada, the Minister for Justice has a statutory reporting requirement to Parliament under the *Department of Justice Act*. The Minister must certify that bills presented to Parliament have been compared with the *Canadian Charter* and any inconsistencies with the purposes or provisions of the *Canadian Charter* must be reported. To date, the Minister has not reported any inconsistencies with the *Canadian Charter*.

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

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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.69

The Canadian ministerial reporting requirement is an important part of the inter-institutional dialogue about democracy and human rights. Pre-legislative scrutiny ensures that the executive is actively engaged in the process of interpreting and refining the scope of the broadly-stated Canadian *Charter* rights. Such assessments by the policy-driven arm of government are a vital contribution to the inter-institutional dialogue about Canadian *Charter* rights. The executive can influence the legislative and judicial understandings of particular Canadian *Charter* issues with the information and analysis contained in the pre-legislative record, particularly if it contained ‘policy objectives, consultations with interested groups, social-science data, the experiences of other jurisdictions with similar legislative initiatives, and testimony before parliamentary committees by experts and interest groups.’ This capacity to influence the inter-institutional dialogue has motivated the executive to undertake serious pre-legislative scrutiny.70 Consistent and thorough pre-legislative scrutiny also ensures that the legislative drafters ‘identify ways of accomplishing legislative objectives in a manner that is more likely both to survive a [Canadian] *Charter* challenge and to minimize disruption in attaining the policy goal.’71

From an inter-institutional dialogic perspective, however, the biggest problem with Canadian executive pre-legislative scrutiny is its secretive character. Understandably, the Department of Justice is reluctant to divulge precise details about Canadian *Charter*-problematic policy objectives, assessments given by the Department of Justice, and the departmental and political responses to those assessments. In addition, cabinet deliberations are secret.72

However, this secrecy hinders the inter-institutional dialogue. The legislature does not fully benefit from the executive assessments of policies and their legislative translations. The legislature only has access to the parliamentary report of the


71 Ibid 7.

72 Ibid 10.

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

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

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

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

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

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75 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).

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

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

78 This is similar to the rule in Pepper v Hart [1993] AC 59.
Statements of compatibility allow the executive to assert its understanding of the open-textured Convention rights in the context of policy formation and legislative drafting. 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’ must support compatibility – is it ‘more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the European Court.’

In relation to the quality of the explanation, the UK HRA does not impose an obligation on the responsible Minister to explain their reasoning as to compatibility. The White Paper did, however, indicate that where a s 19(1)(b) statement was made, ‘Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the bill.’ During debate on the Human Rights Bill, it was suggested that the reasoning would be disclosed only if raised in parliamentary debate.

After the UK HRA came into operation, the Home Office has indicated that a Minister ‘is generally not in a position to disclose detailed legal advice, nor should it be necessary to do so.’ Rather, s 19(1) statements should only indicate which

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79 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.


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


Convention issues were considered and ‘the thinking which led to the conclusion reflected in the statement.’ The detail of the compliance issue ‘is most suitably addressed in context, during debate on the policy and its justification.’ 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.’”

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”, even though ‘this is perhaps the most important requirement of the UK HRA.”

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

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.


Ibid.


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. 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.\(^9\)

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


\(^91\) This is a double-edged sword. If the reasoning behind the statement is not disclosed, the executive retain the element of surprise in any subsequent litigation involving the legislation. Conversely, non-disclosure precludes the reasoning of the executive from influencing the views of parliament and the judiciary.
See further:

- Julie Debeljak, Human Rights and Institutional Dialogue, pp 151 to 155 and 212 to 218 (Canada); pp 291 to 306 (Britain)

2) Limitations on rights:

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

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

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

Finally, rights can be externally limited. The Canadian Charter is a good example of this. Section 1 of the Canadian Charter guarantees all the rights contained therein, subject to any reasonable limits that are prescribed by law and that can be

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demonstrably justified in a free and democratic society.\textsuperscript{93}

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

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

Secondly, under s 1 the limitation must be necessary in a free and democratic society. This is verified by a three-step proportionality test. The first component is a rationality test. The rights-limiting legislative objective must be rational, in that the legislative means must achieve the legislative objective.\textsuperscript{98} A substantial majority of limitations are found to be rational by the Supreme Court of Canada. Between 1982 and 1997, 86 per cent of legislation that violated the Canadian Charter possessed a rational connection to the legislative objective.\textsuperscript{99}

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

\textsuperscript{93} 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.

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

\textsuperscript{95} Another component for adjudging limits under the Canadian Charter and the ECHR is whether the limit is prescribed by law. This is not usually difficult, particularly when legislation is involved


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

\textsuperscript{99} Peter W Hogg and Alison A Bushell, ‘The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)’ (1997) 35 Osgoode Hall Law Journal 75, 98.
possible.\textsuperscript{100} It is this component which most rights-limiting legislation falls foul of. Of the 50 (out of 87) infringements of \textit{Canadian Charter} that have failed the s 1 limits test, 86 per cent (43 infringements) failed the minimum impairment test.\textsuperscript{101}

The third component is the need for proportionality between the negative effects of the rights-limiting legislation, and the legislative objective identified as being of sufficient importance.\textsuperscript{102} 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.\textsuperscript{103}

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

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

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

\textsuperscript{101} Peter W Hogg and Alison A Bushell, ‘The \textit{Charter} Dialogue Between Courts and Legislatures (Or Perhaps the \textit{Charter} of Rights Isn’t Such a Bad Thing After All)’ (1997) 35 Osgoode Hall Law Journal 75, 100.

\textsuperscript{102} More recently, the Supreme Court of Canada also required there to be proportionality between the negative and salutary effects of the rights-limiting legislation: \textit{Canadian Broadcasting Corporation v Dagenais} [1994] 3 SCR 835, 889.


\textsuperscript{104} \textit{R v Oakes} [1986] 1 SCR 103. This is as refined by \textit{Canadian Broadcasting Corporation v Dagenais} [1994] 3 SCR 835 – see above n 102.

\textsuperscript{105} \textit{Canada (Attorney-General) v Hislop} [2007] 1 SCR 429.

\textsuperscript{106} \textit{Canada (Attorney-General) v Hislop} [2007] 1 SCR 429 [44].

\textsuperscript{107} \textit{Canada (Attorney-General) v Hislop} [2007] 1 SCR 429 [44].
The fact that rights may be limited reflects the features of democracy and human rights discussed earlier. Allowing limits to be placed on most rights indicates that there is no definitive meaning of rights or democracy; we cannot say once and for all that a value we consider important enough to be called a ‘right’ ought to be absolute. Limits also accommodate diversity and difference of opinion. Rights do not necessarily trump other values, and we expect disagreement about which competing democratic values justifiably limit rights. Indeed, the UK HRA and the Canadian Charter contain mechanisms for dealing with such disagreement. Finally, ensuring rights are not absolute recognises the evolutionary nature of the concepts of democracy and human rights.\(^{108}\)

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

If the legislation is challenged, the judiciary then contributes to the dialogue. The judiciary must assess the judgments of the representative institutions. From its own institutional perspective, the judiciary must decide whether the legislation limits a human right and, if so, whether the limitation is justified. Taking the external limit test as an example, the judiciary, first, decides whether the legislative objective is important enough to override the protected right — that is, a reasonableness assessment. Secondly, the judiciary assesses the proportionality of the legislation: is there proportionality between the harm done by the law (the unjustified restriction to a protected right) and the benefits it is designed to achieve (the legislative objective of the rights-limiting law)? The proportionality test usually comes down to minimum impairment assessment: does the legislative measure impair the right more than is necessary to accomplish the legislative objective?\(^{109}\)

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


\(^{109}\) It must be noted that under the Canadian Charter and the UK HRA/ECHR, the limit must also be prescribed by law, which is usually a non-issue.
arms of government from pursuing a policy or legislative objective. With minimum impairment at the heart of the judicial concern, it means that parliament can still achieve their legislative objective, but must use less-rights-restrictive legislation to achieve this.

The judicial analysis will proceed from its unique institutional perspective, which is informed by its unique non-majoritarian role, and its particular concern about principle, reason, fairness and justice. If the judiciary decides that the legislation constitutes an unjustified limitation, that is not the end of the story. The representative arms can respond, under the third mechanism, to which we now turn.\textsuperscript{110}

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

See further:

3) Remedial powers and representative response mechanisms:

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

Under the Canadian Charter, judges are empowered to invalidate legislation that they consider unjustifiably limit rights guaranteed under the Canadian Charter.\textsuperscript{111}


\textsuperscript{111} Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11, ss 51–52.
This reflects the constitutional nature of the Canadian Charter. However, unlike in Australia and the US, this is not the end of the story. The representative arms of government have numerous response mechanisms. The first response is inaction, such that the legislation remains invalid. This means that the judicial invalidation remains in place presumably because the legislature on reflection agrees with the judiciary, or there is no political will to respond.

Secondly, the legislature may attempt to secure its legislative objective by a different legislative means. This will occur where the judiciary invalidated legislation because it failed the proportionality test. The legislature may still attempt to achieve its legislative objectives, but by more proportionate legislative means. This usually requires the legislature to focus on minimally impairing the affected rights, but may also require the legislature to focus on the rationality of the link between the legislative objective and the legislative means chosen to achieve those objects, or the proportionality between the violation of the right and the importance of the rights-limiting legislative objective.

Thirdly, the legislature can re-enact the invalidated legislation notwithstanding the Canadian Charter under s 33. The legislature can override the operation of the Canadian Charter in relation to that legislation for a period of 5 years. The judicial decision remains as a point of principle during the period of the override and revives at the expiration of the 5 years. Legislative use of the override indicates that the legislature disagrees with the judicial interpretation of the Canadian Charter or simply finds it unacceptable according to majoritarian sensibilities.

Use of the override provision is only needed when the judiciary takes issue with the legislative objectives pursued. Under the Canadian Charter, from 1982-97, this has happened in only 3% of Charter cases.132 Of course, the override may also be used to secure a legislative objective by a particular legislative means found to be an unjustified limitation on rights (i.e. in the situation where the legislative means have failed the proportionality test). Presumably this would only occur when parliament was particularly wedded to the legislative means, because the less confrontational way around proportionality issues is to tweak the legislative means under the second response mechanism.

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

Despite the perception that the override clause is only a theoretical possibility in Canada, in reality the override has been used on numerous occasions and has not exacted such a high political price. The use of s 33 is more widespread than most

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To be sure, the override has only been used twice as a direct response to a judicial ruling. The first such use was in Saskatchewan, where the provincial legislature used s 33 to re-enact back-to-work legislation that was invalidated by the Saskatchewan Court of Appeal for violating freedom of association under the s 2(d) of the Canadian Charter. The second such use was in Quebec, where the provincial legislature used s 33 to re-enact unilingual public signs legislation invalidated by the Supreme Court for violating freedom of expression under the s 2(b) of the Canadian Charter. 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 Alberta Government tabled a Bill that included a notwithstanding clause, but it was withdrawn before it was enacted. Only two of the 17 legislative attempts to utilise an override clause never came into force: once in the Yukon and once in Alberta. Four of the 17 notwithstanding provisions have been repealed or expired without re-enactment, covering three Quebec uses and the Saskatchewan

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113 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.'

114 For the Court of Appeal decision, see RWDU 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: RWDU 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.

115 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.


117 Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter' (2001) 44 Canadian Public Administration 255, 259. The Yukon government enacted legislation subject to a notwithstanding clause but the legislation never came into force, and the Alberta government withdrew from parliamentary consideration one of its two attempts to use the notwithstanding clause.
use.118 The ten remaining invocations of the override in Quebec have been renewed on numerous occasions.

Moreover, the use of s 33 is not as politically suicidal as many commentators portray it to be. To be sure, there has been political fallout from the use of s 33, with the unilingual public signs legislation in Quebec being the high-water mark. Quebec’s re-enactment of the judicially invalidated legislation subject to a notwithstanding clause ‘deepened the divide between anglophones and francophones in Quebec, and between francophones in Quebec and the rest of Canada.’119 In Quebec, four English-speaking Ministers of Premier Bourassa’s Government resigned. Prime Minister Mulroney declared that the Canadian Constitution was ‘not worth the paper it was written on.’120 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.121

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.122


122 Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (Irwin Law, Toronto, 2001) 191-2. See Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (revised and updated ed, Wall & Thompson, Toronto, 1994) 89 (citation omitted): ‘Not only did the [Saskatchewan] government suffer no adverse consequences, it was in fact solidly re-elected in a general election held nine months after the law was passed, arguably with a political assist from the override.’ See Graham Fraser, ‘What the Framers of
suggests that ‘[s]ection 33 is not politically fatal.’

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

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

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

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

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

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

Fourthly, the government may derogate from the ECHR, such that the right temporarily no longer applies in Britain. This is the most extreme response, and can be equated to using s 33 of the Canadian Charter (although it contains much greater safeguards, is consistent with international human rights law, and is accordingly the preferred model for override/derogation provisions). From an international perspective, derogation is necessary to alter Britain’s international legal obligations, and may be necessary to ensure that domestic grievances do not succeed before the European Court of Human Rights.

From a domestic perspective, derogation will never be necessary because judicially assessed incompatible legislation cannot be judicially invalidated. However, the representative arms may choose to derogate to secure compliance with the UK HRA (as opposed to the Convention rights guaranteed therein). Domestically, derogation may be used to resolve an incompatibility based on the judicially assessed illegitimacy of a legislative objective. Moreover, where the judiciary considers the legislative means to be incompatible, derogation allows the representative arms to re-assert their understanding of the interaction of Convention rights and any conflicting non-protected values, as reflected in their chosen legislative means.127

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

127 A disagreement over legislative means may be resolved by the other response mechanisms if the impugned legislative means are not vital to the representative institutions’ legislative platform.
Thus, the judicial remedies and response mechanisms under the \textit{UK HRA} and the \textit{Canadian Charter} are consistent with the features associated with human rights. First, the judiciary is not empowered to have the final say on human rights, which is proper given that there is no one true meaning of human rights. Secondly, the remedies and response mechanisms recognise that disagreement will feature between the arms of government, and provide structures for the temporary resolution of the disagreement. Thirdly, there is no judicial foreclosure on the limits of rights and democracy, highlighting that human rights are evolving and subject to continuous negotiation and conciliation.

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

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

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

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

See further:
Dr Julie Debeljak
Submission to the
National Human Rights Consultation


Which Model: The Canadian Charter or the UK HRA?

In conclusion, this submission recommends that Australia adopt a modern human rights instrument that establishes a robust, mutually respectful, yet not unduly deferential, inter-institutional dialogue about human rights and democracy in preference to the current representative monopoly.

In terms of a preference between the two dialogic models discussed, it helps to focus on two problems with the current system of rights protection in Australia – the under-enforcement of human rights in Australia, and the perception that the judiciary is too activist or illegitimately law-making when it contributes to the protection of human rights. These issues are better addressed under the Canadian Charter. The UK HRA does not as effectively guard against the under-enforcement of rights and leaves the judiciary more open to allegations of improper activism and law-making. Accordingly, this submission recommends the Canadian Charter as the preferred model of adoption.¹⁸

1) Under-Enforcement of Rights:

The biggest problem with the UK HRA is its potential tendency to under-enforce human rights due to the effects of legislative inertia.¹⁸ Under the Canadian Charter, when the judiciary assesses legislation as unjustifiably violating Canadian Charter rights, the individual victim gets the benefit of legislative inertia; the law is invalidated and the representative arms must take a positive step to re-instate the law – either by using s 1 if they wish to re-enact the same

¹⁸ The ICCPR is modelled more like the UK HRA than the Charter, in that there is no external limitations clause applying to the rights protected, but rather limits are expressed internally with respect to specific rights. In adopting the Canadian model, Australia should adopt an external limitations clause subject to non-derogability rules with respect to international human rights law, with the internal limits on specific ICCPR rights acting as specific examples of the justifiable limitations. See ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, Towards an ACT Human Rights Act, 2003 [4.44] – [4.52], especially [4.52].

¹⁹ Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (Irwin Law, Toronto, 2001) 63.
legislative objective using a different rights-limiting legislative means, or by using s 33 if they wish to re-enact an impugned legislative objective or the impugned legislative means.

Conversely, under the UK HRA, the representative arms enjoy the benefits of legislative inertia: if the judiciary issues a declaration of incompatibility, the judicially-assessed Convention-incompatible law remains valid, operative and effective, such that the representative arms need not do anything positive to maintain the status quo. However, the representative arms must pass remedial legislation if they prefer to ensure rights-compatibility of the law, and this is where legislative inertia may set in. The Legislative inertia may occur for many reasons, including the timing of an election, the unpopularity of a decision to amend the law to be rights-compatible, or an already full legislative program.

Accordingly, relying on the representative arms to undertake a positive step to secure rights-compatibility is a weaker form of representative accountability for the human rights implications of governmental actions, and has a tendency to weaken the promotion and protection of human rights.

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

The difficulty of legislative inertia is not an insurmountable bar to Australia adopting the British model. Rather, legislative inertia is an issue to be aware of and improve upon if Australia adopts an instrument based on the UK HRA. One answer to this problem in Australia would be to include an obligation on the legislature to respond within six months to any judicial declaration of

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

131 ECHR, opened for signature 4 November 1950, 213 UNTS 221, art 46 (entered into force 3 September 1953). Under art 46, a State party must respond to an adverse decision of the European Court of Human Rights by fixing the human rights violation. The judgments impose obligations of results: the State Party must achieve the result (fixing the human rights violation), but the State Party can choose the method for achieving the result.

incompatibility issued.” Another solution would be to adopt the preferred model – the Canadian Charter.

2) Judicial Activism and Judicial Law-Making:

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

a) Re-interpretation:

In considering the s 3 re-interpretation issue, we need to first explore the judicial task in more detail. Under the UK HRA, the judicial task can be split between the classic ‘rights questions’ and the unique ‘UK HRA questions’ according to Woolf CJ in the Donoghue case.154 There are two ‘rights questions’. First, the judiciary must decide whether the legislation limits the right in question.155 Secondly, if so, the judiciary must assess whether the legislation is nonetheless a justifiable limitation on the right. If the legislation is an unjustifiable limit on the right, the judiciary needs to ask whether the legislation can nevertheless be saved by the s 3 interpretation power.

This brings us to the ‘UK HRA questions’. First, the court must alter the meaning of the legislative words, but the alteration is limited to ‘that which is necessary to achieve compatibility.’156 Secondly, the court must decide whether the altered legislative interpretation is ‘possible’. In so deciding, the court’s ‘task is still one of interpretation.’157 If the court must


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

155 This involves determining the nature and scope of the right, the nature and scope of the impugned legislation, and comparing the two.

156 Donoghue [2002] QB 48 [75].

‘radically alter the effect of the legislation’ to secure compatibility, ‘this will be an indication that more than interpretation is involved.’\footnote{138}

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

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

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

b) \textbf{Power Differentials}

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

\footnote{138} \textit{Donoghue} [2002] QB 48 [76].

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

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

Now this, in and of itself, is not a problem – indeed, s 3 was intended to be the primary remedial clause.142 It becomes a problem, however, if s 3 is used beyond its legitimate scope. If a judge must choose between producing rights-respecting outcomes for litigants in particular cases through a strained s 3 interpretation, or enforcing incompatible laws in the case at hand coupled with a s 4 declaration, a judge’s preference for interpretation to resolve the case at hand may be understandable.

However, any tendency to over-use judicial interpretation and under-use judicial declaration will undermine parliamentary sovereignty.143 Over-using judicial interpretation may indicate a judge has strayed into judicial legislating territory, and over-using the interpretation power at the expense of the declaration mechanism means that decisions on how to recast rights-incompatible laws are being taken by the judiciary not the legislature – with “overusing” here being the operative word.

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


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

143 This will also hinder the representative arm’s ability to contribute to the institutional dialogue because one of the dialogue-inducing tools, the s 4 declaration, is being under-used.
to re-interpret them. Judicial invalidation passes the power back to the representative arms to create a new, alternative law, or to re-enact the impugned law notwithstanding the protected rights.

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

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


For further discussion of:

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

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

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

The Australian Constitution and the Dialogue Models

Much debate during the consultation process has centred on the constitutionality in Australia of the British model. I assume the focus has been on the British model because the government clearly stated in the Terms of Reference to the Consultation Committee that any options identified should not include a constitutionally entrenched bill of rights.\(^{15}\)

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

1) Ghaidan arguments

Former High Court judge Michael McHugh has recently expressed his view that the UK interpretative clause is not apparently constrained by the purpose of the legislation, and that such interpretation would be unconstitutional in Australia as a breach of the separation of judicial powers doctrine, as it would amount to a judicial rewriting of legislation.\(^{16}\) With respect, I disagree with McHugh’s interpretation of Ghaidan v Godin-Mendoza,\(^{17}\) its differentiation from the equivalent interpretative provision in the Victorian Charter, and the potential influence Ghaidan would have in any federal human rights instrument.

a) The Decision in Ghaidan

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

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to clarify the scope of the s 3 interpretative power. This historical and contextual background is discussed at length in Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian Charter on Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33 Monash University Law Review 9, especially pp 40-49, and I implore the Consultation Committee to consider this. I will briefly consider this issue.

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

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

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

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

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

150 United Kingdom, Parliamentary Debates, House of Commons, 16 February 1998, col 778 (Mr Jack Straw MP, Secretary of State for the Home Department) (emphasis added).
courts 'to construe legislation in a way which is so radical and strained that it arrogates to the judges a power completely to rewrite existing law: that is a task for the Parliament and the executive.' The Home Secretary stated that 'it is not our intention that the courts, in applying [s 3], should contort the meaning of words to produce implausible or incredible meanings.' Rather, s 3 is supposed to enable 'the courts to find an interpretation of legislation that is consistent with Convention rights, so far as the plain words of the legislation allow.' Again, these statements clearly contemplate an interpretative role only for the judiciary and clearly exclude a legislative role.

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

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

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


154 Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595.


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


159 R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46.


161 Rents Act 1977 (UK).
“spouse”: ‘a person who was living with the original tenant as his or her wife of husband.’ The House of Lords, in upholding the Court of Appeal, saved this provision through s 3 interpretation by reading in three words, so the definition became ‘... as if they were his or her wife of husband...’

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

In contemplating the reach of s 3, Lord Nicholls admits that ‘... section 3 itself is not free from ambiguity’ because of the word “possible.” However, his Lordship noted that ss 3 and 4 read together make one matter clear: ‘Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant.’ Given the ambiguity in s 3 itself, Lord Nicholls pondered by what standard or criterion “possibility” is to be adjudged, concluding that ‘[a] comprehensive answer to this question is proving elusive.’ Lord Nicholls then states that:

the interpretative obligation decreed by s 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear... Section 3 may require the court to depart from ... the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires the court to depart form the intention of the enacting Parliament. The answer ... depends upon the intention reasonably to be attributed to the Parliament in enacting section 3.

Rents Act 1977 (UK), Sch 1, para 2(2).

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


Ghaidan [2004] UKHL 30 [27].

Ghaidan [2004] UKHL 30 [27].

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

Ghaidan [2004] UKHL 30 [30].
This passage needs to be approached with caution, particularly Lord Nicholls comments about departing from parliamentary intention. It is not at all clear that Lord Nicholls instructs courts to go against the will of parliament; especially given that Lord Nicholls then goes on to articulate a set of guidelines about what s 3 does and does not allow. This set of guidelines includes instructions that s 3 does not allow an interpretation that goes against fundamental features of legislation. Lord Nicholls is not saying that the will of Parliament as expressed in the UK HRA will always prevail over the will of Parliament as expressed in the impugned legislation.

Lord Nicholls’ set of guidelines pertaining to the reach of s 3 are illuminating. Section 3 enables ‘language to be interpreted restrictively or expansively’; is ‘apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant’; can allow a court to ‘modify the meaning, and hence the effect, of legislation’ to ‘an extent bounded by what is “possible”’. However, s 3 does not allow the courts to ‘adopt a meaning inconsistent with a fundamental feature of legislation’; any s 3 re-interpretation ‘must be compatible with the underlying thrust of the legislation being construed’ and must ““go with the grain of the legislation.””

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

Focusing on departures from parliamentary intention, Ghaidan and Sheldrake do not state that judges must depart from the legislative intention of parliament. These cases indicate that judges may depart from legislative intention, but not where to do so would undermine the fundamental features of legislation, would be incompatible with the underlying thrust of legislation, or would go against the grain of legislation. It is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation would not support a rights incompatible parliamentary intention, and thus leave

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169 Ghaidan [2004] UKHL 30 [32].

170 Ghaidan [2004] UKHL 30 [33]. Lord Nicholls concluded on the facts: ‘In some cases difficult problems may arise. No difficulty arises in the present case. There is no doubt that s 3 can be applied to section 2(2) of Rents Act so it is read and given effect ‘to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant.’

171 Sheldrake v DPP [2005] 1 AC 264 [28].

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

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

All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: “so far as it is possible to do so…”

Similar sentiment was earlier expressed by Woolf CJ in Donoghue, when he stated that Woolf CJ acknowledged that “[t]he most difficult task which courts face is distinguishing between legislation and interpretation”, with the ‘practical experience of seeking to apply section 3 … provid[ing] the best guide.” Perhaps the lesson for Australia is not to angst too much in the abstract about the meaning of s 3, and to simply understand it through its applications in particular cases.

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

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172 In my opinion, R v A (No 2) [2001] UKHL 25 ("R v A") is not even an instance of this. See below n 182. See further Aileen Kavanagh, "Unlocking the Human Rights Act: The "Radical" Approach to Section 3(1) Revisited" (2005) 3 European Human Rights Law Review 259.

173 See above n 172.

174 Sheldrake v DPP [2005] 1 AC 264 [28].

175 Donoghue [2001] EWCA Civ 595 [76].
In conclusion, I am not being a myopic apologist for s 3 of the UK HRA. The main thrust of the article in which this analysis appears is to highlight ways in which the statutory British model of human rights instruments could usurp parliamentary sovereignty if not approached in certain ways and interpreted in certain ways. Indeed, my preferred model for Australia is the Canadian Charter. The fact remains, however, that Ghaidan is bounded and s 3 does not allow for judicial acts of legislation.

b) Ghaidan and the Victorian Charter

McHugh states that the UK HRA ‘gives the courts a far more radical power of interpretation tha[n] is found in the Victorian and ACT legislation.’

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

The arguments are canvassed in great detail in Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian Charter on Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33 Monash University Law Review 9, 49-56, and I implore the Consultation Committee to read this extract. In brief, the arguments are as follows.

First, the Explanatory Memorandum to the Victorian Charter states that the reference to statutory purpose is to ensure ‘courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.’ This is no more than a codification of the British jurisprudence to date culminating in Ghaidan, which categorises displacement of parliamentary purposes and displacement of legislative objectives as examples of impossible interpretations.

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

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177 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 23. The parliamentary debate was silent on the matter.
favoured. The HRC Committee expressly cited the case of Ghaidan, particularly Lord Nicholls’ opinion that s 3 interpretation ‘must be compatible with the underlying thrust of the legislation being construed’ and Lord Rodger’s opinion that s 3 ‘does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen.’ This has now been confirmed by Bell J in one of the leading Victorian Charter cases of Kracke v Mental Health Review Board and Ors.

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

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


184 Ibid [108] (Lord Hope).

185 Lambert [2001] UKHL 37 [81].
care orders with no continuing supervisory role, which the s 3 interpretation of the Court of Appeal improperly displaced.

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

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

Fourthly, if the Victorian courts were to reject that the inclusion of “consistently with [statutory] purpose” is a codification of the British jurisprudence and particularly the Ghaidan authority, numerous problems and anomalies arise, which are discussed in detail in Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian Charter on Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33 Monash University.

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

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

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

c) *Ghaidan* and a federal human rights instrument

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

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

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

189 Human Rights Law Resource Centre, above n 178, ch 5, 46. This is true of the UK HRA, see above n 142.
Given this, the adoption of s 3 of the UK HRA or s 32 of the Victorian Charter or s 30 of the ACT HRA, in my opinion, poses no challenge to the separation of powers doctrine implied into the Australian Constitution. Indeed, McHugh admits that the High Court of Australia would be likely to give an interpretative provision wording identically to s 3 of the UK HRA the same meaning as the s 32 of the Victorian Charter and s 30 of the ACT HRA: the High Court ‘would hold that, on its proper construction, [s 3] required legislation to be interpreted in a way that is compatible with human rights only when such an interpretation was consistent with the purpose of the legislation.’ In my opinion, this is correct because the Victorian Charter codifies the British jurisprudence. In McHugh’s opinion, this is because the Victoria Charter somehow circumscribes the radical nature of s 3 of the UK HRA. On either reading, it appears that an interpretative provison that contains the two riders which prevent judicial acts of legislation is on safe constitutional ground.

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

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\[99\] That is, s 49(1) of the \textit{New Matilda Pill}.

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

2) **Declarations of Incompatibility/Inconsistent Interpretation:**

A controversy has arisen in relation to the declaration of incompatibility (s 4 of the *UK HRA*)/declaration of inconsistent interpretation (s 36 of the *Victorian Charter*) in the Australian context. Some commentators have queried whether conferring such a power on the judiciary would fall foul of the implied separation of powers principle under the *Australian Constitution*.\(^{103}\) According to the argument, to invest a power to issue declarations of incompatibility, which arguably have no legal consequence, in the federal judiciary is to invest the federal judicial arm with a non-judicial power in violation of the principle of separation of powers. It is also argued that such declarations may, in truth, be advisory opinions which the federal judiciary have no power to issue.\(^{104}\) The arguments in favour of the constitutionality of such clauses,\(^{105}\) and against such constitutionality,\(^{106}\) are canvassed in considerable detail elsewhere.

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

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

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\(^{104}\) See *Re Judiciary and Navigation Acts (Advisory Opinions Case)* (1921) 29 CLR 257.

\(^{105}\) Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2006) 12 Deakin Law Review 1

\(^{106}\) Hon Michael McHugh AC, QC, 'A Human Rights Act, the Courts and the Constitution' (Presentation given at the Australian Human Rights Commission, 5 March 2009).
legislation enacted by federal parliaments, and it equally should not be required in this instance.

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

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

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

The alternative proposal to a judicial declaration mechanism proposed by the Australian Human Rights Commission is also viable.

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

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R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254 (High Court of Australia (the “High Court”)) (‘Boilermakers’ Case’), A-G (Cth) v R; Ex parte Australian Boilermakers’ Society (1957) AC 288 (Privy Council) and R v Joske; Ex parte Shop Distributive and Allied Employees’ Association (1976) 135 CLR 194 establish that only judicial power, or powers ancillary or incidental thereto, can be exercised by the judiciary under Chapter III.

I refer you to the Home Secretary during parliamentary debate on the Human Rights Bill, where expected ‘that, in almost all cases, the courts will be able to interpret legislation compatibly with the Convention. However, we need to provide for the rare cases where that cannot be done’: United Kingdom, Parliamentary Debates, House of Commons, 16 February 1998, col 778 (Mr Jack Straw MP, Secretary of State for the Home Department) (emphasis added). I also refer you to Lord Steyn in Ghaidan v Godin-Mendoza [2004] UKHL 30 [39], [41], [49]. See further Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian Charter on Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33 Monash University Law Review 9-71.

Australian Human Rights Commission, Constitutional Validity of an Australian Human Rights Act, 22 April 2009 [6].
between the arms of government. It also ensures that the judicially-assessed human rights costs of representative action are clearly identified, with the representative arms taking responsibility for them.

3) Conclusion:

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

The Wording of a Rights-Compatible Interpretation Provision

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

The wording of an interpretative provision that was proposed during the Western Australian Consultation Process and endorsed in a Draft Bill in the Committee’s final report201 should not be adopted. Draft cl 34(3) reads:

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

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

the provision must be interpreted —

(c) in a way that is compatible with human rights in so far as it possible to do so consistently with the purpose or object underlying the written law; and
(d) taking into account the extent to which Part 6202 requires persons to act compatibly with human rights.

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

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202 Part 6 of the Human Rights Bill 2007 (WA) addresses the obligations of government agencies with respect to human rights.
1) **Clause 34 itself:**

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

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

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

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

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than an inter-institutional dialogue.

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

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

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

2) When Coupled with a Limitations Power:

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

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

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

\(^{204}\) That case being not returning non-national suspected terrorism to a country where they are at risk of suffering torture.

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

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

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

**The Appropriate Limitation and Override Provisions**

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

There are four main methods of restricting rights. First, rights may be internally qualified, such as the internal qualifications to the right to liberty and security of the person under the *ICCPR* and *ECH*. Secondly, rights may be internally limited,
such as the internal limits placed in the freedom of religion and expression under the ICCPR and ECHR. Thirdly, rights can be externally limited, such as the general limitations power under s 1 of the Canadian Charter. Fourthly, rights can be temporarily suspended in exceptional circumstances. In the international and regional setting, this is referred to as derogation. In the domestic setting, temporary suspension is more commonly referred to as overriding rights.

Under the Victorian Charter, which is a statutory human rights instrument modelled on the UK HRA, each form of limitation has been adopted. The adoption of all limitations mechanisms is excessive and the reach of the general limitations power and the override ride power is excessive. My arguments in relation to the limitations and override provisions in the Victorian Charter are found in Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006’ (2008) 32 Melbourne University Law Review 422-469. In brief, they include the following:

1) The General Limitations Provision:

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

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

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210 See ICCPR, opened for signature 19 December 1966, 999 UNTS 171, arts 12, 18, 19, 21, and 22 (entered into force 23 March 1976); ECHR, opened for signature 4 November 1950, 213 UNTS 222, art 8 – 11 (entered into force 3 September 1953). For example, art 22(2) of the ICCPR, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) states that ‘[n]o restrictions may be placed on the exercise of [the right to freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others; and art 9(2) of the ECHR, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) states that ‘[f]reedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

To the extent that s 7 of the Charter applies to so-called absolute rights, it does not conform to international human rights law.\textsuperscript{212} Under international human rights law, absolute rights cannot be derogated from (or overridden) and no circumstance justifies a qualification or limitation of such rights.\textsuperscript{213} Absolute rights in the ICCPR\textsuperscript{214} include: the prohibition on genocide (art 6(3)); the prohibition on torture or cruel, inhuman and degrading treatment or punishment (art 7); the prohibition on slavery and servitude (arts 8(1) and (2)); the prohibition on prolonged arbitrary detention (elements of art 9(1)); the prohibition on imprisonment for a failure to fulfil a contractual obligation (art 11); the prohibition on the retrospective operation of criminal laws (art 15); the right of everyone to recognition everywhere as a person before the law (art 16); and the right to freedom from systematic racial discrimination (elements of arts 2(1) and 26).\textsuperscript{215}

The solution to this problem is to retain the generally-worded external limitations provision, but to specify which protected rights it does not apply to.

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

\textsuperscript{212} To the extent that other domestic human rights instruments have general limitations powers that do not account for absolute rights, they too do not conform to international human rights law. See eg, Canadian Charter, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11, s 1; NZ Bill of Rights 1990 (NZ), s 5.

\textsuperscript{213} When dealing with absolute rights, the treaty monitoring bodies have some room to manoeuvre vis-à-vis purported restrictions on absolute rights when considering the scope of the right. That is, when considering the scope of a right (that is, the definitional question as opposed to the justifiability of limitations question), whether a right is given a broad or narrow meaning will impact on whether a law, policy or practice violates the right. In the context of absolute rights, a treaty monitoring body may use the definitional question to give narrow protection to a right and thereby allow greater room for governmental behaviour that, in effect, restricts a right. However, the fact that absolute rights may be given a narrow rather than a broad definition does not alter the fact that absolute rights (whether defined narrowly or broadly) allow of no limitation. Indeed, the very fact that the treaty monitoring bodies structure their analysis as a definitional question rather than a limitation question reinforces that absolute rights admit of no qualification or limitation.

\textsuperscript{214} The ICCPR, opened for signature 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976) is a relevant comparator because, inter alia, the rights guaranteed in the Charter are modelled on the rights guaranteed in the ICCPR. See further, above Part 3.1.

Dr Julie Debeljak
Submission to the
National Human Rights Consultation


2) The Danger of an Override Provision

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

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

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

One might accept the inclusion of an override – even if it was superfluous – if it did not create other negative consequences. This cannot be said of the override provision in s 31 of the Victorian Charter. A major problem with s 31 is the supposed safeguards regulating its use. Overrides are exceptional tools; overrides allow a government and parliament to temporarily suspend human rights that they otherwise recognise as a vital part of modern democratic polities. In international law, the override equivalent – the power to derogate – is similarly recognised as a necessity, albeit an unfortunate necessity.

In recognition of this necessary exceptionality, the power to derogate is carefully circumscribed in international and regional human rights law. First, in the human rights context, some rights are non-derogable, including the right to life, freedom from torture, and slavery. Second, most treaties allow for derogation, but place conditions/limits upon its exercise. The power to derogate is usually (a) limited in time – the derogating measures must be temporary; (b)

limited by circumstances – there must be a public emergency threatening the life of the nation; and (c) limited in effect – the derogating measure must be no more than the exigencies of the situation require and not violate international law standards (say, of non-discrimination).

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

First, the override provision can operate in relation to all rights. There is no category of non-derogable rights, an outcome that contravenes international human rights obligations.

Secondly, the conditions placed upon its exercise do not reach the high standard set by international human rights law. The circumstances justifying an override in Victoria are labelled “exceptional circumstances”. However, once you scratch the surface, it becomes apparent that “exceptional circumstances” are no more than the sorts of circumstances that justify “unexceptional limitations”, rather that the “exceptional circumstances” necessary to justify a derogation in international and regional human rights law. Let me explain.

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

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

One answer is oversight. When the executive and parliament place a limit on a right because of public safety, security or welfare, such a decision can be challenged in court. The executive and parliament must be ready to argue why the limit is reasonable and justified in a free and democratic society, against the specific list of balancing factors under s 7. The executive and parliament must be accountable for limiting rights and provide convincing justifications for such action. The judiciary then has the opportunity to contribute its opinion as to

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Footnotes:

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

218 Section 7(2) of the Victorian Charter outlines factors that must be balanced in assessing a limit, as follows: (a) the nature of the right; (b) the importance of the purpose of the right; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purposes; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve – a minimum impairment test.
whether the limit is justified. If it is not, the judiciary can then exercise its s 32 power of re-interpretation where possible, or issue a s 36 declaration of incompatibility.

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

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

The third failure of the override provision is the complete failure to regulate the effects of the derogating or overriding measure. Section 31 of the Victorian Charter does not limit the effect of override provisions at all. There is no measure of proportionality between the exigencies of the situation and the override measure, and nothing preventing the Victorian Parliament utilising the override power in a way that unjustifiably violates other international law norms, such as, discrimination.

Each of these arguments is more fully developed in the appended article Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations andOverrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006’ (2008) 32 Melbourne University Law Review 422, especially at pp 436-453. The article also examines the override in the context of the Victorian Government’s stated desire to retain parliamentary sovereignty and establish an institutional dialogue on rights (pp 453-58). It further assesses the superior comparative methods for providing for exceptional circumstances (be they via domestic override or derogation provisions under the British, Canadian and South African human rights instruments (pp 458-68)).

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

In conclusion, an override provision does serve a vital purpose under the Canadian model – that of preserving parliamentary sovereignty). If Australia adopts the Canadian model (whether entrenched in the Constitution or by manner and form), an override provision ought to be included, but it ought to be modelled on the derogation provisions under art 4 of the ICCPR, as is the case under s 37 of the South African Bill of Rights.219

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

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

Any override provision modelled on art 4 of the ICCPR and s 37 of the South African Bill of Rights will have to account for the fact that ICESCR does not contain an explicit power of derogation. It appears that derogation from economic, social and cultural rights is not allowed under international human rights law. I endorse the position of the Castan Centre in its Submission that any derogation clause under a federal human rights instrument not extend to economic, social and cultural rights; and that, in any event, derogation is unlikely to be necessary given that a State Parties’ obligations under ICESCR are limited to progressive realisation to the extent of its available resources.

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

See further:


Executive Pre-legislative Human Rights Scrutiny

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

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

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

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

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

Parliamentary Pre-legislative Human Rights Scrutiny

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

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

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

\textsuperscript{221} This expressly excludes the power to consider individual complaints of alleged violations of the HRA 1998 (UK) c 42. See Homepage, Parliamentary Committee <http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cm> at 2 July 2003.

\textsuperscript{222} Parliamentary Committee, House of Commons and Lords, Scrutiny of Bills: Third Special Report: Session 2000-01 (2001) [1].

\textsuperscript{223} Ibid [2].

\textsuperscript{224} Parliamentary Committee, House of Commons and Lords, Scrutiny Report on Private Members’ Bills and Private Bills: Fourteenth Report, Session 2001-02 (2002) [1]. In relation to Private Members’ Bills, the Parliamentary Committee will scrutinise these for compatibility, however, priority will be accorded to government legislation because of the limits of time and resources. Private Bills, which now must include a s 19(1) statement, will be considered by the Parliamentary Committee in a similar manner to Government Bills: at [4], [5], [22], and [23]. See also Lester, ‘Parliamentary Scrutiny of Legislation’, above n 80, 445-6.
circumstances. The Parliamentary Committee adopts the European Court’s approach to assessing the compatibility of legislation. It also relies on legal advice that is independent of the Government and is currently constituted in a non-partisan manner.

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

Overall, the Parliamentary Committee is considered ‘a key component of the legislative process’ which has ‘strengthened the role of Parliament in scrutinising legislative proposals and administrative practices against [human rights] standards.’

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


230 Ibid.

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


233 Lester, ‘Parliamentary Scrutiny of Legislation’, above n 80, 437 and 433 respectively.
This is not only vital for parliament in fulfilling its constitutional roles of legislative scrutineer and law-maker; it is also vital in terms of making robust, considered, and educative contributions to the institutional dialogue about rights and justifiable limits on rights.

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

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

HUMAN RIGHTS AND PUBLIC DECISION-MAKING

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

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

I refer you to Julie Debeljak, Human Rights Responsibilities of Public Authorities Under the Charter of Rights’ (Presented at The Law Institute of Victoria Charter of Rights Conference, Melbourne, 18 May 2007) for an in-depth discussion of how the public authority provisions operate (or fail to operate) under the Victorian Charter, in contrast to the operation of the equivalent provisions under the UK HRA. I also reiterate that the British government’s own five-year review found that the UK HRA did not hamper the actions of the government.
**Which public authorities?**

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

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

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

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

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

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

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\(^{234}\) See respectively see *UK HRA 1997* (UK), ss 6(3)(b) and (5), and *Victorian Charter 2006* (Vic) ss 4(1)(c), (2), (4) and (5).
administration. Rather than being a separate after thought or an additional regulatory burden, human rights will become part of the operational framework for public administration.

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

**Courts and Tribunals as Public Authorities**

Another issue that arises is whether to include courts and tribunals in the definition of core “public authority”. In the United Kingdom, the courts and tribunals are core public authorities. This means that courts and tribunals have a positive obligation to interpret and develop the common law in a manner that is compatible with human rights. The major impact of this to date in the United Kingdom has been with the development of a right to privacy.\(^{236}\)

Under the *Victorian Charter*, in contrast, courts and tribunals were excluded from the definition of public authority. The HR Consultation Committee report indicates that the exclusion of courts was to ensure that the courts are not obliged to develop the common law in a manner that is compatible with human rights. This is linked to the fact that Australia has a unified common law.\(^{237}\) If it was otherwise, the High Court may strike down that part of the *Victorian Charter*.

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

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


\(^{237}\) *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, para 135.
development of the common law. Accordingly, it is much more preferable to include courts and tribunals in the definition of public authorities.

For further discussion on which public authorities should attract human rights obligations, see Julie Debeljak, Human Rights Responsibilities of Public Authorities Under the Charter of Rights’ (Presented at The Law Institute of Victoria Charter of Rights Conference, Melbourne, 18 May 2007), pp 2-12.

**Which Human Rights Obligations?**

The human rights obligations imposed on “public authorities” should mimic those obligations contained in s 38 of the Victorian Charter. Section 38(1) states that ‘it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.’ This essentially imposes two obligations on public authorities: (a) an obligation to act compatibly with the substance of the human rights; and (b) a procedural obligation, ensuring that the human rights are a relevant part of the decision-making process.

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

There are a number of exceptions to s 38(1) unlawfulness in the Victorian Charter that need to be considered. First, under s 38(2), there is an exception to s 38(1) where the law dictates the unlawfulness. That is, there is an exception to the s 38(1) obligations on a public authority where the public authority could not reasonably have acted differently, or made a different decision, because of a statutory provision, the law or a Commonwealth enactment. This applies, for example, where the public authority is simply giving effect to incompatible legislation.²²⁸

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

From a human rights perspective, that is not necessarily the end of the story. Sure, if a law is rights-incompatible, s 38(2) allows a public authority to rely on the incompatible law to justify a decision or a process that is incompatible with human rights. However, a person in this situation is not necessarily without redress. An individual may be able to seek a rights-compatible interpretation of the provision which alters the statutory obligation. That is, if the law can be given a rights-compatible interpretation, the potential violation of human rights will be avoided. The

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²²⁸ See the notes to Victorian Charter 2006 (Vic), s 38. Note that s 32(3) of the Victorian Charter states that the interpretative obligation does not affect the validity of secondary legislation ‘that is incompatible with a human rights and is empowered to be so by the Act under which it is made.’ Thus, secondary legislation that is incompatible with rights and is not empowered to be so by the parent legislation will be invalid, as ultra vires the enabling legislation.
rights-compatible interpretation, in effect, becomes your remedy. The law is re-interpreted to be rights compatible, the public authority has obligations under s 38(1), and the s 38(2) exceptions to unlawfulness do not apply.

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

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

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

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

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

**What remedies?**

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

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

The precise reach of s 39(1) has not been established by jurisprudence as of yet. From the wording of s 39(1), it appears that the applicant must only be able to “seek” a pre-existing, non-Charter relief or remedy; it does not appear that the applicant has to succeed on the non-Charter relief or remedy, in order to be able to secure the relief or remedy based on the Charter unlawfulness. This may be interpreted as meaning that an applicant must be able to survive a strike out application on their non-Charter ground, but need not succeed on the non-Charter ground. The unique and convoluted nature of this provision probably gives rise to more questions that it resolves.

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

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

Section 39 is a major weakness in the Victorian Charter and undermines the enforcement of human rights in Victoria. This situation should not be replicated at the federal level. First, it is not clear that the federal government is reluctant to embrace
effective remedies for human rights violations. Indeed, it does mention the provision of ‘remedies when a violation does occur’ in its Background Paper.

Secondly, the provisions of the Victorian Charter are highly technical and not well understood. Indeed, it is still not yet precisely how they will operate. It may be that the government and public authorities spend a lot more money on litigation in order to establish the boundaries of s 39, than they would have if victims were given a free-standing remedy and an independent right to damages (capped or otherwise).

Thirdly, it is vital that individuals be empowered to enforce their rights when violated and for an express remedy to be provided. In order to meet Australia’s obligations under art 2(3) of the ICCPR, all victims of an alleged human rights violation are entitled to an effective remedy. Moreover, failure to provide a remedy may bring into question the constitutional validity of a human rights instrument under s 51(29) of the Australian Constitution. The failure to provide an effective remedy for violations of human rights may undermine a treaty obligation, and therefore cause the human rights instrument to fall outside the external affairs power. In addition, a failure to provide an effective remedy may indicate that the law incorporating the treaty is not appropriate and adapted, and thus fall outside the external affairs power.

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

Most importantly, under s 8 of the UK HRA, where a public authority acts unlawfully, a court may grant such relief or remedy, or make such order, within its power as it considers just and appropriate, which includes an award of damages in certain circumstances if the court is satisfied that the award is necessary to afford just satisfaction. The British experience of damages awards for human rights breaches is influence by the ECHR. Under the ECHR, a victim of a violation of a human right is entitled to an effective remedy, which may include compensation. Compensation payments made by the European Court of Human Rights under the ECHR have

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

23 The Consultative Committee recommended adopting the UK model in this regard, but the recommendation was not adopted: see ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, Towards an ACT Human Rights Act, 2003 [4.53] – [4.78].
always been modest,\textsuperscript{244} and this has filtered down to compensation payments in the United Kingdom. Given that international and comparative jurisprudence ought to inform any interpretation of a federal human rights instrument (indeed, the Victorian and ACT instruments), one could expect the federal judiciary to take the lead from the European Court and the United Kingdom jurisprudence and avoid unduly high compensation payments, were a power to award compensation included in a federal human rights instrument.

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

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

The failure to create a separate cause of action and remedy under any federal human rights instrument (like the \textit{Victorian Charter}) will cause problems. Situations will inevitably arise where existing causes of action are inadequate to address violations of human rights and which require some form of remedy. In these situations, rights protection will be illusory. The NZ experience is instructive. Although the statutory \textit{Bill of Rights Act 1990} (NZ) does not expressly provide for remedies, the judiciary developed two remedies for violations of rights – first, a judicial discretion to exclude evidence obtained in violation of rights; and, secondly, a right to compensation if rights are violated.\textsuperscript{245} This may be the ultimate fate of the Victorian experiment. It is eminently more sensible for the federal parliament to provide for the inevitable rather than to allow the judiciary to craft solutions on the run.

For further discussion on the human rights obligations of public authorities, particularly the complexity associated with \textit{not} enacting a free-standing remedy, see Julie Debeljak, Human Rights Responsibilities of Public Authorities Under the Charter of Rights’ (Presented at The Law Institute of Victoria Charter of Rights Conference, Melbourne, 18 May 2007), pp 12-20.

\textbf{WIDER CHANGES ARISING FROM A HUMAN RIGHTS INSTRUMENT}

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

\textsuperscript{244} It would be rare for a victim of a human rights violation to be awarded an amount in excess of GBP 20,000.

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

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

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

Part 6 of the ACT HRA establishes the office of Human Rights Commissioner, which is to be undertaken by the existing Discrimination Commissioner. The Commissioner’s functions are four-fold. Firstly, the Commissioner is to review Territory law and the common law for compliance with the protected rights and report to the Attorney-General. This report will be presented to the Legislative Assembly. Secondly, the Commission is to provide education about the ACT HRA and human rights generally. Thirdly, the Commissioner may advise the Attorney-General on any matter relevant to the ACT HRA. Finally, the Commissioner may intervene in court proceedings with leave.

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

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

**Review of Legislation**

The federal government should undertake to audit all legislation, policy and practices before any human rights instrument comes into force and its approach could be modelled on the British experience. In Britain, all government departments audited
their legislation, policies and practices for human rights compliance before the UK HRA came into force. They also undertook human rights awareness training within their departments.

The pre-UK HRA audit was undertaken under the auspices of the Human Rights Unit of the Home Office (‘Unit’). 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.’ 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.

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

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246 The Human Rights Unit (‘Unit’) was established to oversee the implementation of the HRA. Its main task was to 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.


within the executive post-UK HRA.\textsuperscript{249}

Unfortunately, the audit process focussed heavily on the expectation of judicial challenges to legislation, policies and practices. Rather than using the UK HRA as ‘the springboard for further steps to be taken as part of a proactive human rights policy,’ the government adopted ‘a containment strategy’ aimed at ‘avoiding or reducing successful challenges’ to policy and legislative initiatives.\textsuperscript{250} A more proactive approach would have increased the influence of the executive in the process of delimiting the open-textured Convention rights. The executive should have honestly and vigorously assert its understandings of the Convention rights. Moreover, such a containment strategy is too judicial-centric.

Thus, any pre-audit undertaken by the Federal Government were Australia to adopt a human rights instrument should learn from the mistakes of the British experience, particularly by proactively asserting its understanding of the scope of the rights and justifiable limits thereto, and using the opportunity to mainstream human rights rather than contain human rights.

\textbf{Within Government?}

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

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


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

Training of the Judiciary:

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

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

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

Reviews?

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

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

APPENDICES

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


FURTHER REFERENCES

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


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BALANCING RIGHTS IN A DEMOCRACY: THE PROBLEMS WITH LIMITATIONS AND OVERRIDES OF RIGHTS UNDER THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

JULIE DEBELIJA\*  

[Under the Charter of Human Rights and Responsibilities Act 2006 (Vic) ("Vic Charter"), the Victorian Parliament protects a range of civil and political rights. The rights are subject to restricting provisions, including a general limitation clause which allows all rights to be subject to such reasonable limits as can be demonstrably justified in a free and democratic society, and an override provision which allows the suspension of the operation of specified Victorian Charter rights in relation to overriding legislation for a renewable period of five years. This article will explore the theoretical underpinnings of the rights-restricting mechanisms before critiquing the mechanisms adopted under the Vic Charter against comparable international, regional and domestic human rights instruments, and against the underlying objectives of the Vic Charter—the preservation of parliamentary sovereignty and the creation of an institutional dialogue about rights. This analysis will demonstrate that the rights-restricting mechanisms under the Vic Charter are flawed devices because they go beyond the restrictions ordinarily accepted under international, regional and domestic human rights law, reach beyond what is needed to establish an institutional dialogue, and tend to unnecessarily promote parliamentary sovereignty at the expense of human rights accountability, justification and scrutiny.]

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I INTRODUCTION

Under the Charter of Human Rights and Responsibilities Act 2006 (Vic) ("Victorian Charter"), the Victorian Parliament protects and promotes a range of civil and political rights,\(^1\) based largely on the rights guaranteed under the International Covenant on Civil and Political Rights ("ICCPR").\(^2\) Those rights, however, may be subject to restriction. Under the general limitation power in s 7(2), all rights may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society'. Some individual rights may also be subject to internal qualifications or limitations specific to those particular rights. Moreover, all rights may be subject to the s 31 override provision, which allows the suspension of the operation of specified rights — or the entire Victorian Charter — in relation to an overriding law for a renewable period of five years.

Allowing rights to be restricted is neither new nor wrong. It is widely acknowledged that not all rights are absolute, that they need to be balanced against other protected rights and that they may conflict with other non-protected values.\(^3\) The ability to restrict rights is also a key mechanism for establishing an institutional dialogue about rights between the three arms of government, in contrast to representative or judicial monologues about rights.

This article will explore the theoretical underpinnings of restriction mechanisms, then critique the mechanisms adopted under the Victorian Charter against comparable international, regional and domestic human rights instruments, and against the underlying objectives of the Victorian Charter — the preservation of parliamentary sovereignty and the creation of an institutional dialogue about rights.\(^4\) This analysis will demonstrate that the rights-restricting mechanisms

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1 As the Victorian Charter only covers civil and political rights (excluding economic, social and cultural rights), this article will refer to the Victorian Charter rights as 'rights' or 'protected rights' to avoid creating the impression that the Victorian Charter relates to human rights generally.


3 The power to restrict rights is acknowledged in international, regional and domestic human rights instruments: see, eg, ibid arts 12, 18–19, 21–2; Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221, arts 8–11 (entered into force 3 September 1953) (commonly known as the European Convention on Human Rights) ("ECHR"); Canadian Charter of Rights and Freedoms 1982 ss 1, 33 ("Canadian Charter").

4 The term 'parliamentary sovereignty' is not used in its strict or absolute sense throughout this article. The Victorian Parliament (and, for that matter, the Commonwealth Parliament and other Australian Parliaments) is subject to constitutional documents, including, primarily, the Constitution Act 1975 (Vic). In a strict legal sense, the Victorian polity has constitutional supremacy, not parliamentary supremacy. Accordingly, the term 'parliamentary sovereignty' is used throughout
under the *Victorian Charter* are flawed devices. These mechanisms go beyond the level of rights restriction ordinarily incorporated in international, regional and domestic human rights instruments and do not contain the corresponding safeguards built into such instruments. Moreover, the override provision, which is not necessary to preserve parliamentary sovereignty, threatens to undermine the institutional dialogue that the Victorian Parliament sought to secure under the *Victorian Charter* and compromises human rights accountability, justificatory decision-making and scrutiny under the *Victorian Charter*.

II BALANCING RIGHTS IN A DEMOCRACY THROUGH THE USE OF RESTRICTIONS

It is a myth that rights are ‘absolute trumps’ over majority preferences, aspirations or desires. In fact, most rights are not absolute.5 Under human rights instruments, rights are balanced against and limited by other protected rights, and other non-protected values and communal needs. A plurality of values is accommodated, not just rights.5 Moreover, in jurisdictions with human rights instruments that adopt an institutional dialogue model (such as Victoria), the specific balance of the pluralistic values is assessed from a plurality of institutional perspectives — usually the executive, the legislative and the judicial.

A Methods of Restricting Rights

Rights can be restricted in various ways under human rights instruments. Many rights are *internally qualified*. For example, under the ICCPR and the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights) (‘ECHR’),7 every person has the right to liberty and security of the person, but this right may be qualified 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.8

this article because of its political significance rather than legal accuracy. Politically, the term ‘parliamentary sovereignty’ was heavily relied upon in ‘selling’ the policy decision to enact the *Victorian Charter*.

5 See eg, Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) 31. According to customary international law, the only rights that are absolute are the right to be free from genocide, slavery and servitude, and from systematic racial discrimination see eg, *Restatement (Third) of the Foreign Relations Law of the United States* § 702 (1987).

6 See eg, *Canadian Charter* s 1, which recognises that the needs of a free and democratic society ‘are numerous, covering the guarantees enumerated in the Charter and more’: R v Kokos (1990) 3 SCR 697, 737 (Dickson CJ) (emphasis added).

7 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

8 See ICCPR, opened for signature 19 December 1966, 999 UNTS 171, art 5 (entered into force 23 March 1976); ibid art 5. For other internally qualified rights, see eg, ICCPR, opened for signature 19 December 1966, 999 UNTS 171, arts 8(3), 9(1), 14(1) (entered into force 23 March 1976), *Canadian Charter* s 7, 11(I), 13, 15. The terms of most qualifications mean that the assessment of the qualification usually proceeds in a similar manner to that of limitations: see further below Part II(B) (discussion of *Victorian Charter* s 7(2)), n 18 (discussion of internal limitations). Presumption by law, rationality and reasonableness are the elements that usually need to be satisfied for a qualification to be lawful.
Rights can also be internally limited. For example, the rights contained in arts 12, 18–19 and 21–2 of the ICCPR and arts 8–11 of the ECHR are guaranteed, subject to limitations that can be justified by reference to particular objectives such as the protection of public health, order or morals; the national interest; national security; public safety or the wellbeing of the country; public order; the prevention of disorder or crime; or the protection of the rights and freedoms of others. Such internal limitations must be in accordance with law and necessary in a democratic society.

Further, rights can be externally limited. For example, s 1 of the Canadian Charter of Rights and Freedoms 1982 ('Canadian Charter') guarantees enumerated rights, subject to any reasonable limits that are prescribed by law and that can be demonstrably justified in a free and democratic society. This is a global limitations clause which applies to all of the guaranteed rights. Similar wording has been adopted in the South Africa, New Zealand and Australian Capital Territory models.

Finally, rights can be temporarily suspended in exceptional circumstances. In international and regional settings, this is referred to as derogation. For example, under art 4 of the ICCPR:

in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, [states] may take measures derogating from their obligations under the [ICCPR] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

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9 See, eg, ICCPR, opened for signature 19 December 1966, 999 UNTS 171, art 22(2) (entered into force 23 March 1976), which states that '[no restrictions may be placed on the exercise of [the right to freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Similarly, art 9(2) of the ECHR, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) states that '[freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

10 Alternatively, these internal limitations must be in accordance with some equivalent requirement, such as 'prescribed by law'.


12 South African Constitution s 36. In South Africa, the human rights guarantees are found in ch 2 of the South African Constitution and are commonly referred to as the 'Bill of Rights'. In this article, South African Constitution ch 2 will be referred to as the 'South African Bill of Rights'. "The principal model for the South African Bill of Rights is the Canadian Charter of Rights and Freedoms which contains a list of rights and a general limitation clause governing the limitation of those rights": Jain Currie and Johan de Waal, The Bill of Rights Handbook (5th ed, 2005) 165.

13 New Zealand Bill of Rights Act 1990 (NZ) s 5.

14 Human Rights Act 2004 (ACT) s 28.

In the domestic setting, temporary suspension is more commonly referred to as overriding rights. Section 33 of the Canadian Charter was the first articulation of the concept of derogation in a domestic setting; it provides that Parliament can expressly declare in legislation that the legislation shall operate notwithstanding a provision of the Canadian Charter for a (renewable) five-year period.

B The Restrictions under the Victorian Charter

The Victorian Charter has adopted all four methods of restricting rights.

First, the main limitation power in the Victorian Charter is the external general limitation power contained in s 7(2), which provides that the protected rights may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. Section 7(2) lists the following factors to be balanced when assessing limits: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve — a minimum impairment test. The global limitation test is borrowed from s 1 of the Canadian Charter, whilst the factors are borrowed from s 36 of the South African Bill of Rights, which itself is modelled on the jurisprudence developed under the Canadian Charter.16

Secondly, some individual rights in the Victorian Charter, such as the freedom from forced labour under s 11(2) and the right to liberty and security of the person under s 21, contain specific internal qualifications to the breadth of the right.

Thirdly, some individual rights contain internal limitations as specific articulations of limitations relevant to that right. For example, the freedom of expression under s 15 of the Victorian Charter may be subject to restrictions necessary to protect the reputation of others, and for the protection of national security, public order, public health or public morality.17 The tests for internal qualifications and limitations are not dissimilar to the general limitations test,18 and the latter still

16 Oddly, the Explanatory Memorandum notes that the general limitations clause is based on the New Zealand Bill of Rights Act 1990 (NZ) s 3 and the South African Bill of Rights s 3c; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9. However, it is more honest to acknowledge the influence of the Canadian Charter, which predated the New Zealand legislation by eight years and provided the basis for the New Zealand legislation.

17 For example, under the ECHR and thus the Human Rights Act 1998 (UK) c 42, an internal limit is valid if it is: first, prescribed by law; secondly, intended to achieve a legitimate objective, as listed within the article itself; and thirdly, necessary in a democratic society. There are two elements to assessing necessity in a democratic society. The first is necessity, which comes down to a pressing social need: see The Sunday Times Case (1979) 30 Eur Court HR (ser A) 35-7; Handyside Case (1976) 24 Eur Court HR (ser A) 22; Goodwin v United Kingdom (1996) 2 Eur Court HR 483, 498-500. And the second is proportionality: R v A [No 2] [2002] 1 AC 41, 65 (Lord Steyn); R (Duffy) v Secretary of State for the Home Department [2001] 2 AC 532, 546-8 (Lord Steyn); R (Parakh) v Secretary of State for the Home Department [2002] 2 AC 139, 1416-17 (Lord Phillips); R v Sharkey [2003] 1 AC 247, 281 (Lord Hope); International Transport Rath GmbH v Secretary of State for the Home Department [2003] QB 728, 785 (Jonathan Parker LJ); R (Pro-life Alliance) v British Broadcasting Corporation [2004] 1 AC 185, 254 (Lord
applies to rights that are subject to specific internal qualifications or limitations.19

Fourthly, Victoria adopted an override provision based on s 33 of the Canadian Charter. Under s 31, Parliament can override the application of any or all of the protected rights. This power may be used when enacting legislation for the first time, or in response to a judicial ruling. Use of the override means that the overriding legislation operates notwithstanding the Victorian Charter; in other words, both the s 32 interpretative obligation and the s 36 declaration power will not apply to that legislation.20 Given the extraordinary nature of an override, a number of safeguards have been incorporated. First, such declarations are to be made only in exceptional circumstances.21 ‘Exceptional circumstances’ include ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria’.22 Secondly, override declarations are subject to a renewable five-year sunset clause.23

C Institutional Justifications for Restrictions: Parliamentary Sovereignty and Dialogue

The Victorian government made it clear from the beginning of its community consultation that any changes to the methods of rights protection would be subject to the preservation of parliamentary sovereignty.24 This preservation of parliamentary sovereignty has been achieved by the institutional arrangements and processes enacted as a result of the community consultation and embodied in the Victorian Charter. This Part will explore the motivation for preserving parliamentary sovereignty, the precise manner in which it has been preserved and the role that restrictions on rights have in such preservation.

1 Motivation to Preserve Parliamentary Sovereignty

The motivation to retain parliamentary sovereignty is linked to traditional rights instruments, such as the United States model, which allow the judiciary to

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20 *Victorian Charter* ss 31(6).
21 *Victorian Charter* ss 31(3)-(4).
23 *Victorian Charter* ss 31(7)-(8).
invalidate legislation that is inconsistent with guaranteed rights.\textsuperscript{25} In short, it is often asserted that democracy requires parliamentary sovereignty. It is argued that if the judiciary was empowered to review and invalidate legislative and executive actions under a rights instrument (which occurs under the United States Constitution), we would have a system of judicial sovereignty. Given that the judiciary is not elected, judicial sovereignty is undemocratic. Therefore, to preserve democracy, the representative arms must retain sovereign power over rights.\textsuperscript{26}

More modern human rights instruments address this supposed anti-democratic tension by ensuring that the judiciary does not have the final say about rights. In these instruments, judicial review is simply one element of an institutional dialogue about rights between the executive, legislature and the judiciary. This contrasts with a parliamentary monologue in jurisdictions with no formal protection of human rights (such as the Australian model), or a judicial monologue under a fully-fledged constitutional human rights instrument (such as the US model).\textsuperscript{27} In order to establish the institutional dialogue, modern rights instruments use various mechanisms which are designed to guard against judicial supremacy while simultaneously ensuring enhanced rights accountability of the representative arms. The Victorian Charter was enacted with the explicit aim of establishing an institutional dialogue about rights\textsuperscript{29} and adopts the approach of these modern human rights instruments.

\textsuperscript{25} Indeed, the Victorian government, the Consultation Committee and the Victorian Parliament were at pains to distance themselves from that model: see Department of Justice, above n 24; Consultation Committee, above n 24, 15; 20–1; Office of the Attorney-General, above n 24; Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 2590 (Rob Hullah, Attorney-General); Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 2016 (Joanne Duncan); Victoria, Parliamentary Debates, Legislative Council, 19 July 2006, 2554 (Gustin Madden, Minister for Sport and Recreation); Victoria, Parliamentary Debates, Legislative Council, 20 July 2006, 2679 (Jenny Mikakos); 2046 (Johan Schefecker).


\textsuperscript{27} Even in the US, various theories and approaches to judicial review have been developed to make judicial review more democratically palatable: see James L. Briere, Limiting Rights: The Dilemma of Judicial Review (1996) 89–103. One example is the approach of Ronald Dworkin, which is summarized (but ultimately rejected) by Jeremy Waldron, Judicial Review and the Concept of Democracy’ (1998) 1 Journal of Political Philosophy 335. Another example is the dialogue theory: Alexander Hicks, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2\textsuperscript{nd} ed, 1983).

\textsuperscript{29} Department of Justice, above n 24; Consultation Committee, above n 24, 66–8, 85–6; Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1290, 1293, 1295 (Rob Hullah, Attorney-General); Victoria, Parliamentary Debates, Legislative Council, 19 July 2006, 2554, 2555–6 (Gustin Madden, Minister for Sport and Recreation); Victoria, Parliamentary Debates, Legislative Council, 27 July 2006, 2679 (Jenny Mikakos). There is only one express reference to dialogue in the Explanatory Memorandums, where the ‘[Victorian Equal Opportunity and Human Rights] Commission’s annual report is expected to focus on key aspects of the Charter’s operation at a consultative institutional dialogue’. Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2008 (Vic) 30.
2. Institutional Dialogue

In order to contextualise the discussion of restrictions, it is pertinent to briefly explore the four institutional dialogue mechanisms employed by modern human rights instruments and the Victorian Charter.29

The first institutional dialogue mechanism relates to the articulation of rights. Modern human rights instruments, including the Victorian Charter, deliberately articulate the protected rights in broad and open-textured terms. This accommodates the uncertainty associated with unforeseeable situations and needs, and manages the (often irreducible) diversity and disagreement within pluralistic communities. Open-textured rights, however, need to be refined in their concrete application. Institutional dialogue is about securing the most broad and diverse input from each of the differently situated and motivated arms of government into this process of refinement.

The second institutional dialogue mechanism is the non-absoluteness of rights. Under the Victorian Charter and other modern human rights instruments, rights are balanced against, and limited by, other protected rights, and non-protected values and communal needs. This ensures that a plurality of values is accommodated through the protection of rights. Moreover, an institutional dialogue approach ensures that the specific resolution of conflicts between rights, and between rights and other non-protected values, will be assessed by a plurality of institutional perspectives. All arms of government are able to provide an assessment of the appropriate balance to be struck when conflicts over rights arise, based on each arm's divergent motivations, strengths, skills and tools.

In terms of the first and second institutional dialogue mechanisms, the executive through policy formulation and legislative drafting,30 the legislature through its constitutional roles of legislative scrutiniser and law-maker,31 and the judiciary through adjudicating disputes and applying the law all contribute to the debate about the refinement of the rights and the justifiability of their limitations. The balance struck between rights and justifiable limitations is a 'process of careful

30 There will always be an 'irreducible element of reasonable disagreement' within a policy, and these will be disagreements for which there will be good but non-decisive reasons on each side'. James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 Modern Law Review 204, 207.
31 The contribution of the executive to the dialogue is formally recognised through the s 28 statement of (in)compatibility, with additional contributions being made through other executive communication tools such as public discussion papers, exposure drafts of legislation, explanatory memorandum and the like. A s 28 statement must either state that, in the minister's opinion, the Bill is compatible with protected rights and how it is so, or that the Bill is incompatible and the nature and extent of the incompatibility: Victorian Charter s 28(3). Section 27 provides that a failure to comply with s 28 does not affect the validity, operation or enforcement of the Act.
32 The contribution of Parliament to the debate is also bolstered by the expanded role of the Scrutiny of Acts and Regulations Committee ("SARC"). Under s 30 of the Victorian Charter, the SARC must scrutinise all proposed legislation against the Charter rights, including assessing the scope of the rights and the justifiability of any limitations placed on rights, and report to Parliament.
adaptation ... carried out by all three branches of government'.33 The ‘maximum participation by [the] different sectors’34 of government is vital to ensuring the educative promise of institutional dialogue, which allows courts to educate legislatures and society by providing principled and robust articulations of the values of the Charter... while allowing legislatures to educate courts and society about their regulatory and majoritarian objectives and the practical difficulties in implementing those objectives.35

The contribution of each arm is informed by distinct institutional motivations, responsibilities and concerns. The representative arms will bring their unique understanding of the requirements of, and balance between, democracy and rights. These perspectives will be informed by their distinct role in mediating between different interests and values within society; their responsibilities to their representatives; their motivation to stay in power; and their distinctive institutional strengths. These are all legitimate and proper influences in the representative arm's decision matrix. The analysis of the judiciary will proceed from its distinct institutional perspective, which is informed by its unique non-majoritarian role and its particular concern about principle, reason, rationality, proportionality and fairness. The judiciary must not be timid and must not simply defer to the executive and legislative viewpoints. Rather, the judiciary must acknowledge, consider and be open to the influence of the executive and legislative contributions, whilst still making an independent assessment of the rights implications of the legislation.

The third institutional dialogue mechanism is the limited powers conferred on the judiciary under the Victorian Charter. Section 32(1) imposes an obligation on the judiciary which requires all statutory provisions to be interpreted in a way that is consistent with protected rights, so far as it is possible to do so consistently with the statutory purpose.36 However, the judiciary is not authorised to invalidate legislation that is not amenable to a s 32 rights-compatible interpretation. Rather, under s 36, the Supreme Court of Victoria or the Victorian Court of Appeal are empowered to make a 'declaration of inconsistent interpretation'.37 A declaration does not affect the 'validity, operation or enforcement' of the legislation, or 'create in any person any legal right or give rise to any civil cause

36 Section 32 is primarily based on the Human Rights Act 1998 (UK) s 42, s 3, but with an additional explicit reference to 'consistently with their purpose': Victorian Charter s 32(1).
37 For the position of subordinate legislation, see Victorian Charter s 32(7)(b); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 34. For a discussion on the use of incompatibility in the United Kingdom in interpreting the powers as exercised under Orders in Council, see Peter Billings and Ben Pontin, 'Precautionary Powers and the Human Rights Act: Elevating the Status of Orders in Council' [2001] Public Law 21.
of action. In terms of institutional dialogue, the judiciary may deliver one of three outcomes under the third mechanism. First, the law may be upheld as rights-compatible because it does not impose unjustifiable limitations on the protected rights. Secondly, s 32 may be used to produce a rights-compatible interpretation of the otherwise rights-incompatible legislation. Thirdly, a s 36 declaration may be issued where a rights-compatible interpretation pursuant to s 32 is impossible and/or inconsistent with the statutory purpose. These judicial outputs feed back into the dialogue loop via the fourth mechanism.

The fourth institutional dialogue mechanism is the representative response mechanism(s) to the judicial outputs. The representative arms may respond to s 32 judicial interpretations and must respond to s 36 judicial declarations. First, Parliament may decide to do nothing, leaving the s 32 judicially-assessed interpretation in place or the s 36 judicially-assessed incompatible law in operation. In relation to the latter, the retention of the judicially-assessed, rights-incompatible legislation is consistent with the preservation of parliamentary sovereignty and demonstrates that dialogue models are not designed to necessarily produce consensus.

Secondly, Parliament may decide to pass ordinary legislation. A legislative response to s 36 declarations would presumably be aimed at removing a judicially-assessed rights-incompatibility. A legislative response to s 32 judicial interpretations may be aimed at clarifying the judicial interpretation, addressing an unforeseen consequence arising from that interpretation, or emphasising a competing right or other non-protected value. Conversely, Parliament may disagree with the judiciary’s rights-compatible interpretation and legislate to reinstate its initial rights-incompatible legislation using express language and/or an incompatible statutory purpose in order to avoid any possibility of a future s 32 rights-compatible interpretation. This latter response is consistent with the preservation of parliamentary sovereignty and accommodation of disagreement.

Thirdly, under s 31 Parliament may choose to override the Charter, thereby avoiding the rights issue altogether. The s 32 interpretative obligation and the s 36 declaration power do not apply to legislation which is subject to an override declaration. This effectively ‘mutes’ the judicial voice on the matter for a period of five years. This is still consistent with dialogue, however, because the

38 Victorian Charter s 36(6). In other words, a declaration will not affect the outcome of the case in which it is issued, with the judge compel to apply the incompatible law, nor does it impact on any future applications of the incompatible law.
39 This refers to legislation that the judiciary assesses as rights-incompatible because it imposes an unjustifiable limitation on protected rights.
40 Victorian Charter s 37.
42 Indeed, the very reason for excluding Parliament from the definition of public authority was to allow incompatible legislation to stand, see Victorian Charter s (1)(b) Consultation Committee, above n 24, 57.
44 See legislative note to Victorian Charter s 31(6).
judicial viewpoint revives when the dialogue continues at the expiration of the override provision. Where new or amended legislation is part of the representative response, the dialogue cycle begins again. The four institutional dialogue mechanisms thus lock the arms of government into a relationship of ongoing dialogue about rights and democracy.

These four institutional dialogue mechanisms ensure that each arm of government shares the responsibility for assessing governmental actions against rights—the executive and legislature make an initial assessment of legislation against the protected rights and justifiable limits (the first and second mechanisms); the judiciary then contributes its perspective (the first, second and third mechanisms); and the executive and legislature can then respond (the fourth mechanism). There are strong incentives for the representative arms of government to engage in a constructive and educative dialogue with the judiciary: an unexpected s 32 judicial rights-compatible interpretation of legislation may compromise the legislative objectives and/or means; and a s 36 judicial declaration 'implies a degree of legal impropriety in what Parliament has done even if it does not amount to illegality.'66 The initial views of the executive and legislature, however, do not necessarily trump because the judiciary can review their actions. Conversely, the judicial view does not necessarily trump, given the representative response mechanisms. Rights accountability is increased through the institutional dialogue about the extent to which governmental activity impacts on rights and the justifications for this. Ultimately, however, parliamentary sovereignty is preserved. Although the judiciary's contribution should prompt a response by the representative arms, it cannot dictate the nature or content of the response, with Parliament being free to retain rights-inconsistent outcomes.

III THE VICTORIAN CHARTER AND LIMITATIONS ON RIGHTS

The above analysis highlights that restrictions on rights are an inherent part of the protection of rights and help to establish an institutional dialogue amongst the arms of government about the legitimacy of governmental actions. The rights-restricting powers contained in the Victorian Charter, however, go beyond those ordinarily accepted in international, regional and comparable domestic human rights law, do not contain the corresponding safeguards built into such instruments, and reach beyond what is needed to establish an institutional dialogue. First, the general limitation power is broader than the equivalent limitation powers under international human rights law (discussed in this Part). Secondly, there are numerous problems with the override provision (discussed below in Parts IV and V). The inclusion of an override power is unnecessary given the preservation of parliamentary sovereignty by the substantial circumscription of judicial powers and the establishment of an institutional dialogue. Moreover, the application of the override to all rights is too broad. Further, the

safeguards included to regulate the use of the override fall far short of those contained in international, regional and comparable domestic human rights instruments.

A Relevance of International Human Right Obligations

Before exploring these shortcomings, it is worth briefly considering whether or not it matters if the Victorian Charter conforms to international human rights law standards. Unlike the United Kingdom, the Victorian Charter was not enacted with the explicit intention of ‘bringing rights home’—that is, of ensuring that international and regional human rights could be enforced within the domestic jurisdiction. However, this does not mean that conformity with international human rights law is irrelevant under the Victorian Charter. First, by adopting the essence of the ICCPR rights, the Victorian Charter implicitly ‘brings rights home’ for Victorians. Secondly, ‘international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision’ under s 32(2) of the Victorian Charter, thereby making international human rights norms relevant. Thirdly, Victorians still retain their right of individual communication to the Human Rights Committee (the treaty monitoring body) for alleged violations of the ICCPR, where, inter alia, all domestic remedies (now including the Victorian Charter) have been exhausted. Finally, where the Victorian Charter obligations are less rigorous than the minimum protections guaranteed under international human rights law, the Commonwealth may still be held to account internationally for any violations of Australia’s international human rights obligations.

B Problems with the General Limitations Power

According to international human rights law, it is permissible to place qualifications and limitations on certain individual rights. Moreover, there is nothing in international human rights law to suggest that qualifications and limitations are


49 The Commonwealth of Australia has international legal personality and is thus the legal entity recognised at international law and held responsible for any violations of international law that may occur within its constituent components.
more effectively imposed by specifically-worded internal qualifications or internal limitations than by a generally-worded external limitations power. However, a generally-worded external limitations clause that applies to all protected rights is problematic as not all rights may be lawfully subject to qualification, limitation, override or derogation in international human rights law—some rights are absolute. To the extent that s 7(2) of the Victorian Charter applies to so-called absolute rights, it does not conform to international human rights law.50

Under international human rights law, absolute rights cannot be derogated from (or overridden) and no circumstance justifies a qualification or limitation of such rights.51 Absolute rights in the ICCPR52 include the prohibition on genocide (art 6(3)); the prohibition on torture or cruel, inhuman and degrading treatment or punishment (art 7); the prohibition on slavery and servitude (arts 8(1) and (2)); the prohibition on prolonged arbitrary detention (elements of art 9(1)); the prohibition on imprisonment for a failure to fulfil a contractual obligation (art 11); the prohibition on the retrospective operation of criminal laws (art 15); the right of everyone to recognition everywhere as a person before the law (art 16); and the right to freedom from systematic racial discrimination (elements of arts 2(1) and 26).53

The solution to this problem is to retain the generally-worded external limitation provision embodied in s 7(2) of the Victorian Charter, but to exclude it from applying to ss 8, 10, 11(1)–(2), 21(2), (8) and 27. This outcome should be achieved by legislative amendment to the Victorian Charter. It may also be achieved through judicial interpretation: given that s 32(2) allows for the influence of international jurisprudence in s 32(1) interpretation, and that the Victorian Charter itself should be interpreted in light of the s 32 rights-compatible interpretation obligation, the general limitations power in s 7(2) should be read down so as not to apply to those rights which are viewed as absolute under international law.

50 To the extent that other domestic human rights instruments have general limitations powers that do not account for absolute rights, they too do not conform to international human rights law: see, eg, Canadian Charter s 1, New Zealand Bill of Rights Act 1990 (NZ) s 5.
51 The treaty monitoring bodies have some room to manoeuvre vis-à-vis purported restrictions on absolute rights when considering the scope of the right. That is, when considering the scope of a right (in relation to the definitional question as opposed to the justifiability of limitations question), whether a right is given a broad or narrow meaning will impact on whether a law, policy or practice violates the right. In the context of absolute rights, a treaty monitoring body may use the definitional question to give narrow protection to a right and thereby allow greater room for governmental behaviour that, in effect, restricts a right. However, the fact that absolute rights may be given a narrow rather than a broad definition does not alter the fact that absolute rights (whether defined narrowly or broadly) allow no limitation. Indeed, the very fact that the treaty monitoring bodies structure their analysis as a definitional question rather than a limitation question reinforces the fact that absolute rights admit of no qualification or limitation.
52 This is a relevant comparator because, inter alia, the rights guaranteed in the Victorian Charter are modelled on the rights guaranteed in the ICCPR.
53 The Human Rights Committee describes the prohibitions against the taking of hostages, abductions and unacknowledged detention as non-derogable. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law: Human Rights Committee, General Comment No 29: States of Emergency (Article 4(1), 15), UN Doc CCPR/C/21/Rev.1/Add.11 (2003).
The Solicitor-General of Victoria, Pamela Tate SC, has acknowledged that the Victorian Charter does not create any absolute rights, although most of its rights are based on the ICCPR which does contain absolute rights.\(^{54}\) She argues that "[t]he status of a right at international law, as absolute or not, will be a relevant consideration in determining whether the limitation upon the right ... is reasonable."\(^{55}\) Presumably, the logic of Tate's argument is that limits on absolute rights will rarely be reasonable and demonstrably justified, and accordingly not lawful. Whether a right is absolute, and thereby admits no limitation, or whether the right is non-absolute but in practice would never admit a justifiable limitation, is inconsequential on this logic because the ultimate result is the same — that is, the right is not limited in that instance. This is not a sufficient answer to the problem created by applying s 7(2) to all of the protected rights.

First, this argument incorrectly suggests that absolute rights are negotiable — that there will be instances, albeit rare, in which an absolute right can be limited. Secondly, it introduces the relatively subjective assessment of proportionality into an area where proportionality assessments are usually excluded.\(^{56}\) Thirdly, it means that the representative arms will be encouraged to enact laws that violate absolute rights and "argue the toss" if they are challenged, rather than recognise that certain rights are non-negotiable. Fourthly, this is relatively unchartered territory. There is no international or regional guidance, and little domestic guidance,\(^{57}\) on how to assess the reasonableness and demonstrable justifiability of a limitation placed on an absolute right. Finally, assessing whether a limitation should be placed on an absolute right via the general limitations power in s 7(2) is therefore unsatisfactory and will amount to a violation of international human rights law. Limiting an absolute right is a serious matter. At a minimum, it should be classified as an extraordinary step and subject to an extraordinary process of enactment and assessment. The tool of derogation or override could be a good template for this, although the preconditions and safeguards adopted for its use under s 31 of the Victorian Charter fall far short of the minimum standards for equivalent provisions in international, regional and domestic comparative instruments.\(^{58}\) As a matter of urgency, all arms of government should reassess the applicability of s 7(2) to absolute rights with the aim of ensuring their special status.


\(^{55}\) Ibid.

\(^{56}\) This criterion is not about subjectivity in judicial decision-making per se. It is acknowledged that there is a certain element of subjective decision-making in adjudicating the scope of protected rights (whether absolute or non-absolute rights), just as there is in adjudicating the justifiability of a limitation or qualification of a non-absolute right. The point made here is just that with respect to absolute right, a proportionality analysis inherent in justifying limitations, with its associated subjectivity, ought to be excluded.

\(^{57}\) See, eg, United States v Burns [2001] 1 SCR 283.

\(^{58}\) See below Part IV.
IV. THE VICTORIAN CHARTER AND OVERRIDING RIGHTS

The balance of this article is dedicated to considering the numerous difficulties with the override provision.\(^{59}\) This Part begins with an assessment of the Victorian Charter, against the international and regional human rights law equivalent of derogation\(^ {60}\) and comparable domestic jurisdictional equivalents.\(^{61}\)

\(^{59}\) Such lengthy analysis is necessary given the frequency with which overrides and derogations have occurred in other comparable domestic jurisdictions. For example, in Canada the s 33 override has been invoked on 16 occasions between 1982 and 2001. — 13 occasions in Quebec, once in the Yukon, once in Saskatchewan and once in Alberta. On another occasion, the Alberta government tabled a Bill that included a notwithstanding clause, but it was withdrawn before it was enacted. Four of the 16 notwithstanding provisions have been repealed or expired without re-enactment, covering three Quebec uses and the Saskatchewan use. The 10 remaining invocations of the override in Quebec have been renewed on numerous occasions; see Tasi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44 Canadian Public Administration 255, 257-67. As at 2001, eight uses of the notwithstanding clause were still in operation: F L Morton, "Can Judicial Supremacy Be Stopped?" (2003) 24(4) Policy Options 25, 27. The fact that on each of these occasions the override was invoked by a provincial government is of especial importance in the Victorian context. Moreover, the UK has been willing to use its derogation provisions on numerous occasions: see further below Parts IV(B), V(B).

\(^{60}\) The ICCPR, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), is the chosen comparator from an international human rights law perspective; see above Part III(A) and above n 52. The ECHR, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) is the chosen comparator from a regional human rights law perspective. The ECHR is relevant in its own right because it contains limitations provisions and a derogation provision, both of which have produced significant guiding jurisprudence. It is also relevant because of its link to the Human Rights Act 1998 (UK) c 42. That is, the Human Rights Act 1998 (UK) c 42 adopts the rights protected in the ECHR, and the application/enforcement provisions of the Victorian Charter are modelled primarily on the Human Rights Act 1998 (UK) c 42: the statement of compatibility requirement under s 28 of the Victorian Charter is modelled on s 19 of the Human Rights Act 1998 (UK) c 42; the s 32 interpretative obligation under the Victorian Charter is modelled on s 3 of the Human Rights Act 1998 (UK) c 42; the s 36 declaration of inconsistent interpretation provision under the Victorian Charter is modelled on s 4 of the Human Rights Act 1998 (UK) c 42; and the obligations on public authorities to act lawfully under s 38 of the Victorian Charter are modelled on s 6 of the Human Rights Act 1998 (UK) c 42.

\(^{61}\) Three jurisdictions were chosen for the purposes of comparison — the UK, Canada, and South Africa. The Human Rights Act 1998 (UK) c 42 is of great comparative relevance given that the predominant mode of applying and enforcing the protected rights under the Victorian Charter is derived predominantly from the UK Act. Canada is highly relevant given that the general limitations power and override provision under ss 7 and 31 of the Victorian Charter are modelled on ss 1 and 33 of the Canadian Charter respectively. South Africa is also a comparator, particularly because s 7(2) of the Victorian Charter is modelled on the South African Bill of Rights, and because, rather than including a domestic override provision modelled on the Canadian Charter, South Africa chose to adopt a derogation provision domestically (this latter point being all the more significant given the large extent to which the South African Bill of Rights was modelled on the Canadian Charter; see above n 12). To focus on the 'constitutional' standing of the Canadian Charter and the South African Bill of Rights on the one hand, and the 'quasi-constitutional' of the Victorian Charter on the other, is misplaced. Neither the South African nor the Canadian model can be considered a supreme law and a full constraint on the plenary power of legislatures and governments in the traditional sense, because of the override/derogation provisions — that is, parliamentary supremacy outweighs any traditional concept of constitutionality. Accordingly, the true points of comparison between South Africa, Canada and Victoria relate to the fact that none of these models are 'constitutional' in the traditional sense; each model adopts an override/derogation provision of some sort (with the South African provision being preferable to the Canadian and Victorian provisions; see below Part V). The Human Rights Act 2001 (ACT) was not chosen as an instrument for the purposes of comparison here because there is not enough experience to draw from it yet. It is, however, referred to throughout the article where relevant. The New Zealand Bill of Rights Act (1990) (NZ) was not chosen as an instrument for the purposes of comparison here because it does not contain a comparative institutional design/evolutionary emphasis. — that is, it does not contain an equivalent to ss 32
Then the override will be considered in the context of the Victorian government's stated desires to retain parliamentary sovereignty and to establish an institutional dialogue on rights.63

A. Non-Derogable Rights under International, Regional and Comparable Domestic Human Rights Law

In international human rights law, the ability to override the operation of rights is recognised through the power of derogation. Derogation allows a state party to temporarily suspend human rights guarantees that it otherwise recognises due to extraordinary, temporary circumstances. The power of derogation is recognised as an exceptional necessity, albeit an unfortunate one. Derogations are not ends in themselves, but rather a means to rights-respecting ends: "The restoration of a state of normalcy where full respect for the [ICCPR] can again be secured must be the predominant objective of a State party derogating from the [ICCPR]."64 Because of its exceptional nature, and because of the scope for abuse, the power to derogate is carefully circumscribed. This is where the Victorian Charter's equivalent override mechanism is left wanting: the safeguards circumscribing the use of s 31 under the Victorian Charter do not meet the minimum standards required by international human rights law when exercising the equivalent power of derogation.

Under international human rights law, some rights are non-derogable.65 Article 4(2) of the ICCPR excludes certain rights from the power of derogation. There can be no derogation from the right to life (art 6); freedom from torture or cruel, inhuman and degrading treatment or punishment, and freedom from

and 36 of the Victorian Charter. This article is not concerned with limits and overrides/derogations per se. Rather, it considers the manner in which limits and overrides/derogations operate given the institutional design/modus operandi of the human rights instrument.

62 See Department of Justice, above n 24; Consultation Committee, above n 24, 66, 74–5; Office of the Attorney-General, above n 24; Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1290, 1292–3 (Rob Hulls, Attorney-General); Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 1984 (Lily D'Ambrosio), 1993 (Richard Wynne); Victoria, Parliamentary Debates, Legislative Assembly, 15 June 2006, 2196 (Joanne Duncan); Victoria, Parliamentary Debates, Legislative Council, 19 July 2006, 2554, 2556–7 (Justin Madden, Minister for Sport and Recreation); Victoria, Parliamentary Debates, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos), 2643 (John Geoffrey Hilton). The desire to retain parliamentary sovereignty is also reflected in the institutional arrangements and processes enacted in the Victorian Charter.

63 See above n 28.

64 Human Rights Committee, General Comment No 29, above n 53, [1].

65 Non-derogable rights differ from absolute rights in that non-derogable rights that are not also absolute rights may be subject to justifiable qualifications and limitations: Human Rights Committee, General Comment No 29, above n 53, [7]. For example, art 18 of the ICCPR, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), which is non-derogable under art 4(2), includes a specific clause on restrictions in art 18(3). Human Rights Committee, General Comment No 29, above n 53, [7]. Moreover, non-derogable rights and peremptory norms of international law (or jus cogens norms) are linked but not identical. Some peremptory norms are non-derogable (for example, ICCPR arts 6 and 7), but peremptory norms extend beyond those that are non-derogable in art 4(2): Human Rights Committee, General Comment No 29, above n 53, [11]; Sir Robert Jennings and Sir Arthur Watts (eds), Oppenheim's International Law (9th ed, 1992) vol 1, 7–8; Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987); Oscar Schachter, International Law in Theory and Practice (1991) 338.
medical or scientific experimentation without consent (art 7); freedom from slavery and servitude (arts 8(1) and (2)); the right to not be imprisoned because of an inability to pay a contractual debt (art 11); the prohibition on the retrospective operation of criminal laws (art 15); the right of everyone to recognition everywhere as a person before the law (art 16); and the freedom of thought, conscience and religion (art 18).66

The Human Rights Committee,67 in its General Comment 29, has expanded the list of non-derogable rights beyond those stated in art 4(2) of the ICCPR.68 First, the Human Rights Committee expressed its opinion that the following rights cannot be lawfully derogated from: the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art 10(1));69 elements of the rights of persons belonging to ethnic, religious or linguistic minorities (art 27);70 the prohibition on propaganda for war, and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (art 20);71 and the obligation to provide effective remedies for violations of the protected rights (art 2(3)).72

Secondly, the Human Rights Committee is of the opinion that the power to derogate under art 4 cannot be used in such a way that results in an indirect derogation from a non-derogable right. The Human Rights Committee focuses on procedural safeguards, such that procedural safeguards cannot be subject to derogating measures that undermine the protection of non-derogable rights. It gives the example of the right to life in art 6. Given that art 6 is non-derogable, any trial resulting in the imposition of the death penalty during a state of

66 Moreover, art 6 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 June 1991), to which Australia is a party, states that the prohibition on capital punishment is non-derogable for states that are parties to the Protocol.

67 The Human Rights Committee is established under the ICCPR, opened for signature 19 December 1966, 999 UNTS 171, pt IV (entered into force 23 March 1976).

68 The Human Rights Committee gives three reasons for classifying rights as non-derogable: (a) some rights are non-derogable 'because their suspension is irrelevant to the legitimate control of the state of national emergency' — for example, the prohibition on imprisonment for inability to fulfil a contractual obligation under art 11; (b) other rights are non-derogable because 'derogation may indeed be impossible' — for example, the freedom of conscience under art 18, and (c) 'some provisions are non-derogable exactly because without them there would be no rule of law'. See Human Rights Committee, General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereeto, or in Relation to Declarations under Article 41 of the Covenant, (10), UN Doc CCR/C/21/Rev.1/Add.6 (1994).

69 The rationale behind this is that art 10(1) reflects a norm of general international law (a jus cogens norm) that is non-derogable. This is bolstered by the close connection between art 10(1) and art 7, that latter article being non-derogable. The prohibition on taking hostages, abductions or unacknowledged detention is also considered non-derogable, and derogations from art 12 to allow forced population transfers or deportations are unlawful, with the latter constituting crimes against humanity. See Human Rights Committee, General Comment No 29, above n 53, [13].

70 The rationale behind this is the non-derogable nature of the prohibition against genocide (art 6(3)), the inclusion of non-discrimination on certain grounds in art 4(1), and the non-derogable nature of the right to freedom of conscience, thought and religion (art 18). Human Rights Committee, General Comment No 29, above n 53, [13(o)].

71 Human Rights Committee, General Comment No 29, above n 53, [13(o)].

72 Although a state of emergency may justify a state party introducing 'adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation ... to provide a remedy that is effective'. Ibid [14].
emergency would have to respect the right to a fair trial in art 14 and the prohibition on the retrospective application of the criminal law in art 15.73

Thirdly, the Human Rights Committee considers certain elements of the right to a fair trial under art 14 to be non-derogable. The Human Rights Committee has adopted this view on the basis that international humanitarian law guarantees certain elements of the right to a fair trial even in times of armed conflict and the Committee "finds no justification for derogation from these guarantees during other emergency situations", and due to "the principles of legality and the rule of law."74 The fundamental, non-derogable elements of a fair trial include: the rule that only a court of law may try and convict a person for a criminal offence; the right to the presumption of innocence; and the right to come before a court without delay to test the lawfulness of detention.75 In its General Comment 29, the Human Rights Committee has dramatically expanded the category of rights it considers to be non-derogable.76

The ECHR (which is the basis for the Human Rights Act 1998 (UK) c 42) also recognises non-derogability. Article 15(1) confers the power of derogation.77 However, art 15(2) states that there can be no derogation from the right to life except in respect of deaths arising from lawful acts of war (art 2); the prohibition on torture (art 3); the prohibition on slavery and servitude (art 4(1)); and the prohibition on retrospective criminal punishment (art 7).

73 Ibid [15]
74 Ibid [16]
75 Ibid. This position is supported by the UN Sub-Commission for the Protection and Promotion of Human Rights in its final report on the right to a fair trial: Stanislav Chernichenko and William Treat, Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Administration of Justice and the Human Rights of Detainees — The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening, UN ESCOR, 46th sess, 52, UN Doc E/CN.4/Sub.2/1994/28 (1994). This report recommends that these provisions linked to the right to fair trial be made non-derogable pursuant to a new optional protocol to the ICCPR: (a) the right to an effective remedy under art 2(3), (b) the right of anyone arrested or detained on criminal charge to be brought promptly before a judge or other officer authorised by law to exercise judicial power, and to be entitled to trial in reasonable time or release under art 9(3); and (c) the right of anyone deprived of their liberty by arrest or detention to take the matter before a court so that the court can decide lawfulness of the arrest or detention and order release if it is unlawful under art 9(4) (the habeas corpus provision): at 51–2. See also the Draft Third Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at Guaranteeing under All Circumstances the Right to a Fair Trial and a Remedy, which now exists and states, under art 1, that there is to be no derogation from arts 2(3), 9(3)–(4) and 14 of the ICCPR at Annex I.
76 Joseph, Schultz and Castan, above n 5, 831 argue that the Human Rights Committee’s "speculation in paragraphs 11–14 regarding possible further non-derogable elements of the Covenant is probably the most controversial aspect of the General Comment. They go on to suggest that the Human Rights Committee may be exercising its authority to comment on what ‘other international obligations’ exist under art 4(1) (such as peremptory norms protected by jus cogens or rights recognised under customary or general international law), or to comment on derogations that it considers would never be proportionate under the art 4(1) requirement that derogating measures be only ‘to the extent strictly required by the exigencies of the situation’: at 831. See further Sarah Joseph, ‘Human Rights Committee: General Comment 29’ (2002) 2 Human Rights Law Review 81, 83–85.
77 ECHR, opened for signature 4 November 1950, 213 UNTS 221, art 15(1) (entered into force 3 September 1953) states that:
In times of war or other public emergency threatening the life of the nation any [state party] may take measures derogating from its obligations under this Convention to the extent strictly required by exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
Similarly, the concept that some rights are non-derogable is recognised in other domestic jurisdictions which adopt an override mechanism. Section 33 of the Canadian Charter is the prototype for override provisions. Section 33 cannot be used to override democratic rights (ss 3–5), mobility rights (s 6) and language rights (ss 16–23). The non-applicability of the override power to these provisions is the equivalent of non-derogability under international human rights law.

The South African Bill of Rights also recognises non-derogability by adopting a derogation mechanism that closely resembles art 4 of the ICCPR, appropriately adapted for a domestic jurisdiction. Under s 37, derogations are permitted in certain circumstances, but with s 37(5)(c) prohibiting derogation from the right to equality with respect to unfair discrimination solely on prescribed grounds (s 9); the right to human dignity (s 10); the right to life (s 11); the prohibition on torture, or cruel, inhuman or degrading treatment or punishment (ss 12(1)(d) and (e)); the right not to be subjected to medical and scientific experimentation without providing informed consent (s 12(2)(c)); the prohibition on slavery and servitude (s 13); various children’s rights (s 28); and various rights relating to arrest, detention and fair trial (s 35).

The Victorian Charter compares unfavourably with international, regional and comparable domestic human rights instruments. The s 31 override power is stated in unlimited terms. On a literal reading of s 31, all rights may be subject to an override declaration despite the non-derogable status of some rights in international, regional and comparative domestic human rights law. However, the scope of s 31 is yet to be established in practice. Given that the Victorian Charter itself is subject to the s 32(1) interpretative obligation, and that international law and the judgments of domestic courts may be considered in interpreting a statutory provision under s 32(2), the concept of non-derogability may be incorporated into s 31 through s 32 interpretation. If not, the Victorian Charter will be inconsistent with Australia’s international human rights law obligations, and out of step with regional and domestic human rights instruments. If left uncorrected through s 32 interpretation, this problem should be addressed by Parliament by express amendment of the scope of s 31. Due to the seriousness of the issue, this ideally would happen immediately, rather than waiting until the four or eight year review of the Victorian Charter.

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79 The prescribed grounds of discrimination are race, colour, ethnic or social origin, sex, religion, or language: South African Bill of Rights s 37(5)(c).

80 This includes the right to be protected from maltreatment, neglect, abuse, degradation and exploitative labour practices: see South African Bill of Rights ss 28(1)(d)–(e).

81 This includes the right to silence, the right against self-incrimination, the right to challenge the lawfulness of detention, the right to the presumption of innocence, and the prohibition on retrospective application of the criminal law: see South African Bill of Rights ss 35(1)(a)–(c), (2)(d), (3)(f), (j)(l).

82 Victorian Charter ss 44–5.
B Conditioning the Use of Derogations/Oversides under International, Regional and Comparable Domestic Human Rights Law

The second way in which the power to derogate is circumscribed in international and regional human rights law is in its application. International and regional human rights treaties that allow derogation place conditions upon its exercise. The power to derogate is limited in time (the derogating measures must be temporary); limited by circumstances (there must be a public emergency threatening the life of the nation); and limited in effect (the derogating measures must be no more than is strictly required by the exigencies of the situation, must not violate other obligations under international law, and must not involve discrimination). In contrast, the Victorian Charter does not contain sufficient safeguards. The Victorian Charter does provide that overrides are temporary by imposing a five-year sunset clause under s 31(7) (although, it must be noted that the power to override is continuously renewable). However, the Victorian Charter fails in two important respects: the circumstances justifying an override, and the regulation of the effects of an override, do not reach the high standards set by international and regional human rights law with respect to the equivalent derogation powers.

1 The Circumstances Justifying a Derogation

Focusing on the first failure, to justify use of the override provision under the Victorian Charter, Parliament must demonstrate that "exceptional circumstances" exist which, according to the Explanatory Memorandum, include "threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria." These circumstances fall far short of the international and regional requirement that there be a "public emergency which threatens the life of the nation". Indeed, the list of "exceptional circumstances" is not "exceptional" at all. The "exceptional circumstances" more closely resemble the justifications offered for ordinary limitations provisions under international and regional human rights law, not for the exercise of the exceptional power to derogate.

Let us focus first on the circumstances that justify derogation in international and regional human rights law. The ICCPR requires there to be a "public emergency which threatens the life of the nation". Circumstances that satisfy

84 This is based on the Canadian Charter. The notwithstanding provisions are subject to a sunset clause of five years, after which date the Parliament or legislature can re-enact the declaration, with every subsequent re-enactment being subject to the five-year sunset clause: Canadian Charter ss 33(3)-(5).
85 Victorian Charter ss 31(3)-(4).
87 ICCPR, opened for signature 19 December 1966, 999 UNTS 171, art 4(1) (entered into force 23 March 1976). The ICCPR also requires the public emergency to be "officially proclaimed": art 4(1). Article 4(3) requires a derogating party to notify the international community "of the provisions from which it has derogated and of the reasons by which it was actuated." The Human Rights Committee, General Comment No 29, above n 53, [5] has indicated that derogating states must "provide careful justification ... for their decision to proclaim a state of emergency". Although the Human Rights Committee notification requirements are "mirror" the general requirement for permissible limitations to ICCPR rights to be "prescribed by law", very few derogation notices have satisfied this standard: Joseph, Schultz and Castan, above n 5, 833-4. This simply
this requirement include 'a war, a terrorist emergency, or a severe natural
disaster, such as a major flood or earthquake.'\textsuperscript{87} The Human Rights Committee
has indicated, however, that not all disturbances and catastrophes qualify; indeed,
even during an armed conflict measures derogating from the [ICCPR] are
allowed only if and to the extent that the situation constitutes a threat to the life
of the nation.\textsuperscript{88}

The ECtHR requires there to be a 'war or other public emergency threatening
the life of the nation'.\textsuperscript{89} The European Court of Human Rights ('European
Court')\textsuperscript{90} has had numerous opportunities to elaborate on this requirement. In the
Lawless Case (Merits) ('Lawless Case'), the European Court had to consider the
lawfulness of a derogation by the UK with respect to legislation that permitted
the detention of suspected terrorists in the context of the situation in Northern
Ireland.\textsuperscript{91} It held that a 'public emergency threatening the life of the nation'
required an 'exceptional situation of crisis or emergency which affects the whole
population and constitutes a threat to the organised life of the community
of which the State is composed.'\textsuperscript{92} The European Court found that a public emer-
gency did exist in the UK, given that a secret army existed in Irish territory, that
the army was engaged in unconstitutional activities and used violence to secure
its ends, and that the army's operations outside of the Irish Territory seriously
jeopardised the UK's relations with the Republic of Ireland.\textsuperscript{93} The European
Court also noted that there had been a consistent and alarming increase in
terrorism,\textsuperscript{94} and that 'the application of ordinary law had proved unable to check
the growing danger which threatened the Republic of Ireland'.\textsuperscript{95} In the later case
of Brannigan and McBride v United Kingdom ('Brannigan'), which also

\textsuperscript{87} Joseph, Schultz and Casam, above n 5, 824-5.
\textsuperscript{88} Human Rights Committee, General Comment No 29, above n 53, [3]. In Landinelli
Silva v Uruguay, the Human Rights Committee had to review a decree of the Government of
Uruguay prohibiting classes of people engaging in activities of political nature for 15 years:
Human Rights Committee, Communication No 34/1978, UN Doc CCR/P/C/12/D/34/1978
(1981). In effect, Marxist and pro-Marxist party candidates from the last two elections could not
engage in political activities. The Human Rights Committee was of the opinion that a public
derogation did not exist. Although the government referred to an emergency situation which was
legally recognised in a number of 'Institutional Acts' and alleged that the emergency situation
was 'a matter of universal knowledge', the Human Rights Committee did not accept this because
the claims were not supported by factual details or information: at [8.2]. Uruguay also failed the
notice requirements under ICCPR art 4(3): at [8.2]-[8.3].
\textsuperscript{89} ECtHR, opened for signature 4 November 1950, 213 UNTS 221, art 15(1) (entered into force 3
September 1953).
\textsuperscript{90} The European Court is established under the ECtHR, and its functions include deciding the merits
of applications from individuals who claim to be the victim of a violation of the ECtHR: ibid
arts 19, 29, 34.
\textsuperscript{91} (1961) 3 Eur Court HR (ser A).
\textsuperscript{92} Ibid 56.
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
\textsuperscript{95} Ibid 58. See also Ireland v United Kingdom (1978) 25 Eur Court HR (ser A), Brannigan and
McBride v United Kingdom (1993) 228-28 Eur Court HR (ser A) ('Brannigan'). In Brannigan,
the UK defended further derogations for others aspects of its counter-terrorism legislation. In
both cases, the European Court held that a public emergency threatening the life of the nation did
exist.
addressed UK counter-terrorism laws, the European Court indicated that it considers 'the nature of rights affected by the derogation, [and] the circumstances leading to, and the duration of, the emergency situation.'

In the 1996 Greek Case, the European Commission of Human Rights considered the lawfulness of a derogation that, inter alia, suspended provisions of the Greek Constitution and allowed the detention of persons without court order. The European Commission found that a 'public emergency that threatens the life of the nation' is characterised as follows:

(1) It must be actual or imminent.
(2) Its effects must involve the whole nation.
(3) The continuance of the organised life of the community must be threatened.
(4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

In that case, there was no relevant public emergency because there was no evidence that the civil unrest adduced as justification was so significant that the displacement of the lawful government was imminent. The street demonstrations, strikes and work stoppages were not of the magnitude of a public emergency; in fact, the police force was not near the limit of its capacity, demonstrations held in university buildings were cleared within a few minutes and the situation had been easily neutralised.

Quite correctly, the circumstances justifying derogation under the ICCPR and ECHR are significantly more dire than those justifying limitations or qualifications. The circumstances justifying an internal limitation under the ICCPR include the protection of national security; public safety, public order, and public health or public morals; the rights and reputations of others; or the fundamental rights and freedoms of others. Under the ECHR, circumstances justifying an internal limitation include interests of national security, territorial integrity, public safety, and the economic wellbeing of the country; the prevention of disorder or crime; public order, health, or morals; the reputation of others; the prevention of disclosure of information received in confidence; maintenance of the authority and impartiality of the judiciary; and the rights and freedoms of others.

96 (1993) 258-B Eur Court HR (ser A) 49.
97 European Commission and European Court of Human Rights, Yearbook of the European Convention on Human Rights: The Greek Case 1969 (1972) vol 12 72. This decision is consistent with the judgment in the Lawless Case. However, the definition appears to have been relaxed in Brammigan (1993) 258-B Eur Court HR (ser A).
98 Ibid 74. Moreover, the formation of a communist government ('Popular Front') was not certain or likely after the election that was due in May 1967: at 75–6.
100 ECHR, opened for signature 4 November 1950, 213 UNTS 221, arts 8–11 (entered into force 3 September 1953).
In comparison, the ‘exceptional circumstances’ justifying an override under the Victorian Charter are ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.’ These circumstances are similar to the public interests that justify an ordinary limitation on rights under the ICCPR and the ECHR. They do not resemble an extraordinary situation of crisis which threatens the continued existence of the organised life of a community, as is required for derogation under art 4 of the ICCPR or art 15 of the ECHR. Thus the ‘exceptional circumstances’ under the Victorian Charter are more akin to the ordinary limitations circumstances under the ICCPR and ECHR, yet the Victorian Charter override is more akin to the exceptional derogation power. Does it matter that an extraordinary override provision is utilising factors that are usually used in an ordinary limitations context?

There are three answers to this question. The first relates to oversight. When the executive and Parliament decide that circumstances exist to justify limiting a right, this decision can be subject to judicial review. Under the Victorian Charter, the executive and Parliament must publicly articulate why the limit is reasonable and demonstrably justified in a free and democratic society generally, and assess the limit against the specific list of balancing factors in §7(2). If the legislation is challenged, the judiciary then contributes its opinion as to whether the limitation is justified. If the judiciary opines that the limitation is not justified, the judiciary can then exercise its §32 power to achieve a rights-compatible interpretation to ensure the limitation is justified, or issue a §36 declaration of inconsistent interpretation where a rights-compatible interpretation is impossible. The representative arms can then respond.

This process serves two fundamental purposes under the Victorian Charter. First, it ensures that there is increased human rights accountability in public decision-making. Although the retention of parliamentary sovereignty under the Victorian Charter (and the Human Rights Act 1998 (UK) c 42) permits Parliament to legislate incompatibly with rights, there are political constraints on power: ‘the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.’ Secondly, it reinforces the justificatory aspects of the Victorian Charter. The Victorian Charter, like the Human Rights Act 1998 (UK) c 42 upon which it is based, ensures that a ‘culture of justification now prevails … it requires constitutional arrangements which diverge from fundamental constitutional principle to be justified pragmatically as being in the public interest.’

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104 Victorian Charter §38.
105 The executive must respond to a declaration of inconsistent interpretation: Victorian Charter §37. However, there is no required response to an interpretation under §32 of the Victorian Charter.
106 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General); Victoria, Parliamentary Debates, Legislative Council, 19 July 2006, 2556 (Justin Madden, Minister for Sport and Recreation).
107 R v Secretary of State for the Home Department; Ex parte Simms [2000] 2 AC 115, 131 (Lord Hoffmann).
Under the Victorian Charter, however, these requirements of accountability and justification are at risk. If Parliament uses the extraordinary override provision to achieve what, according to international and regional human rights law, can and ought to be achieved via an ordinary limitation on rights, the judiciary is excluded from the picture. An override in effect means that the s 32 interpretation and the s 36 declaration powers do not apply to the legislation for a renewable five-year period. Moreover, the judicial oversight in relation to the conduct of public authorities under ss 38 and 39 is removed because conduct that would ordinarily be considered unlawful under s 38 would no longer be considered so where a valid override declaration was in operation. The main judicial oversight tools are not available for overrides of rights (as compared to limitations on rights), such that human rights accountability and justification are severely compromised. Given that s 32 is the primary remedial mechanism under the Victorian Charter, and the relative weakness of the ss 38 and 39 remedies compared to analogous provisions in the Human Rights Act 1998 (UK) c 42, further erosion in the enforceability of the Victorian Charter via override declarations is inexusable.

The procedural aspects of the override reinforce this conclusion. Sections 31(3) and (5) set out various legislative procedures requiring an explanation of the justifying 'exceptional circumstances' when enacting overriding legislation. However, s 31(9) states that a failure to comply with ss 31(3) and (5) does not affect the validity, operation or enforcement of that Act. Not only do the requisite circumstances justifying an override fall below the accepted minimum human rights standards, there is no consequence if the responsible Member of

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109 Human Rights Act 1998 (UK) c 42, ss 6–9. Although modelled on the public authority provisions under the Human Rights Act 1998 (UK) c 42, the Victorian Charter offers significantly weaker protection. Three major differences are responsible for this. First, the definition of public authorities in the Human Rights Act 1998 (UK) c 42 includes courts and tribunals (s 6(1)), unlike the definition of public authorities under the Victorian Charter (s 4(1)(g)). The UK definition imposes an express obligation on UK courts and tribunals to develop the common law in a manner consistent with the protected rights, which is absent under the Victorian instrument. Secondly, s 7 of the Human Rights Act 1998 (UK) c 42 creates a freestanding cause of action where a public authority acts unlawfully by acting in a manner incompatible with the protected rights (being breach of statutory duty, with the statute being the Human Rights Act 1998 (UK) c 42). This remedy is in addition to such unlawfulness being a new ground of judicial review for administrative actions and such unlawfulness being able to be relied upon in any legal proceeding (whether as a defence to proceedings brought by public authorities, or as the basis for an appeal against a decision of a court or tribunal). The Victorian Charter does not create a freestanding cause of action for unlawfulness by public authorities. Rather, under s 39(1), relief for unlawfulness depends on the pre-existence of some other relief or remedy — that is, if, Victorian Charter aside, a person may seek any relief or remedy in respect of an act or decision of a public authority on the basis that it was unlawful, that person may seek that relief or remedy, or a ground of unlawfulness arising under the Victorian Charter. Thirdly, under s 8 of the Human Rights Act 1998 (UK) c 42, a court may grant such relief or remedy or make such order, within its power, as it considers just and appropriate, including the power to award damages. In contrast, s 39(3) expressly states that a person is not entitled to damages for breach of the Victorian Charter. Rather, under s 39(4), damages will only be available if a person has a pre-existing right to damages.

110 Section 31(3) of the Victorian Charter requires a Member of Parliament introducing a Bill containing an override declaration to make a statement 'explaining the exceptional circumstances that justify the inclusion of the override declaration.' Section 31(5) states that the s 31(3) statement must be made: (a) during the second reading speech of the relevant Bill; or (b) with 24 hours notice and before the third reading; or (c) with the leave of the relevant house of Parliament, at any time before the third reading.
Parliament fails to make the requisite statements in Parliament. This may bolster parliamentary sovereignty but significantly undermines human rights accountability and justifiability.

The second answer to the question posed is that human rights are undermined. Setting the standard for overriding 'exceptional circumstances' too low places rights in a precarious position. It becomes too easy to justify a suspension of guaranteed rights which, in turn, compromises the status of rights and results in the under-enforcement of the rights. Such a relaxed standard for override declarations may promote parliamentary sovereignty, but the cost is a substantial undermining of the protected rights.

The third answer is that override provisions undermine the institutional dialogue that the Victorian Charter was designed to create. A pre-emptive override — when Parliament attaches an override declaration to legislation when it is first enacted, and before the judiciary has an opportunity to consider it under the Victorian Charter — entirely suppresses the contribution the judiciary may make to the dialogue in relation to the scope of the relevant protected rights, the justifiability of any limitation, the possible s 32 rights-compatible interpretations and the need for a s 36 declaration of inconsistent interpretation. The institutional dialogue sought after is therefore replaced with a legislative monologue about rights. Where a limitation is used to restrict rights in preference to an override, all four institutional dialogue mechanisms can be engaged — including

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111 The Canadian Charter does not regulate when the override is used, such that the override may be used pre-emptively or in response to a judicial ruling. From 1982 to 2001, the Canadian override had only been used twice as a direct response to a judicial ruling. This means that the other 16 uses were, in effect, pre-emptive uses of the override; see further above n 59. The first use in response to a judicial ruling 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 in R v WSU v Saskatchewan (1985) 19 DLR (4th) 609 for violating freedom of association under s 2(d) of the Canadian Charter. The law affected was The Dairy Workers (Maintenance of Operations) Act, SS 1983-84, c D-1.1 and the overriding legislation was The SGEU Dignity Settlement Act, SS 1984-85-86, c 111. The use of the override proved to be unnecessary as, on appeal, the Supreme Court of Canada ruled the original legislation to be constitutional: R v WSU v Saskatchewan (1987) 1 SCR 460. Given that the override was used whilst the case was still on appeal may, in fact, make this case more of a pre-emptive use in any event. The second use of the override as a direct response to a judicial ruling was in Quebec, where the provincial legislature used s 33 to re-enact unilingual public signs legislation invalidated by the Supreme Court of Canada in Ford v A-G (Quebec) [1985] 2 SCR 712 ('Ford') for violating freedom of expression under s 2(b) of the Canadian Charter. The law affected was the 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 Human Rights Committee, in which the Human Rights Committee was of the view that the legislation violated the 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 generally Hogg and Bushell, above n 78, 83, 85-6, 114-15; Kahan, above n 59, 264-5, 269-71. An example of a pre-emptive use of the override is the Albertan Marriage Amendment Act, SA 2000, c 3. Section 5 defines 'marriage' as the union between a man and a woman, in order to exclude same-sex marriage under the Albertan Marriage Act, RSA 2000, c M-5. The amending legislation contained an override provision, pre-emptively protecting the legislation from Canadian Charter challenge. The constitutionality of this legislation is questionable, given that the Federal Government has jurisdiction over marriage under the Canadian Constitution and that s 33 does not apply to those provisions of the Canadian Constitution: Constitution Act 1867 (UK) 30 & 31 Vict, c 3, s 91(26). See Kahan, above n 59, 268-9; Janet L Hebert, Charter Conflicts: What Is Parliament's Role? (2002) 197-8.
the (advisedly amended) override after an adverse judicial decision, whether that be a s 32 rights-compatible interpretation or a s 36 declaration.\textsuperscript{112}

It is unclear whether or not this shortcoming of s 31 can be rectified other than by amendment to the \textit{Victorian Charter}. Given the explicit proviso in s 31(9) that a failure to comply with the legislative procedural aspects does not affect the validity, operation or enforcement of that Act to which the override applies, it seems that both the s 32(1) interpretative obligation and the s 32(2) power to refer to international and regional comparative jurisprudence may not be available to secure a greater level of substantive accountability for override declarations via a procedural requirement. The only way to ensure that the \textit{Victorian Charter} reflects international and regional minimum human rights standards may be by legislative amendment.

Another possible solution may be found in s 31(4), which states that ‘[i]t is the intention of Parliament that an override declaration will only be made in exceptional circumstances.’ If Victoria follows the lead of Canada,\textsuperscript{113} such a provision will not be given any substantive content, meaning that the existence of ‘exceptional circumstances’ will not operate as a precondition to the exercise of overrides.\textsuperscript{114} Professor George Williams, Chair of the Human Rights Consultation Committee, has reinforced this view, classifying the requirements of s 31(4) as ‘non-justiciable’.\textsuperscript{115}

Conversely, if s 31(4) is given substantive content by injecting the higher international and regional standards of justifying circumstances, it could conceivably act as a more effective hurdle for justifying exceptional departures from protected rights. The s 32(1) interpretative obligation, coupled with the s 32(2) power to consider international and regional human rights law, may encourage the judiciary to require a substantive content similar to those circumstances that justify extraordinary derogations rather than those that justify ordinary limitations on rights. On the other hand, the judiciary may limit the substantive content to that outlined in the Explanatory Memorandum, which falls far short of accepted minimum human rights standards.

2. \textit{Regulation of the Effects of a Derogation}

Turning to the second shortcoming, the regulation of the effects of an overriding measure under the \textit{Victorian Charter} does not reach the minimum standards set by international and regional human rights law with respect to the equivalent derogation power. Indeed, such regulation is non-existent under the \textit{Victorian Charter} — there is no limit placed on the effects of the override provision; no requirement of proportionality between the exigencies of the emergency situation and the overriding measures; and nothing preventing Parliament from utilising the override power in a way that unjustifiably violates other international law norms, such as the prohibition against discrimination. This is in stark contrast to

\textsuperscript{112} Moreover, compared with the \textit{Canadian Charter}, an override is not needed to establish an institutional dialogue in Victoria; see further below Part IV(C)(2).

\textsuperscript{113} See further below Part V(C), n 204.

\textsuperscript{114} \textit{Ford} [1988] 2 SCR 712.

the equivalent international and regional (and some comparable domestic)\textsuperscript{116} human rights standards in relation to derogation.

Article 4 of the ICCPR permits only measures derogating from ICCPR obligations ‘to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law and do not involve discrimination’ based on listed prohibited grounds.\textsuperscript{117} The Human Rights Committee has expanded upon this condition in its General Comment 29,\textsuperscript{118} stating that ‘[t]his requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.’\textsuperscript{119} Having recognised the distinction between derogation on the one hand, and qualification and limitation on the other, it states that ‘the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers.’\textsuperscript{120} Moreover, it expects state parties to ‘provide careful justification’ for the specific derogating measures adopted.\textsuperscript{121} By way of example, the Human Rights Committee suggests that a natural catastrophe, mass demonstration or major industrial accident may be sufficiently addressed by limits to the freedoms of movement or assembly, rather than by derogation.\textsuperscript{122}

Professor Sarah Joseph, Jenny Schultz and Melissa Castan argue that, given the broad scope to impose justifiable limitations to most ICCPR rights, it is difficult to see how measures beyond those allowable limits would ever satisfy a strict test of proportionality [under derogation], even in the most serious emergency.\textsuperscript{123} By way of example, the commentators ask how an arbitrary interference with privacy, which would fall foul of the limitations power, could ever be considered proportionate in the context of derogation given that the definition of ‘arbitrary’ itself contains a proportionality test. Or, by way of another example,\textsuperscript{116} The comparable domestic instruments will be considered further in Part V.

\textsuperscript{117} The listed grounds of prohibited discrimination under art 4(1) are race, colour, sex, language, religion or social origin. This is narrower than the non-discrimination protections in arts 2(1) and 26 in two ways. First, art 4(1) does not explicitly list as prohibited grounds of discrimination: political or other opinion, national origin, property or birth. Secondly, art 4(1) is written in ex-hustive language, whereas arts 2(1) and 26 are written in inclusive language (or ‘other status’). This indicates two matters: (a) that the prohibited grounds under art 4(1) were intended to exclude the additional prohibited grounds listed in arts 2(1) and 26; and (b) that art 4(1) was not designed to be expanded as the circumstances require due to the omission of ‘or other status’. A further restriction has been highlighted by Rosalyn Higgins, a former member of the Human Rights Committee. She argues that the use of the word ‘solely’ in [art 4] means that only deliberate discrimination rather than inadvertent discrimination, is prohibited’: Joseph, Schultz and Castan, above n 5, 829.

\textsuperscript{118} The Human Rights Committee confirmed that art 4 cannot justify a ‘derogation from the [ICCPR] if such derogation would entail a breach of the State’s other international obligations, whether based on treaty or general international law’. Human Rights Committee, General Comment No 29, above n 53, [9]. Examples of such ‘international obligations’ include the Geneva Conventions, the Convention on the Rights of the Child, opened for signature 20 November 1989, 1977 UNTS 3 (entered into force 2 September 1990), and other human rights treaties: see further Joseph, Schultz and Castan, above n 5, 828; Joseph, above n 76, 89.

\textsuperscript{119} Human Rights Committee, General Comment No 29, above n 53, [4].

\textsuperscript{120} Ibid.

\textsuperscript{121} Ibid [5].

\textsuperscript{122} Ibid.

\textsuperscript{123} Joseph, Schultz and Castan, above n 5, 826.
Joseph, Schultz and Castan ask how could it ever be proportionate in an emergency situation to restrict freedom of movement beyond the need to protect national security, public order, public health or morals, or the rights and freedoms of others, as permitted under art 12(3)? Indeed, the requirement of proportionality may, in practice, expand the categories of non-derogable rights, such that derogable rights are only those rights expressed in absolute terms, such as art 9(3).

In *Landinelli Silva v Uruguay*, the Human Rights Committee reviewed a decree of the Government of Uruguay prohibiting classes of people from engaging in activities of a political nature for 15 years. In effect, Marxist and pro-Marxist party candidates from the last two elections could not engage in political activities. The Human Rights Committee believed that there was no attempt to prove that the derogating measures were 'strictly required'. In terms of proportionality, the Committee found the restriction to be unlawful because it applied to all members of certain political parties who had been candidates in previous elections, with no distinction being made between those promoting political ideas by peaceful means and those resorting to violence.

These points highlight the flaws in the override provision of the *Victorian Charter*. Under the *ICCPR*, a much stricter justification test is imposed for derogating measures as compared to limitations on rights, and both tests require there to be some level of proportionality between the derogating measures or limitation on rights, and the impact on rights. In stark contrast, under the *Victorian Charter* the representative arms must satisfy proportionality requirements before an ordinary limitation will be justified, whereas Parliament has no such restriction whatsoever when it enacts legislation subject to an extraordinary override. Why would the preconditions and safeguards placed on exercising restrictions on rights be far less demanding (indeed, non-existent) when Parliament exercises an extraordinary power, which imposes far greater encroachments on protected rights, than when Parliament places ordinary limitations on protected rights? At best, this could be justified as an anomaly in order to preserve the unduly venerated sovereignty of Parliament; at worst, it can be seen as a blatant undermining of an effective system of human rights protection, scrutiny and accountability.

To further illustrate the regulation of the effects of derogating measures, let us return to the *ECHR*. Article 15 permits a state to take derogating measures 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' In the *Lawless Case*, the emergency measures that permitted the detention of

124 Ibid, Joseph, above n 76, 97.
125 Joseph, above n 76, 97. Article 9(3) of the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) guarantees that '[a]nyone arrested or detained on criminal charge shall be brought promptly before a judge.'
127 Ibid [8.4]. For further discussion of the application of the proportionality principle under the *ICCPR*, see Joseph, above n 76, 86–8.
suspected terrorists satisfied this test. The European Court admitted that the detention of suspected terrorists seemed grave, but it found that such measures were required in the circumstances because, inter alia: (a) the ordinary law had proved to be ineffective; (b) the criminal and military courts were unable to restore peace and order; and (c) the gathering of evidence was difficult because of the militant, secret and terrorist character of the activities, and the fear engendered in the public by the Irish Republican Army. The European Court was also persuaded by the safeguards contained in the relevant emergency legislation, which included: (a) parliamentary supervision of the application of the legislation; (b) the establishment of a ‘Detention Commission’, consisting of one officer of the defence force and two judges, who could review cases of detention and whose decisions were binding on government; and (c) the public statement by Parliament that anyone detained would be released if they gave an undertaking to observe the law and refrain from terrorist activities, with the additional promise that those arrested would be informed immediately about the option of the undertaking.

In Ireland v United Kingdom, the derogating measures allowed the arrest and detention of persons not because they were suspected of committing a crime, but to obtain information from them. These measures did not provide for any administrative or judicial remedies. In the circumstances, the European Court upheld these derogating measures. The Court accepted that witnesses were not able to give evidence freely without running great risks, and therefore had to be arrested in order to be questioned in conditions of relative security and not exposed to reprisals. It was also swayed by the fact that the deprivation of liberty was for a maximum of 48 hours.

In Aksoy v Turkey, the applicant was detained for 14 days without being brought before a court, purportedly under emergency legislation relating to PKK (‘Workers’ Party of Kurdistan’) terrorist activity. The previous jurisprudence on art 5(3) allowed a maximum detention period of approximately four days, such that the emergency legislation clearly violated art 5(3). The issue was whether the violation was excused because of a lawful derogation. The European Court held that the derogating measures were not ‘strictly required by the exigencies of the situation’ because detention for 14 days was far beyond the

128 Lawless Case (1961) 3 Eur Court HR (ser A) 56–8.
130 (1978) 25 Eur Court HR (ser A) 80–1.
131 The fact that the government later abandoned this measure because it was ineffectual did not mean it was not ‘strictly required by the exigencies of the situation’. The European Court held that it must consider the circumstances when steps were originally taken, not with hindsight. In Ireland v United Kingdom, the Court said (at ibid 83):

When a State is struggling against a public emergency threatening the life of the nation, it would be rendered ineffective if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards ... The interpretation of Article 15 must leave a place for progressive adaptations.

132 Ibid 80–1. See also Branigian (1993) 258-B Eur Court HR (ser A) 54, where the European Court was swayed by the ‘special difficulties’ involved in combating terrorism, recognising the necessity of extended periods of detention which can occur without charge and are not judicially controlled.

133 (1996) 6 Eur Court HR 2260.
acceptable norm of four days, and the legislation did not contain any safeguards for detainees: the detention was incommunicado; the state was not required to inform anyone of the applicant’s detention; and habeas corpus was not available.\textsuperscript{134}

The European Court often finds that derogating measures satisfy this test. This does not mean that the safeguards regulating the effects of derogating measures are meaningless. Many benefits flow from the processes triggered by regulating the effects of derogation, even where the end result is a lawful derogating measure. First, there is value in independent oversight of executive actions, especially in times of emergency. During purported public emergencies, the executive tends to expand its power at the expense of the judiciary. The control of crime (usually an executive task) and due process (usually a judicial task) often merge in emergency situations, with the executive taking control of both. The merging of the tasks of investigation, prosecution and adjudication creates vast scope for human rights violations.\textsuperscript{135} Supervision of executive actions, particularly the independent supervision that courts or treaty monitoring bodies can offer, is vital in such a context.

Secondly, there is value in requiring the executive and legislature to publicly articulate a full justification for the derogating measures, including the articulation of the competing interests at stake, the balance they seek to achieve between the competing interests, the legislative or other measures they claim achieve this balance, and the proportionality between the harm done to protected rights and the benefit secured for the common good. This bolsters human rights accountability.

Another factor to consider is the problem of emergency measures becoming the norm — emergency measures ‘become a way of deferring normality [or] rather, they often become normality.’\textsuperscript{136} An example is when the derogating measures in emergency legislation become part of the ordinary criminal law. This phenomenon occurs due to the perceived effectiveness of the emergency legislation,\textsuperscript{137} such that it becomes the model for the regulation of non-emergency related behaviours. There is evidence of this occurring within

\textsuperscript{134} Ibid 2283.

\textsuperscript{135} Indeed, public emergencies ‘have all too often acted as veils for gross abuses of human rights’: Joseph, Schultz and Catan, above n5, 836. See also Currie and de Waal, above n12, 801, 801 n3; Dominic McGoldrick, \textit{The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights} (1991) 301; P R Ghoundhi, ‘The Human Rights Committee and Derogation in Public Emergencies’ (1989) 32 German Yearbook of International Law 323.

\textsuperscript{136} Susan Marks, ‘Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights’ (1995) 15 \textit{Oxford Journal of Legal Studies} 69, 86. See also Currie and de Waal, above n12, 802.

\textsuperscript{137} This comes as no surprise. The emergency measures usually take away the rights of the accused and various safeguards within the criminal system. Without these rights and safeguards, it is much easier to secure convictions, making the administration of criminal justice much more efficient but not necessarily more accurate and reliable. A recent example of ‘mission creep’ in the UK is the possible extension of the ‘control order’ system introduced under the \textit{Prevention of Terrorism Act} 2005 (UK) (‘PoT4’). The control order provisions ‘were passed with the spectre of the 11 September 2001 terrorist attacks in the United States in mind. However, ministers have confirmed that their use in Northern Ireland is under consideration’: Roger Smith, ‘Rights and Wrongs: A Hasty Measure’ (2005) 102(14) \textit{Law Society Gazette} 13.
Australia. Another example is when the state of emergency becomes the norm, such is likely to be the case with the current ‘War on Terror’, and which occurred in Northern Ireland where the situation continued for at least 30 years. It is arguable that at some point the situation could no longer be characterised as exceptional or extraordinary and that the emergency legislative measures could no longer be characterised as extraordinary, but rather subsumed as part of the ordinary body of law. Given these tendencies, one could expect even greater scrutiny of emergency measures — at the very least, one could expect a strict application of the minimum human rights safeguards in place in international and regional law.

Instead, the Victorian Charter offers very little. It does not regulate the overriding measures in the same way derogations are regulated, and it fails to impose any judicial oversight, any requirements of justifiability, or any rights accountability with respect to overrides. Where does this leave Victorians if and when the emergency situation becomes the normal situation and/or the emergency overriding measures become part of the ordinary general law? There will be major encroachments on protected rights without any serious human rights regulation, oversight, justification or accountability. It is lamentable that in the ordinary course of affairs derogations become the norm, even when internationally and regionally recognised minimum human rights safeguards are in place and operating; but it is quite extraordinary that, under the Victorian Charter, overrides may become the norm in the absence of any safeguards other than a continually renewable sunset provision, and to reiterate, under the Victorian Charter, more serious safeguards apply to the less serious power to place limitations on rights, whilst less adequate (indeed, arguably inadequate) safeguards apply to the more serious power to override rights.

In conclusion, it is worth considering the rationale behind allowing derogations and overrides. Derogations and overrides in times of public emergencies are certainly aimed at assisting the executive government in difficult situations. The

138 Tom Allard, ‘Police to Get Unlimited Powers’, The Age (Melbourne), 1 August 2007, 1. Proposed Commonwealth legislation introduces ‘delayed notification warrants’ under which law enforcement bodies may search, seize equipment from, and plant listening devices in a person’s home or business. This is done without the person’s knowledge (that is, initially there is a six month delay in notifying a person, with a potential 18 month delay if the warrant is extended) and without court approval. It also provides for ‘controlled operations’ which allow federal law enforcement agents to participate in criminal activity to further their investigations. These powers will apply to all crimes that are liable to a penalty of 10 years’ imprisonment or more. See further Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 (Cth) especially sch 2. A Senate Committee’s recommendation that these laws be restricted to terrorism offences, organised crime offences and offences involving death or a term of life imprisonment was rejected: see Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 (2007) especially 11–16.

139 Consideration should be given to the situations in Algeria, which has had derogations in place since 1991, Israel since 1991, El Salvador since 1983, Nicaragua since 1980, and Peru since 1983: see Joseph, above n 76, 82 fn 9. Also, the Branigan derogation was in force for 17 years. The Prevention of Terrorism (Temporary Provisions) Act 1989 (UK) c 4 introduced the derogation in 1989, whilst The Human Rights Act (Amendment) Order 2001 (UK), amending Human Rights Act 1998 (UK) c 42, effected the withdrawal of the derogation from art 3(1), effective as of 26 February 2001. The withdrawal was considered possible following the implementation of sch 8 of the Terrorism Act 2000 (UK) c 11.
constitutional arrangements of most states allow for an increase in executive power, and a marginalisation of judicial power, in order to give the executive greater leeway in responding to public emergencies. Conversely, emergency powers also protect the individual in situations of public emergency by ensuring that there is an established framework in place within which executive governments must operate. In the Victorian Charter context, the override power seems solely concerned with buttressing state power and not sufficiently concerned with the counterbalancing rationale of protecting the human rights of the individual.

C Underlying Objectives of the Victorian Charter and the Override

The fact that the override does not meet internationally and regionally accepted minimum human rights standards is problematic in and of itself. It becomes even more problematic when the override is considered in the context of the underlying objectives of the Victorian Charter. If one could point to a convincing rationale under the Victorian Charter that explained the need for the override, one may accept the technical violation of international human rights law as expedient (even if not human rights respecting). However, when the twin objectives of preserving parliamentary sovereignty and establishing an institutional dialogue are considered, the arguments against the override in its current form are reinforced. Each objective will be considered in turn.

1 Preservation of Parliamentary Sovereignty

In relation to preserving parliamentary sovereignty, it is unclear why an override provision was included in the Victorian Charter. The override is borrowed from the Canadian Charter, which is a 'constitutional' document that empowers the judiciary to invalidate legislation that unjustifiably limits a right. In order to preserve parliamentary sovereignty, it was necessary to empower Parliament to re-enact legislation that had been invalidated by the judiciary according to the latter’s assessment of rights-incompatibility. Indeed, adoption of the override was the vital political compromise that ensured the enactment of the Canadian Charter; ‘section 33 broke the impasse on entrenchment by tempering judicial review of rights claims with a legislative escape.’

140 The term ‘constitutional’ is used loosely. Because of the override provision, the Canadian Charter is not ‘constitutional’ in the traditional sense: see above n 61.
141 Constitution Act 1982, being sch B to the Canada Act 1982 (UK) c 11, s 52(1): “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”
The parliamentary sovereignty rationale for the override under the *Canadian Charter*, however, does not apply under the *Victorian Charter*. The *Victorian Charter* differs from the *Canadian Charter* in two important respects: (a) the *Victorian Charter* is not a 'constitutional' document; and (b) the judiciary is not empowered to invalidate legislation. Under the *Victorian Charter*, use of the override will never be necessary to preserve parliamentary sovereignty because judicially-assessed, rights-incompatible legislation cannot be invalidated, unwanted or undesirable s 32 judicial rights-compatible reinterpretations can be altered by ordinary legislation, and s 36 judicial declarations of inconsistent interpretation are unenforceable. In other words, the Victorian Parliament need only enact explicit rights-incompatible legislation with an incompatible statutory purpose to avoid a rights-compatible judicial interpretation. Admittedly, an override may be used to avoid the controversy of Parliament ignoring a s 36 judicial declaration which impugns legislation. However, use of the override itself would surely result in equal, if not more, controversy than Parliament refusing to alter legislation in light of a s 36 declaration.

Perhaps the answer lies in the *Human Rights Act 1998 (UK)* c 42. That legislation empowers Parliament to derogate from Convention rights, which is the override equivalent.\(^{143}\) Domestically in the UK, as in Victoria, a derogation serves no purpose — judicially-assessed, rights-incompatible legislation cannot be invalidated, unwanted or undesirable s 3 judicial rights-compatible reinterpretations can be altered by ordinary legislation, and s 4 judicial declarations of incompatibility are unenforceable. Internationally, however, derogation does serve a purpose.\(^{144}\) Where UK law potentially violates international or regional human rights obligations, derogation is necessary to alter the UK's international and regional legal obligations. This is especially important in relation to the *ECHR* because decisions of the European Court are enforceable,\(^{145}\) such that altering the human rights obligations via derogation is necessary to ensure that domestic grievances do not succeed before the European Court.

The international rationale for derogation under the *Human Rights Act 1998 (UK)* c 42, however, does not apply to the *Victorian Charter*. First, the State of Victoria does not have international legal personality and therefore does not have obligations under international law. Rather, it is the Commonwealth of Australia that has international legal personality and international legal obligations. Secondly, the enforcement mechanisms under the international human rights treaties to which Australia is a party are weaker than the *ECHR* mechanisms. The

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\(^{143}\) As the *Human Rights Act 1994 (UK)* c 42 was based on the *ECHR*, it adopted the regional and international human rights instrument terminology of 'derogation', rather than the domestic human rights instrument terminology of 'override'.

\(^{144}\) Indeed, this point was recognised by Lord Scott in *A v Secretary of State for the Home Department* [2005] 2 AC 68, 147 ('Case of A'). It seems to me somewhat of a puzzle why section 14 of the *Human Rights Act 1998 (UK)* c 42 was necessary at all. The *Human Rights Act 1998 (UK)* c 42 does not assume to restrict Parliament's power to enact legislation inconsistent with the *ECHR*. So what was the purpose of the designated derivative section? The purpose was, perhaps, simply to enable it to be made clear that the inconsistency was deliberate and not inadvertent, and thereby to constitute an aid to the courts in construing the statutory provision.

\(^{145}\) *ECHR*, opened for signature 4 November 1950, 213 UNTS 221, art 46 (entered into force 3 September 1953).
decisions of the European Court are enforceable. In comparison, the views and opinions of the treaty monitoring bodies under the relevant treaties to which Australia is a party are, at best, only of influence, as they are not strictly enforceable at the international or domestic level.146 Because of this difference in enforceability, the same rationale does not apply in the Victorian jurisdiction. Finally, even if the international rationale were to apply in the State of Victoria, the override provision does not meet the minimum international human rights standards relating to derogation. Therefore, use of the override would most likely be a technical violation of those standards.

Williams confirms that "as a matter of law the override clause ... is unnecessary."147 He argues that the override provides an alternative means to the amendment of the Victorian Charter itself: "use of s 31 is preferable to a permanent amendment of the [Victorian Charter] enacted at a time of crisis that might damage the legitimacy of the instrument."148 This is not a sufficient justification for the inclusion of the override. First, the override provision itself damages the 'legitimacy of the instrument' by undermining the minimum accepted human rights standards associated with derogation. Secondly, the potential for continuous renewal of override provisions every five years will, in effect, equate to permanent changes to the protected rights in Victoria by stealth. Thirdly, it also fails to recognise the way in which temporary measures adopted in emergency situations creep into the permanent legal system. Finally, the argument fails to acknowledge the political cost of amending or repealing a human rights instrument. Once conferred, individuals are reluctant to have their rights abrogated and are suspicious of moves to do so. Williams' argument overestimates the ease with which the representative arms could amend or repeal the Victorian Charter, even in times of emergency.149

Overall, the Victorian Charter preserves parliamentary sovereignty by limiting the powers of the judiciary to interpretation and declaration, and denying the judiciary the power to invalidate legislation. The override power is not required to preserve parliamentary sovereignty; rather, it serves to undermine the level of protection of human rights in Victoria.150

2 Establishing an Institutional Dialogue

The aim of establishing an institutional dialogue about rights under the Victorian Charter does not provide any underlying justification for the override clause either. Again, it is worth considering how the override device within the Conca-

147 Williams, above n 115, 899.
148 Ibid.
149 See, eg, Francesca Klug, Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights (2000) 170: "Repealing the Human Rights Act 1998 (UK) c 42 is almost inconceivable in the foreseeable future. It is fair to say that enforcement of human rights standards through the courts is here to stay."
150 It should be noted that the Human Rights Act 2004 (ACT), which is also modelled on the Human Rights Act 1998 (UK) c 42, does not contain an additional override/derogation provision. The Human Rights Act 2004 (ACT) implicitly recognises that the retention of parliamentary sovereignty is achieved by limiting the powers of the judiciary to interpretation and declaration alone.
Magnified Charter facilitates an institutional dialogue. Under the Canadian Charter, the judiciary is empowered to invalidate legislation that, from its institutional perspective, unjustifiably limits rights. However, the legislature has multiple response mechanisms, which facilitate an institutional dialogue (that is, the equivalent of the fourth institutional dialogue mechanism discussed above). Two situations commonly arise. The first is where the legislative means fall foul of the Canadian Charter, while the second occurs where the legislative objectives do so.

First, where the legislative means are impugned, the legislature can respond by enacting ordinary legislation in a second attempt to achieve its legitimate legislative objectives. This involves refining the s.1 limitation in some way. Rights-limiting legislative means that unjustifiably violate the Canadian Charter generally do so because the legislative means are not the least rights-restrictive way to achieve the legitimate legislative objective; or, the legislative means do not have a rational connection to the legitimate legislative objective. Accordingly, the legislature usually needs to adjust its legislative means to ensure that it is less rights-restrictive and more rationally connected to the legitimate legislative objective. It is the s.1 general limitations power that structures the dialogue here.

In the second situation, where the legislative objectives are impugned, the legislature must resort to the override power in s.33. Exercise of the override power is only necessary where the judiciary impugns the legislative objectives. This is a rare occurrence, with only three per cent of legislation being invalidated because of unreasonable legislative objectives. From a dialogue perspective, when there is irresolvable institutional disagreement over the reasonableness of the legislative objectives behind rights-limiting legislation, 'section 33 provides a carefully structured outlet for the extraordinary dialogue'. Although the use of s.33 indicates a temporary suspension of the institutional dialogue between the judiciary and the legislature, 'the Court's point

151 Under the Victorian Charter, we can expect the minimum impairment factor in s.7(2)(c) to be the most difficult to achieve, followed by the reasonability factor in s.7(2)(d). For statistics on unjustifiable limitations on rights under the Victorian Charter, see Leon E. Trakman, William Cole-Hamilton and Sean Gatien, 'R v Oakes 1986-1997: Back to the Drawing Board?' (1998) 36 Osgoode Hall Law Journal 83, 149-64; Ægge and Bushell, above n.78, 907-24. For similar discussions under the Human Rights Act 1998 (UK) c.42, see Nicholas Blake, 'Importing Proportionality: Clarification or Confusion?' (2002) 7 European Human Rights Law Review 19, 23.

153 Resort to the s.33 structural dialogue mechanisms is not necessary, unless the representative arms insist on re-enacting precisely the impugned legislative means.

155 The Parliament may choose to use s.33 to override a judicial ruling where it is determined to re-enact the precise impugned legislative means, although the less confrontational s.1 structural mechanism is available.

Trakman, Cole-Hamilton and Gatien, above n 151, 95. 'From 1986 to the time of writing (autumn, 1997), a majority of the Supreme Court considered eighty-seven violations under s.1, eighty-four of which were held to have pressing and substantial objectives: at 95 fn.37. Note that 1986 was the year of R v Oakes [1986] 1 SCR 103. Examples where the objectives were found not to be reasonable include R v Big M Drug Mart Ltd [1985] 1 SCR 295; Sonerville v A-G (Canada) [1996] 136 DLR (4th) 203; A-G (Quebec) v Quebec Protestant School Boards [1984] 2 SCR 66; R v Zundeck [1992] 2 SCR 731.

of principle [is preserved], to be reconsidered in calmer times when the override expires after five years.\textsuperscript{115}\textsuperscript{115} Moreover, the dialogue between the represented and the legislature continues, with the represented being ‘clearly warned about what is being done in [their] name’.\textsuperscript{117} In an institutional dialogue framework under a ‘constitutional’ human rights instrument, s 33 is a legitimate temporary assertion of the voice of the representative arms. If s 33 did not exist and the judiciary impugned legislative objectives, the institutional dialogue would more closely resemble a judicial monologue.

In Victoria, the override mechanism is not needed to establish a dialogue. Unlike the \textit{Canadian Charter}, the \textit{Victorian Charter} does not empower the Victorian judiciary to invalidate legislation where the legislative objective behind the rights-limiting legislation is unreasonable. Moreover, unwanted s 32 rights-compatible interpretations of the legislative objectives are unlikely if the statutory provisions and statutory purpose clearly prevent such an exercise of the s 32 interpretation power. Further, any unwanted or undesirable s 32 rights-compatible judicial interpretations of legislative objectives can be altered by ordinary legislation, and s 36 judicial declarations of inconsistent interpretation based on an unreasonable legislative objective are unenforceable. The legislature does not need ‘a legislative counter-weight to judicial power’\textsuperscript{118} in the form of an override power because the \textit{Victorian Charter} does not give the Victorian judiciary the same ‘weight’ in the form of the power to invalidate as the \textit{Canadian Charter} gives the Canadian judiciary. Nor does the legislature need the override to ensure its voice in an ongoing institutional dialogue because the \textit{Charter} provides no scope for a judicial monologue.

Finally, not only is the override unnecessary to facilitate an institutional dialogue under the \textit{Victorian Charter}, but its inclusion may in fact promote a representative monologue. There is nothing in the \textit{Victorian Charter} to prevent the use of the override ‘pre-emptively’\textsuperscript{119}. Parliament is able to use an override when first enacting legislation to shield the legislation from judicial review, rather than only using it as a response to the contribution of the judiciary to the dialogue. Recall that the s 32 interpretative and s 36 declaratory powers do not apply to overriding legislation.\textsuperscript{120} Such pre-emptive uses of the override have the potential to suppress the judicial contribution to the debate about rights and democracy, taking us from an institutional dialogue to a representative monologue.

D Conclusion

The s 31 override power in the \textit{Victorian Charter} is problematic. It does not contain the minimum safeguards of equivalent override and derogation provisions in international, regional or comparative domestic human rights instruments. Nor does it promote the underlying objectives of the \textit{Victorian Charter}. It

\textsuperscript{115} Reach, \textit{The Supreme Court on Trial}, above n 155, 265.

\textsuperscript{117} Ibid.

\textsuperscript{118} Russell, ‘Standing Up for Notwithstanding’, above n 155, 301.

\textsuperscript{119} This is also true of the \textit{Canadian Charter}; see above n 111.

\textsuperscript{120} \textit{Victorian Charter} s 31(6).
seems that the drafters of the Victorian Charter satisfied the political imperative to give the representative arms of government as many tools as possible for reducing the impact of rights protections on democratic decision-making. In doing so, the drafters have compromised rights protection and the notion of institutional dialogue, and disingenuously relied on the need to preserve parliamentary sovereignty to deny individuals meaningful human rights accountability. A full review of the need for and contours of s.31 must be undertaken.

V COMPARABLE DOMESTIC HUMAN RIGHTS INSTRUMENTS AND OVERRIDES/DEROGATION

The Victorian concerns about the preservation of parliamentary sovereignty and the creation of an institutional dialogue do not dictate the need for and content of s.31 of the Victorian Charter in addition to the other methods of restricting rights that are available therein. Comparable domestic human rights instruments demonstrate that parliamentary sovereignty can be preserved and an institutional dialogue can be created, whilst ensuring that internationally and regionally recognised minimum human rights standards are respected vis-à-vis restricting rights in extraordinary times. The South African, UK and Canadian experiences with overrides and derogations hold lessons for Victoria.

A Derogation under the South African Bill of Rights

The South African Bill of Rights recognises that exceptional measures may need to be taken in times of war or where there is a threat to the life of the nation, and that it is better to permit and regulate this under the Constitution rather than rely on extra-constitutional power, prerogative powers or martial law. Indeed, South Africa experienced many extra-constitutional states of emergency in the apartheid era, which ‘resulted in gross violations of human rights.’161 Accordingly, the domestic South African Bill of Rights contains a power of derogation mimicking the international and regional human rights standards, with limits in time, circumstance and effect.

In terms of limits in time and circumstance, s 37(1) permits a state of emergency to be declared only ‘in terms of an Act of Parliament’, with the relevant Act requiring a state of emergency to be officially proclaimed by the President.162 Moreover, such a declaration can only be made when ‘(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.’163 Under s 37(2), a declaration of a state of emergency, and any legislation enacted in consequence, must be prospective and will be effective for

161 Currie and de Waal, above n 12, 801.
162 The relevant Act of Parliament is the State of Emergency Act 1997 (RSA). Section 1 of this Act states that the ‘President may by Proclamation in the Gazette declare a state of emergency in the Republic or in any area within the Republic.’ The reasons for the state of emergency must be included in the Proclamation, and the public must be informed about the existence of the emergency and the measures taken to respond to it: ss 1(2), 2(1)(b), 3(1). See Currie and de Waal, above n 12, 803-4.
163 South African Bill of Rights s.37(1) (emphasis added).
no more than 21 days from the date of the declaration unless the Parliament extends it. Parliament is able to grant extensions of the declaration and legislation, but they only operate for a renewable three-month period.\textsuperscript{164} Under s 37(3), the judiciary is empowered to decide on the validity of a declaration of a state of emergency, any extension thereof, and any legislation enacted or other action taken as a consequence thereof. In terms of the declaration of the state of emergency itself, the s 37(1)(b) requirement that a declaration is necessary to restore peace and order introduces a justiciable element of proportionality into the equation.\textsuperscript{165}

These provisions go beyond that required by the minimum international and regional human rights standards, and highlight the deficiencies of the override provision in the \textit{Victorian Charter}. First, the power to derogate under the \textit{South African Bill of Rights} is subject to strict time limits. Indeed, the initial derogation is only in place for 21 days, and Parliament is obliged to continuously appraise the situation via a three-month review obligation. This is far more rigorous than the \textit{Victorian Charter}, which imposes a five-yearly review obligation for legislation that overrides the protected rights.

Secondly, the limits on the requisite circumstances justifying extraordinary derogation reflect the international minimum human rights standards. Importantly, they differ from the justifying circumstances under the \textit{Victorian Charter}, which are little more than the circumstances that would justify imposing an ordinary limitation on protected rights. The circumstances listed in s 37(1) are of a different ilk — they envisage something that threatens the life of the nation, going well beyond the safety, security and welfare of Victorians. Moreover, s 37(1) permits a declaration of a state of emergency and consequential legislative measures only where the threat is so grave that exceptional measures are necessary to restore peace and order. ‘If peace and order can be restored or maintained under the ordinary law ... s 37 cannot be invoked.’\textsuperscript{166} The ability to limit rights, and the circumstances justifying a limit, are part of the application of human rights within the ordinary law. Section 37 highlights that exceptional derogating/overriding measures can only be justified where ordinary limitations on rights under ordinary law are an insufficient response.\textsuperscript{167} The opposite is true under the \textit{Victorian Charter} — the preconditions for exercising the override

\textsuperscript{164} The first extension of the state of emergency must be carried with a vote of the majority of the National Assembly, with subsequent extensions being carried with a vote of at least 60 percent of the members of the National Assembly. Public debate in the National Assembly must precede these votes. See \textit{South African Bill of Rights} s 37(2)(b).

\textsuperscript{165} Currie and de Wail, above n 12, 804, 804 fn 20. “[A] declaration of an emergency must be a proportionate response to the threat that is faced”: at 804 fn 20.

\textsuperscript{166} Ibid 802. In other words, “the "normal" provisions of the law must first be exhausted”: at 802 fn 8.

\textsuperscript{167} Ibid 802. Currie and de Wail highlight this difference well with an example. A state of emergency may justify the imposition of a curfew requiring people to stay home during certain hours. Such a derogation from the freedom of movement will be permissible if the circumstances of the emergency require it. In ordinary times, it is highly unlikely that a curfew would be permitted as a justifiable limit on the freedom of movement under a general or specific limitations power.
power more closely resemble the circumstances justifying ordinary limitations on rights rather than extraordinary derogations from rights.\textsuperscript{168}

Thirdly, s 37 of the \textit{South African Bill of Rights} imposes various institutional limits. States of emergency no longer permit the executive to basically take control of state affairs.\textsuperscript{169} Rather, s 37 clearly forces the executive to be answerable to both the legislature and the judiciary. Although the executive has the power to publicly declare a state of emergency for up to 21 days, it is Parliament that has the power to renew such declarations and enact legislation in consequence thereof, not the executive. Moreover, all aspects of the declaration and the consequential measures are justifiable before a competent court. Further, all arms of government have the power to bring a state of emergency to an end.\textsuperscript{170} This kind of power sharing — involving checks and balances across the arms of government — protects against the type of human rights abuse that is characteristic in times of emergency.\textsuperscript{171}

In terms of limits in effects, ss 37(4) to (8) place conditions upon the exercise of the power to derogate. First, s 37(4) provides that legislation may only derogate from the \textit{South African Bill of Rights} to the extent that: (a) 'the derogation is strictly required by the emergency'; (b) the legislation conforms to South Africa's international law obligations in times of emergency; (c) the legislation is published in the Government Gazette as soon as reasonably possible after being enacted; and (d) the legislation conforms with s 37(5). Secondly, s 37(5) sets out an extensive and detailed list of the non-derogable sections of the \textit{South African Bill of Rights} (as discussed above).\textsuperscript{172} Thirdly, s 37(5)(a) does not permit the state of emergency declaration or legislation made thereto to indemnify the state, or any persons, in respect of any unlawful act. Fourthly, s 37(6) sets out various conditions that must be observed whenever any person is detained without trial as a consequence of derogation.\textsuperscript{173} The s 37 restrictions on the effects of derogating measures attain the minimum international human rights standards.\textsuperscript{174} All of these safeguards are omitted from the \textit{Victorian Charter}.

\textsuperscript{168} There is no strict time limit imposed on derogating measures under the \textit{ICCPR} and \textit{ECHR}. It is, however, explicit in art 4(1) of the \textit{ICCPR} and art 15(1) of the \textit{ECHR} that the measures are temporary and in place only whilst the emergency situation exists. This imposes a temporal limit, although this does not dictate the duration of the derogation.

\textsuperscript{169} See Currie and de Waal, above n 12, 801, where it was noted that '[t]he uncontrolled power of the executive that characterized states of emergency under apartheid has been curbed.'

\textsuperscript{170} See \textit{State of Emergency Act 1997 (RSA)} s 1(3) (by proclamation of the President), \textit{South African Bill of Rights} ss 37(2)(a) (Parliament fails to resolve to extend the state of emergency), (3)(a)-(b) (judiciary adjudicates the declaration, or finds an extension of a declaration to be invalid).

\textsuperscript{171} For a discussion of this under apartheid, see Currie and de Waal, above n 12, 801 fn 3.

\textsuperscript{172} See \textit{South African Bill of Rights} s 37(5)(c). For a complete list, see Part IV(A) above. The derogation power itself is 'entrenched' under s 37(5)(b), which provides that no derogation is allowed from s 37 itself.

\textsuperscript{173} These conditions include informing a family member or friend of the detention; publication in the \textit{Government Gazette} of the detainee's name and place of detention; access to a medical and legal practitioner of the detainee's choice; court review of the detention within 10 days; and further court review where the detainee is not released. Section 37(7) conditions attempts at re-detaining a previous detainee, and s 37(8) excludes the operation of ss 37(6) and (7) for persons detained because of an international armed conflict, displacing the protections offered under binding international humanitarian law.

\textsuperscript{174} Indeed, s 37 goes beyond the minimum international human rights standards.
Another major difference in the safeguards available relates to judicial review in times of emergency. Under s 37, the lawfulness of the declaration of a state of emergency and the derogating legislation are justiciable. Under the Victorian Charter, it is as yet unclear whether the existence of ‘exceptional circumstances’ is justiciable. In an attempt to impose some regulation on an otherwise totally unregulated power to ignore protected rights, it is hoped that the Victorian judiciary will regard the existence of ‘exceptional circumstances’ as justiciable.175

The deplorable and regrettable apartheid era of South Africa produced important lessons for the South African people that are reflected in the South African Bill of Rights. Although the Victorian Parliament acknowledged the insight of the South Africans in adopting its general limitations power,176 it is unfortunate that it was unwilling to learn the lessons associated with times of emergency.

B Derogation under the UK Human Rights Act

Not unlike the South African instrument, the Human Rights Act 1998 (UK) c 42 utilises a power of derogation rather than an override in a domestic setting. The seminal derogation case under the Human Rights Act 1998 (UK) c 42 illustrates how effective derogation provisions modelled on international and regional human rights instruments can be in securing human rights accountability in times of emergency. That case will also be used to demonstrate the inadequacy of the derogation and accountability associated with override provisions contained in the Canadian Charter and the Victorian Charter.

The UK has had a long history with counter-terrorism legislation and derogation from human rights obligations, particularly arising from the situation in Northern Ireland. As the discussion of the ECHR jurisprudence above shows, the UK representative arms of government have been willing to enact legislative measures that they believe are necessary in times of emergency; to recognise or accept after court judgment that the legislative measures violate human rights obligations; to derogate from their international and regional human rights obligations accordingly; and to justify the basis for derogation and the derogating measures domestically, regionally and internationally.177 Whether one agrees with the need for derogation and the derogating measures taken, the UK representative arms must be commended for exposing themselves to such searching human rights scrutiny and accountability.

The UK finally withdrew its derogation from art 5(3) of the ECHR in relation to counter-terrorism legislation enacted to deal with the situation in Northern Ireland, effective as of 26 February 2001.178 The Terrorism Act 2000 (UK) c 11 superseded the relevant provisions,179 paving the way for the withdrawal of the

172 Cf Williams, above n 115, 900.
176 Primarily, the general limitations power under s 36 of the South African Bill of Rights.
178 The withdrawal of the derogation was done by The Human Rights Act (Amendment) Order 2001 (UK).
179 Terrorism Act 2000 (UK) c 11, sch 8.
derogation. In only a matter of months, as part of its response to the September 11 attacks in the US, the UK representative arms again derogated from art 5 of the 
ECtHR in relation to s 23 of the Anti-Terrorism, Crime and Security Act 2001
(UK) c 24 ("ATCSA").

Under s 21 of the ATCSA, the Home Secretary could issue a certificate in 
relation to resident non-nationals believed to be a risk to national security and
suspected of being international terrorists. Section 23 empowered the Home 
Secretary to indefinitely detain without trial certified resident non-nationals that
could not be criminally prosecuted and could not be deported for practical or
legal reasons. The UK government analysed the scope of art 5(1)(f) of the
ECtHR, which allows for the lawful detention of a person against whom action
is being taken with a view to deportation or extradition. It concluded that continued
detention under s 23 may not be consistent with art 5(1)(f) in all circumstances,
and accordingly derogated from art 5(1)(f) under art 15 of the ECHR and s 14 of
the Human Rights Act 1998 (UK) c 42.

Detainees challenged s 23 in A v Secretary of State for the Home Depart-
ment. At first instance, the Special Immigration Appeals Commission ("SIAC") held that the s 23 derogating measure did not satisfy the art 15 deroga-
tion requirements and it issued a declaration of incompatibility in respect of
s 23. The Court of Appeal overruled the decision of SIAC, holding that the
three requirements for derogation under art 15 had been satisfied. On further
appeal, the House of Lords agreed with SIAC.

The House of Lords held that only the first of the three derogation re-
quirements were met. In relation to the first requirement, an overwhelming majority

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180 The Human Rights Act 1998 (Designated Derogation) Order 2001 (UK) designates the proposed
derogation from art 5(1)(f) of the ECHR for the purposes of the Human Rights Act 1998 (UK)
c 42, and The Human Rights Act 1998 (Amendment No 2) Order 2001 (UK) amends sub s 3 of the
Human Rights Act 1998 (UK) c 42 so as to incorporate the derogation from art 5(1) which has
been lodged with the Council of Europe under art 15 of the ECHR.

181 The practical reasons for non-deportation include there being no country that would accept
the person, and the legal reasons include the inability to deport a person who was at risk of torture or
inhuman or degrading treatment or punishment if deported, in accordance with art 3 of the
ECHR, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September
1953). There was disagreement as to whether the domestic criminal law was extensive enough to
criminalise activities of non-national suspected terrorists; see Adam Tomkins, "Legislating against

182 See The Human Rights Act 1998 (Designated Derogation) Order 2001 (UK); The Human Rights

183 [2004] QB 335. Seventeen persons were certified, with 16 of them being detained. Two of those
certified voluntarily left the country; one successfully appealed against certification; two had
their certifications revoked after the second periodic review by SIAC; the mental health of two
was affected, with one being taken to Broadmoor (a secure mental health hospital) and one being
granted bail and placed under house arrest. Sangita Shah, "The UK's Anti-Terror Legislation

184 Essentially, SIAC held that s 23 did not satisfy the third requirement for lawful derogation
because it unjustifiably discriminated against suspected terrorists that were non-nationals whom
could be arbitrarily detained and those that were nationals whom could not be arbitrarily dete-


186 Case of A [2005] 2 AC 68. The House of Lords sat as a bench of nine judges, rather than the
usual five judges, "an occurrence that has only happened once before since World War II": Shah,
above n 183, 406.
of Law Lords held that there was an emergency threatening the life of the nation.\(^{187}\) In relation to the second requirement, an overwhelming majority of Law Lords characterised the s 23 derogating measure as a counter-terrorism measure.\(^{188}\) When characterised as such, the Law Lords held that s 23 was not strictly required by the exigencies of the circumstances because it was under-inclusive and ineffective for two reasons. First, if the threat to the life of the nation was terrorism, and that threat was posed by both national and non-national suspected terrorists, the measure did not adequately address the threat because s 23 singled out only non-nationals. Why were national suspected terrorists treated differently? If nationals could be dealt with in a manner not requiring derogation, why not use this scheme for non-nationals? Secondly, if the non-national suspects did pose such a danger, this danger was not resolved by sending them to another country to continue their activities.\(^{189}\)

In relation to the third requirement, an overwhelming majority of the Law Lords held that the measures were inconsistent with other obligations under international law to the extent that they were unjustifiably discriminatory between nationals and non-nationals.\(^{190}\) According to Lord Bingham, there was a difference in treatment between the national suspected terrorists and the non-national suspected terrorists on the proscribed ground of national origin.\(^{191}\) Moreover, the two groups were in an analogous situation, with the relevant comparative circumstances being that nationals and non-nationals alike: (a) were suspected of being international terrorists; (b) could not be successfully prosecuted; and (c) could not be deported or exiled. Further, the difference in treatment was not objectively justified.\(^{192}\) Lord Bingham acknowledged that states can differentiate between nationals and non-nationals in an immigration context, but that such differentiation is not legitimate in a national security context.\(^{193}\)

Because the threat facing the UK was not purely from non-nationals, the

\(^{187}\) Eight of the nine Law Lords so decided: \textit{Case of A [2005] 2 AC 68}, 101–2 (Lord Bingham), 129 (Lord Nicholls), 136–8 (Lord Hope), 148 (Lord Scott), 151–2 (Lord Rodger), 166 (Lord Walker), 172 (Baroness Hale), 175 (Lord Carswell). Lord Hoffmann dissented: at 130–2.

\(^{188}\) See, eg, ibid 104–6, 111 (Lord Bingham), 128 (Lord Nicholls), 133–4 (Lord Hope), 151–4 (Lord Rodger). Lord Walker dissented on this issue: at 166–7. This is in contrast to the Court of Appeal, which characterised s 23 as an immigration measure: see, eg, \textit{A v Secretary of State for the Home Department [2004] QB 335}, 361–2 (Woolf CJ).


\(^{190}\) Ibid 124 (Lord Bingham). Again, Lord Walker dissented on this issue: at 166–70. The discrimination issue was also argued in terms of the second requirement that is, that being discriminatory, the provision could not be strictly required by the exigencies of the situation and was accordingly disproportionate: see, eg, at 112 (Lord Bingham), 138 (Lord Hope).

\(^{191}\) Ibid 124.

\(^{192}\) The government argued that the appropriate comparison was between non-national suspected terrorists who could be deported and non-national suspected terrorists who could not be deported. This argument was rejected. To accept this argument would have allowed the government to maintain an immigration control focus on what was essentially a national security issue (see above n 188). See also Mary Arden, \textit{Human Rights in the Age of Terrorism} (2005) 121 \textit{Law Quarterly Review} 604, 608.

\(^{193}\) \textit{Case of A [2005] 2 AC 68}, 116–17 (Lord Bingham). Recall that the Court of Appeal characterised s 23 as an immigration measure (see above n 188), whereas the House of Lords characterised it as a counter-terrorism measure: at 115–16 (Lord Bingham).
different treatment of non-nationals could not be justified. The derogation was unlawful and of no force, and s 23 of the ATCSA violated art 5 when read with art 14 of the ECHR. The violation could not be remedied by the s 3 power of judicial interpretation, such that the House of Lords issued a declaration of incompatibility.

The representative arms respected this decision and returned to the legislative drawing board. The representative response was the Prevention of Terrorism Act 2005 (UK) c 2 (‘PoTA’). The PoTA enabled the repeal of ss 21–3 of the ATCSA. The PoTA empowers the UK government to subject both national and non-national suspected terrorists to ‘control orders’ where it is not possible to criminally prosecute or deport them. Control orders can, inter alia, impose curfews, place geographical restrictions on non-curfew activities, restrict who the controlled person can visit and be visited by, restrict the public meetings they can attend, impose requirements to submit to searches, forbid access to cellular telephone communications or internet, and restrict them to the use of one approved bank account. There are two categories of control orders based on the intensity of such restrictions — non-derogating control orders and derogating control orders. Non-derogating control orders are of a less severe degree, for example, where there is interference with the freedom of movement. Derogating control orders are of a more severe degree, for example, where the restrictions amount to a deprivation of liberty.

This case highlights how strong human rights accountability and scrutiny in the context of emergency situations can be balanced against parliamentary sovereignty and institutional dialogue. In terms of accountability, because the UK power of derogation is modelled on the international and regional provisions, the UK government offered detailed justification of the public emergency, the measures to be taken and the legality of the measures. In terms of scrutiny, these justifications were examined by SIAC and two levels of the judiciary, and were ultimately found to be wanting. In terms of parliamentary sovereignty, the declaration of incompatibility did not tie the hands of the representative arms.

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195 The House of Lords also quashed the Human Rights Act 1998 (Designated Derogation) Order 2001 (UK): see, eg, ibid 127 (Lord Bingham), 144 (Lord Hope), 150 (Lord Scott), 160 (Lord Rodger).

196 See Case of A [2005] 2 AC 68, 127 (Lord Bingham), 129 (Lord Nicholls), 144 (Lord Hope), 150 (Lord Scott), 160 (Lord Rodger).

197 See United Kingdom, Parliamentary Debates, House of Commons, 26 January 2005, 306 (Charles Clarke, Secretary of State for the Home Department).

198 The legislation was enacted by the House of Commons, with 62 Labour Members of Parliament crossing the floor to vote against it: see James Button, ‘Blair’s Plan to Detain without Trial Causes Uproar’, The Age (Melbourne), 5 March 2005, 20.

199 These sections were repealed on 14 March 2005 by the PoTA s 16(2)(a).

200 For the sorts of controls imposed by date, see Lord Carlile of Berriew, First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (2006) 13, 33. See also PoTA s 16(4).

201 No derogating control orders have been issued to date: Carlile, above n 200, 16. But, as the nomenclature indicates, a derogation under art 15 of the ECHR, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) and s 14 of the Human Rights Act 1998 (UK) c 42 will be required if and when one is issued.
Rather, it forced the executive and Parliament to reassess the public emergency, the legislative objective and the legislative means by which the objective was to be achieved. Arguably, the resulting legislative changes improved the representative arms' response to the threat posed, by ensuring the measures effectively addressed the threat in its entirety (that is, both the national and non-national threat). In terms of institutional dialogue, the legislative response addressed the concerns of the House of Lords. First, the PoTA applies equally to nationals and non-nationals, for domestic and international terrorism alike. Secondly, the controls are individualised according to the threat posed by each subject, ensuring the proportionality that the Law Lords considered to be absent under the ATCSA. Thirdly, the PoTA impairs rights to a lesser extent, whilst still meeting the legislative objectives; for example, rather than subjecting suspected terrorists to indefinite detention without trial, they will be subjected to restrictions on movement at best and house arrest at worst.

Section 31 of the Victorian Charter requires none of this. Although s 31(3) requires an explanation in Parliament of the ‘exceptional circumstances’ justifying the override, this limitation on circumstances is insufficient for a number of reasons — the standard of exceptionalism is not demanding enough; failure to give such an explanation does not affect the validity, operation or enforcement of the override provision; and the justiciability of the issue remains to be decided. Moreover, the Victorian Charter does not impose any limitation on the effects of the overriding measures. Accordingly, human rights accountability and scrutiny are virtually absent in Victoria. Without such accountability and scrutiny, the institutional dialogue sought after becomes a representative monologue — at least in times of public emergency, which is precisely the time when institutional dialogue is most needed as a check against abuses of executive power. The only thing that s 31 achieves in common with the derogation provisions of the Human Rights Act 1998 (UK) c 42 is parliamentary sovereignty, but it does so in a manner that disregards both human rights accountability and an institutional dialogue about human rights.

\[210\] Carlile, above n 200, 13:
The key to the obligations is proportionality. In each case they must be proportional to the risk to national security presented by the controllee. I would urge that in each case the individual risks are examined closely, and the minimum obligations consistent with public safety [be] imposed.


\[213\] Victorian Charter’s 31(9).
C Overides under the Canadian Charter

Given that s 31 of the Victorian Charter is modelled on s 33 of the Canadian Charter, the leading Canadian case illustrates how the Victorian override might (unfortunately) operate.201 It also demonstrates the vastly different approaches to override provisions compared to derogation provisions. The case of Ford v Attorney-General (Quebec) ("Ford") concerned the Government of Quebec's attempt to legislatively require all business signs to be bilingual (French only).202 In the course of its judgment, the Supreme Court had to consider Quebec's blanket use of the s 33 override power, which purported to apply a standard override clause to all pre-Canadian Charter legislation in Quebec. The standard override clause was also to be included in all post-Charter legislation. This omnibus override legislation entered into force three months after the Canadian Charter came into effect, such that the standard override clauses were to operate retrospectively to the date that the Charter came into force.207

The Supreme Court held that s 33 contains requirements of form only.208 It held that the 'form' required by s 33 was an express declaration of the section, subsection or paragraph number of the legislation to be overridden. It did not require the subordinating legislation to be linked to particular rights that were being subordinated.209 This limited approach was justified on the basis that "a
substantive specificity requirement would impose not only an impermissible task on the courts, but an excessively onerous burden on legislatures as well—a\textsuperscript{210} impermissible judicial task being substantive review of the legislative policy motivating the override—a\textsuperscript{211} and the onerous legislative burden being the problematic task of identifying precisely what \textit{Canadian Charter} rights are implicated by the override legislation. Having satisfied itself that the formalities had been met,\textsuperscript{212} the Supreme Court upheld the omnibus use of the override power. However, it held that an override provision cannot be applied retrospectively, such that the three-month retrospective application of the omnibus override legislation was invalidated.\textsuperscript{213}

Thus, there are only three safeguards regulating the use of s 33 in the \textit{Canadian Charter:} first, s 33 does not apply to democratic, linguistic and minority rights;\textsuperscript{214} secondly, there is a five-year (renewable) sunset clause; and thirdly, s 33 cannot be used retrospectively. This falls far short of the safeguards regulating exercises of the power to derogate. Unfortunately, the Victorian override falls even shorter, given that the power to override under s 31 of the \textit{Victorian Charter} applies to all of the protected rights.

The Canadian position has been criticised. Peter Russell supports the inclusion of the override within the Canadian constitutional settlement "when it is invoked only after a reasoned debate in the legislature."\textsuperscript{215} He criticises the formal approach taken by the Supreme Court and argues that, as with other provisions of the \textit{Canadian Charter}, a purposive approach to s 33 is required:

\begin{quotation}
The primary purpose of the override is to provide an opportunity for responsible and accountable public discussion of rights issues, a purpose that may be seriously undermined if legislatures are free to use the override without discussion and deliberation.\textsuperscript{216}
\end{quotation}

In dialogue terms, a formal rather than substantive judicial approach to s 33 promotes a representative monologue about rights.

Professor Lorraine Weinrib laments the Supreme Court's failure to consider 'the institutional roles implicit in the [Canadian] Charter's structure', and the absence of 'references to the modes of [purposive] interpretation established in other [Canadian] Charter cases.'\textsuperscript{217} She is also perplexed by the failure to acknowledge the many restrictive elements of s 33, such as the exclusion of certain rights from its reach, the requirement for express provision of an over-

\textsuperscript{210} Weinrib, above n 142, 556.
\textsuperscript{211} To decide otherwise 'would lead the judiciary into review of the permissibility of legislative policy as to exercise of the override': ibid 553, commenting on \textit{Ford} [1988] 2 SCR 712, 743 (Dickson CJ, Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ).
\textsuperscript{213} Ibid 744-5.
\textsuperscript{214} Where these rights are at stake, and the legislative objective of invalidated legislation is impugned, the only representative response available is constitutional amendment: see, eg, \textit{Somerville v A-G (Canada)} (1996) 184 AR 243; \textit{A-G (Quebec) v Quebec Protestant School Board} [1984] 2 SCR 66. See further Hogg and Hurlhe, above n 78, 93-5.
\textsuperscript{216} Ibid 799.
\textsuperscript{217} Weinrib, above n 142, 553–4.
ride, and the sunset clause: 'These terms ... are restrictive', yet the Supreme Court 'sees no significance in these features and finds in s 33 an easily exercised formality.' She argues to the contrary, that restrictive elements of s 33 coupled with the title of s 33 — 'Exception where express declaration' — justify a narrow reading of the override power. Weinrib is also critical about the absence of the requirement to identify the rights subordinated by an exercise of the override; the Supreme Court 'assumes that s 33 permits a legislature to subordinate potential rights claims of which it is unaware or uncertain.'

Given that the Victorian Charter currently contains an override modelled on the Canadian override, the Victorian judiciary has an opportunity to learn from and improve upon the Canadian experience. In terms of justifying circumstances, the Victorian judiciary has an opportunity to inject some substantive analysis into the 'exceptional circumstances' consistent with the limits in circumstances under the derogation powers. This would entail contrasting the Victorian provision with the Canadian equivalent (which is easily done given the s 31 'exceptional circumstances' rider is absent from s 33 of the Canadian Charter), adopting a more purposive analysis allowing for substantive review rather than formal review, and expanding the meaning of 'exceptional' beyond that noted in the Explanatory Memorandum through the use of international and regional jurisprudence under s 32(2). In terms of safeguards as to effect, the judiciary should use s 32 to read into s 31 safeguards similar to the international and regional minimum standards on the exercise of derogation. If this is too much to expect from judicial interpretation, the representative arms must legislatively recast the safeguards of s 31, if indeed s 31 is not entirely repealed.

D Conclusion

The experience of the UK, Canadian and South African jurisdictions not only offer guidance for the purpose of interpreting the override contained in the Victorian Charter, but they also allow an evaluation of the effectiveness of the rights-restricting mechanisms adopted under the Victorian Charter. In relation to the latter, it has been argued that the adoption of the judicial interpretation and declaration mechanisms of the Human Rights Act 1998 (UK) c 42, without the addition of the Canadian override, is legally sufficient to preserve parliamentary sovereignty and to establish an institutional dialogue about rights within the Victorian jurisdiction. If, however, an override or derogation was a necessary part of the political settlement surrounding the Victorian Charter, the South African and UK derogation models are preferable to the Canadian override.

218 Ibid 554.
219 See ibid 568–9. For a more recent analysis of s 33, see also Lesson, above n 142.
220 Weinrib, above n 142, 556. She also takes issue with the suggestion that requiring the subordinated rights to be specified will involve judges assessing the merits of the legislative policy: at 555.
221 That is, within a jurisdiction that lacks international law personality such that it is only concerned with domestic ramifications of governmental decision-making, as opposed to a jurisdiction that must be concerned with both domestic and international ramifications of governmental decision-making—see above Part IV(C)1.
VI Conclusion

The methods of restricting rights in the Victorian Charter are flawed. First, the general limitations power is over-inclusive because it applies to all rights. Secondly, the override provision lacks the essential safeguards which are built into equivalent provisions in international, regional and comparable domestic human rights instruments. The Victorian Charter is lacking because of its failure to recognise non-derogable rights, the relatively unexceptional nature of the circumstances justifying an override, and the total failure to regulate the effects of overriding measures. The international and regional equivalent ‘right of derogation is in fact very narrow. This was overlooked by the Victorian Parliament when it adopted an extremely broad and relatively unregulated override power; indeed, the supposedly exceptional override power has fewer restrictions, safeguards and accountability measures than the unexceptional limitations power.

The flaws in the methods of restricting rights — particularly the flaws in the override — will allow the representative arms of government to act beyond the rule of human rights law. The House of Lords decision in A v Secretary of State for the Home Department (‘Case of A’) reminds us of ‘what it means to live in a society where the executive is subject to the rule of law. Even the Government, and even in times when there is a threat to national security, must act strictly in accordance with the law.’ The Victorian Charter does not offer Victorians the confidence that comes with upholding the rule of law.

‘[G]rand narratives’, such as democracy and human rights, ‘offer not harmony, but a practical framework in which a society, if it is sufficiently durable and flexible, can maintain an equilibrium between conflicting interests.’ Powers of limitation and derogation/override are part of this framework. However, the precise operation of limitation and derogation/override provisions has the capacity to tip the equilibrium in favour of certain interests. In Victoria, the equilibrium is tipped in favour of parliamentary sovereignty, at the expense of establishing a genuine and robust institutional dialogue about rights and a solid regime of vigorous human rights accountability, justifiability and scrutiny under the Victorian Charter.

222 Joseph, Schultz and Castan, above n 5, 836.
223 [2005] 2 AC 68.
224 Arden, above n 192, 622.
PARLIAMENTARY SOVEREIGNTY AND DIALOGUE
UNDER THE VICTORIAN CHARTER OF HUMAN
RIGHTS AND RESPONSIBILITIES: DRAWING THE
LINE BETWEEN JUDICIAL INTERPRETATION AND
JUDICIAL LAW-MAKING

JULIE DEBELJAK*

In 2005, the Victorian Government established the Human Rights Consultation Committee to undertake a community consultation about the state of rights in Victoria. The main recommendation of the Committee was the enactment of a domestic rights instrument for Victoria. The Victorian Government accepted the recommendation and, by mid-2006, the Victorian Parliament had enacted the Charter of Human Rights and Responsibilities Act 2006 (Vic). The Charter is based largely on the British Human Rights Act 1998 (UK) (‘HRA’). This article explores some of the substantive difficulties with the adoption of the British model given the twin stated aims of the Victorian Government to preserve parliamentary sovereignty and to establish an educative inter-institutional dialogue. In particular, it explores how the mechanisms adopted to preserve parliamentary sovereignty — the s 32 judicial power of rights-compatible interpretation and the s 36 judicial power of declaration — may, in fact, undermine parliamentary sovereignty, threaten the educative dialogue amongst the differently placed, skilled and motivated arms of government, erode the justificatory and accountability aspects of rights instruments, and undermine the protection of rights.

I INTRODUCTION

In May 2004, the Victorian Attorney-General released a Justice Statement which prioritised the need to recognise and protect human rights in Victoria. This included a commitment to consult with the Victorian community on how best to protect and promote human rights. In May 2005, the Victorian Government released a Statement of Intent which announced the establishment of the Human Rights Consultation Committee (the ‘HRC Committee’) that was to undertake the community consultation and outlined the range of issues to be considered. Interestingly, the Statement of Intent pre-empted various matters. For instance, it stated that the ‘Government is concerned to ensure that the sovereignty of Parliament is preserved in any new approaches that might be adopted to [sic]

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human rights. It also stated that the Government was ‘interested’ in models of domestic rights protection that preserve parliamentary sovereignty, such as the British model, rather than constitutional models which empower the judiciary to invalidate legislation, such as the model of the United States of America (the ‘United States’). In relation to the role of the courts, the Victorian Government emphasised its preference for ‘mechanisms that promote dialogue, education, discussion and good practice rather than litigation.’

After extensive community consultation, the HRC Committee recommended that the Victorian Parliament enact, via ordinary legislation, a Charter of Human Rights and Responsibilities to protect and promote civil and political rights, and that the judiciary only be empowered to interpret legislation compatibly with the protected rights, or to issue a non-enforceable declaration of incompatibility where such an interpretation is not possible. On 20 December 2005, the Attorney-General announced the Victorian Government’s intention to accept the central recommendations of the HRC Committee. A Bill was introduced into Parliament on 2 May 2006 and, after a relatively easy passage through both Houses of Parliament, the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the ‘Charter’) received Royal Assent on 25 July 2006.

This is a cautious approach to domestic rights protection, satisfying the desire to retain parliamentary sovereignty. Caution is evidenced by the resistance to entrench rights within the Victorian Constitution. The attempt to preserve parliamentary sovereignty is demonstrated by the conferral of powers of judicial interpretation and non-enforceable declaration only, rather than conferring powers of judicial law-making or judicial invalidation. Finally, the interaction

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1 Government of Victoria, Statement of Intent, (2005), [8].
2 Ibid [9].
3 Ibid [12]. The Chair of the Human Rights Consultation Committee (‘HRC Committee’), George Williams, recognises that the HRC Committee was designed to ‘operate independently of the Attorney-General and of government’, but notes that ‘upon [the HRC Committee’s] appointment’, the Statement of Intent was released which ‘set out the Government’s preferred position on any human rights model for the state’: George Williams, ‘The Victorian Charter of Human Rights and Responsibilities: Origins and Scope’ (2007) 30 Melbourne University Law Review 880, 886-87. Williams acknowledges that this attracted criticism, including criticism that the ‘Statement of Intent was too prescriptive and could be seen as prejudging the process’, but defends the Statement of Intent because of its usefulness during the community consultation and its ‘influential [nature] within government when the [HRC] Committee reported in a form that fell within the preferences expressed in it’: 887. In relation to the latter, it is difficult to gauge the direction of the influence between the Statement of Intent and the HRC Committee’s conclusion.
4 The HRC Committee undertook 55 community consultations and 75 consultations with governmental and other bodies, and received 2524 written submissions: HRC Committee, Government, of Victoria Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee (2005) 5. Indeed, the Committee received ‘the highest number of submissions ever received for a process in Australia that has looked at [the] issue’: 5.
5 Ibid 6. Economic, social and cultural rights are not protected under the Charter; see further below 14.
6 Ibid 9-10.
8 Constitution Act 1975 (Vic) (‘Victorian Constitution’).
between the arms of government is characterised as a dialogue about rights and their limitations, rather than a judicial monologue under which judges are the final arbiters of rights, with the executive and parliament shaping their policy and laws to fit judicial interpretations of rights – charter-proofing policy and laws, if you like.9

Unfortunately, the Victorian model may not secure its purposes. First, the line between proper judicial interpretation and improper judicial law-making is far from clear. At what point does a judicial interpretation that achieves compatibility in truth become a judicial re-writing of legislation? What is presented as judicial interpretation may in substance be judicial law-making, and judicial law-making is an erosion of parliamentary sovereignty. Attempts (legitimate or otherwise) at judicial interpretation under the Charter are bound to generate criticism of improper judicial activism.

Second, the power of judicial interpretation can be more potent than judicial declaration, because the judiciary achieves particular legislative outcomes with interpretation which it cannot achieve through declaration.10 Judicial interpretation will produce judicially-sanctioned outcomes that differ to that legislated by the representatives in the name of rights-compatibility, whereas judicial declaration leaves the judicially-assessed rights-incompatible representative outcome in place. This may influence the judiciary to draw the line between legitimate interpretation and illegitimate legislating in favour of the former – indeed the judicial interpretation power has been described as ‘dangerously seductive’11 which, again, potentially encroaches on parliamentary sovereignty.

Third, if the aim is to develop a dialogue about rights between the arms of government, one must be very careful about where and – more particularly – how the line between judicial interpretation and judicial law-making is drawn. How and where the line is drawn, whether deference becomes the tool of delineation, and the principles of deference to be applied, will have a great influence over the type of dialogue that occurs between the arms of government. The Victorian Government’s aim to create a dialogue may be undermined, with the consequent loss of an educative exchange about rights between the arms of government, the loss of the envisaged rights accountability, and the undermining of rights protection.

These issues will be explored in this article. It will begin with a focus on institutional dialogue. Analysis will include an examination of how dialogue models secure parliamentary sovereignty – a discussion of the development of dialogue under the Canadian Charter and its expected operation in Victoria. With these perspectives in mind, the mechanisms for securing parliamentary sovereignty will be explored. In particular, the line between interpretation and

11 Ghaidan v Godwin-Mensah [2004] 2 AC 557, 61 (Lord Millet) (‘Ghaidan’). This was acknowledged by the Victorian Opposition in debate: Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 2000 (Robert Clark).
declaration will be discussed, the need for and theories of judicial deference will be examined and challenged, and the risks of under-use of declarations will be considered. Throughout, the article will assess whether the Charter will meet the Victorian Government's objectives: the preservation of parliamentary sovereignty and the creation of an educative dialogue about rights.

This article is not intended as a criticism of the decision of the Victorian Government to enact a Charter. On the contrary, the author is very supportive of domestic rights instruments that establish educative dialogues about rights between the arms of government. Rather, the purpose of the article is to foreshadow some of the difficulties associated with interpretative rights instruments, such as the HRA, and to discourage timid approaches to institutional dialogue.

II INSTITUTIONAL DIALOGUE AND THE CHARTER

In this section, a brief overview of the operation of the Charter is undertaken. Focus then turns to the way in which institutional dialogue models of rights protection operate to secure parliamentary sovereignty and how, in particular, the Canadian and Victorian models do so.

A Brief Overview of the Charter

The Charter is largely based on the British model and, despite the Victorian Government's failure to so acknowledge, the Canadian model. The similarities will be highlighted throughout.

The Charter confers statutory protection of civil and political rights, based primarily on the rights contained in the International Covenant on Civil and


13 The Australian Capital Territory also has an interpretative rights instrument, based on the British model: Human Rights Act 2004 (ACT) (the 'ACT HRA'). Like the Charter, it confers statutory protection of civil and political rights and contains a general limitations clause. However, unlike the Charter, it impacts only on legislation, requiring Ministerial statements of compatibility and parliamentary committee reports, imposing interpretative obligations, conferring the power to issue declarations of incompatibility, requiring formal responses to declarations by the Attorney-General, and the like (although, it does not include an override provision). Unlike the HRA and Charter, the ACT HRA does not contain any obligations on public authorities. The ACT HRA is not considered in depth in this article because the activity and jurisprudence under this model is not as developed as other comparative jurisdictions. See further Debeljak 'The Human Rights Act 2004 (ACT)', above n 12.
Political Rights (1966) ('ICCPR').\textsuperscript{14} The rights are found in ss 8 to 27.\textsuperscript{15} The essence of each right reflects its ICCPR equivalent, subject to linguistic refinements and the omission of some rights because of the jurisdictional competence of Victoria.\textsuperscript{16} The Charter, however, recognises that rights are not absolute, adopting two mechanisms enabling rights to be limited. First, s 7(2) contains a general limitations clause, which provides that the protected rights may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. Resolution of such conflicts comes down to a balancing act, with s 7(2) specifying an inclusive list of relevant factors. Second, some individual rights contain qualification and limitation powers.

The protected rights impact on the Victorian system of government in two ways, both being modelled on the HRA. The first impact relates to legislation – the focus of this article. Section 32 imposes an interpretative obligation on the judiciary, which requires all statutory provisions to be interpreted in a way that is compatible with protected rights, so far as it is possible to do so consistently with the statutory purpose.\textsuperscript{17} This provision gives rise to a strong rebuttable presumption in favour of rights-consistent interpretations of legislation,\textsuperscript{18} which is avoided only by clear legislative words or intention to the contrary. This differs to the current common law rule in that legislative ambiguity is not a prerequisite to a rights-compatible interpretation of legislation.\textsuperscript{19}

Where legislation cannot be read compatibly, the judiciary is not empowered to invalidate it. Rather, the Supreme Court of Victoria (the 'SCV') or Victorian Court of Appeal ("VCA") may issue an unenforceable 'declaration of inconsistent application' under s 36.\textsuperscript{20} A declaration is an alarm bell of sorts, allowing the judiciary to warn the executive and parliament that legislation is inconsistent with

\textsuperscript{14} International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). Because the Charter of Human Rights and Responsibilities Act 2006 (Vic) ('Charter') only covers civil and political rights, excluding economic, social and cultural rights, the author considers it inappropriate to refer to the rights within the Charter as 'human rights'. Throughout the article, the rights will be referred to as 'rights' or 'protected rights'.

\textsuperscript{15} Section 7(1) states that the Parliament seeks to protect and promote the rights listed in ss 8-27.

\textsuperscript{16} Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8. For example, the prohibition on the expulsion of non-nationals and rights relating to marriage were not included.

\textsuperscript{17} See Human Rights Act 1998 (UK) c 42, s 3 ('HRA'). The Charter is based on s 3, but adds the reference to 'consistently with their purpose'.

\textsuperscript{18} See eg, Guitton [2004] 2 AC 557, [50] (Lord Steyn).


\textsuperscript{20} See HRA 1998 (UK) c 42, s 4. The nomenclature in the British legislation is 'declaration of incompatibility'. It is unclear why the Victorian Government insisted on altering this to 'declaration of inconsistent application', as s 36 of the Charter is intended to operate in an identical fashion to s 4. See further, discussion under section III A.1.
the judiciary's understanding of the protected rights. It prompts the executive and legislature to review their rights assessment of the legislation, but does not dictate the content of the response. Throughout, parliamentary sovereignty is retained – the judiciary cannot invalidate legislation enacted by the representative arms, and the latter decide whether or not to amend the impugned legislation.

Three further provisions affect legislation. First, s 28 states that a member of Parliament introducing legislation into Parliament must make a statement assessing its compatibility with the protected rights. Such statements do not bind the judiciary. Secondly, the parliamentary committee, the Scrutiny of Acts and Regulations Committee (the 'SARC'), must consider all proposed legislation and report to Parliament on its compatibility with the protected rights. Finally, Parliament can override the operation of protected rights via ordinary legislation. Section 31(1) allows Parliament to expressly declare that an Act of Parliament will operate despite being incompatible with a protected right or despite the Charter, in which case the Charter has no effect on the legislation.

The second impact of the Charter relates to the behaviour of 'public authorities'. Although not the focus of the article, a brief outline of this aspect is warranted. Section 38 provides that it is unlawful for a public authority to act incompatibly with, or to fail to give proper consideration to, a human right. An exception to this duty is where the public authority could not reasonably have acted differently or made a different decision because of the law, such as, where the public authority is simply giving effect to incompatible legislation. Section 39 outlines the legal consequences of unlawfulness. No new cause of action is created under the Charter. Rather, a person can only seek redress if they have pre-existing relief or remedy in respect to the act of the public authority, in which case that relief or remedy may also be granted for Charter unlawfulness. Sections 3 and 4 contain a definition of 'public authority', which includes core governmental bodies, as well as hybrid (i.e. part-public and part-private) bodies. Parliament, and courts and tribunals, are excluded from the definition.

21 See Charter 2006 (Vic) ss 36(6), (7).
22 Charter 2006 (Vic) s 37.
23 Charter 2006 (Vic) s 28(4). These provisions are modeled on the New Zealand and British models: Bill of Rights Act 1990 (NZ), s 33, and Human Rights Act 1998 (UK) c 42, s 10. Similar provisions have been enacted in Canada: Department of Justice Act, RSC 1985, c J-2, s 4; Statutory Instruments Act, RSC 1985 c S-22.
24 Charter 2006 (Vic) s 30.
25 Section 31(1) is further discussed in section II.D.2 below.
26 See the notes to Charter 2006 (Vic) s 38.
27 This is in contrast to the British model. Under the HRA, where a public authority acts unlawfully, a victim can bring a proceeding for breach of statutory duty (with the HRA itself being the statute) or a victim can rely on the unlawfulness in any legal proceedings, whether as a defence to proceedings brought by public authorities, or as the basis for an appeal against a decision of a court or tribunal: HRA 1998 (UK) c 42, s 7(1).
28 Charter 2006 (Vic), ss 4(1)(i) and (j). The exclusion of Parliament is aimed at preserving parliamentary sovereignty. Parliament, as sovereign law maker, is able to act in a manner that is incompatible with the protected rights and such acts are not unlawful. The exclusion of the courts and tribunals is aimed at ensuring the courts are not obliged to develop the common law in a manner that is compatible with the Charter. This is linked to the fact that Australia has a unified common law.

B Parliamentary Sovereignty and Institutional Dialogue

From the outset, the Victorian Government indicated that any formalisation of rights protection was subject to the preservation of parliamentary sovereignty. This was explicit in the Statement of Intent,29 underpinned the entire community consultation and the report of the HRC Committee,30 was reiterated in the media release of the Attorney-General launching the report,31 was referred to in parliamentary debate on the bill,32 and is reflected in the institutional arrangements and processes enacted in the Charter.

The concern about retaining parliamentary sovereignty is linked to traditional rights instruments, such as the United States model, which allow the judiciary to invalidate legislation that is inconsistent with guaranteed rights. Indeed, the government, the HRC Committee and Parliament were at pains to distance themselves from that model.33 In short, it is often asserted that democracy requires parliamentary sovereignty. If the judiciary is empowered to review and invalidate legislative and executive actions under a rights instrument as happens under the United States Constitution, so the argument goes, we would have a system of judicial sovereignty. Given that the judiciary is not elected, judicial sovereignty is undemocratic. Therefore, to preserve democracy, the representative arms must retain sovereign power over rights.34 In order to ameliorate this anti-democratic tendency, various theories and approaches to judicial review have been developed.

29 Victoria Government, above n 1, [8], [9], and [11].
30 HRC Committee, above n 4, 15, 20-2.
31 Office of the Attorney-General, above n 7, [15].
32 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1290, 1299 (Rob Hulls, Attorney-General); Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 1984 (Lily D’Ambrosio); Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 1993 (Richard Wynne); Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 2196 (Joanne Duncan); Victoria, Parliamentary Debates, Legislative Council, 19 July 2006, 2554, 2556, 2557 (Justin Madden, Minister for Sport and Recreation); Victoria, Parliamentary Debates, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos); Victoria, Parliamentary Debates, Legislative Council, 20 July 2006, 2643 (Geoff Hilton).
to make judicial review more democratically palatable.\textsuperscript{35} One such theory is the dialogue theory.\textsuperscript{26}

More modern rights instruments address this supposed anti-democratic tension by ensuring that the judiciary does not have the final say about rights. Modern rights instruments use various mechanisms – open-textured statements of rights, the non-absoluteness of rights, the powers conferred to the judiciary, and the representative response mechanisms – to protect against judicial supremacy, while simultaneously ensuring enhanced rights accountability of the representative arms. Two such models are the Canadian Charter and the HRA. Institutional dialogue theories are being developed to explain, in hindsight, how the Canadian Charter operates, whilst the HRA\textsuperscript{37} and the Charter were enacted on the institutional dialogue premise. With respect to the Charter, this is evident in the Statement of Intent,\textsuperscript{38} the report of the HRC Committee,\textsuperscript{39} the parliamentary debate on the bill\textsuperscript{40} and the structure of the Charter.\textsuperscript{41}

Given this, discussion will now focus on institutional dialogue models. The precise meaning of ‘dialogue’ must be identified. Discussion will first focus on the development of the institutional dialogue theory with respect to modern rights instruments, and then outline the potential for the Charter to establish a dialogue. ‘Dialogue’ is at risk of becoming an empty, meaningless buzzword used to assure everyone that encroachments are not being made on democracy, parliamentary sovereignty or rights. This is a big ask and, unfortunately but not surprisingly, some forms of dialogue do in fact encroach on democracy, parliamentary sovereignty and/or rights. Much of the problem stems from using judicial deference as a tool to unnecessarily protect parliamentary sovereignty.


\textsuperscript{36} Alexander Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} (2\textsuperscript{nd} ed, 1986).


\textsuperscript{38} Victoria Government, above n 1, [12] – [13].

\textsuperscript{39} HRC Committee, above n 4, ch 4, especially 66-68, 85-86.


\textsuperscript{41} There is only one express reference to dialogue in the Explanatory Memorandum, where ‘the [Victorian Equal Opportunity and Human Rights] Commission’s annual report is expected to focus on key aspects of the Charter’s operation as a conduit for institutional dialogue’ Explanatory Memorandum, above n 16, 30.
C DEVELOPMENT OF INSTITUTIONAL DIALOGUE MODELS

1 The Canadian Experience

Our discussion of dialogue begins with the study of Hogg and Bushell on situations of institutional dialogue in Canada.42 This study has produced significant constructive and critical comment which, due to constraints of length, cannot be exhaustively addressed in this article.43 This remains a seminal work, however, because it initiated the debate about dialogue theories in the context of modern rights instruments, and its message is fundamentally relevant to Victoria because of the Victorian Government's stated commitment to dialogue.

Hogg and Bushell define dialogue as 'those cases in which a judicial decision striking down a law on [Canadian] Charter grounds is followed by some action by the competent legislative body.'44 Any so-called legislative sequel to a judicial decision is 'dialogue' because 'legislative action is a conscious response from the competent legislative body to the words spoken by the courts.'45

Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which [Canadian] Charter values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the [Canadian] Charter values ... identified by the Court, but which accommodates the social or economic objectives that the judicial decision has impeded.46

During the period of 1982-97, there were 65 decisions striking down legislation for an unjustified limitation of Canadian Charter rights.47 Of the 65 decisions,

42 Peter W Hogg and Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 Osgoode Hall Law Journal.
44 Hogg and Bushell, above n 42, 82.
45 Ibid 98. 'In all of these cases, there must have been consideration of the judicial decision by government, and a decision must have been made as to how to react to it': 82.
46 Ibid 79-80.
47 Ibid 89.
Hogg and Bushell assess that 52 (80 per cent) generated legislative sequels.\footnote{Of the 13 cases without legislative sequels, two had been the subject of proposed legislation, and three were decided only within the last two years: Ibid 97.} Of the legislative sequels, in 44 of the 52 cases (85 per cent) the legislature amended the impugned law.\footnote{Ibid 80-1, 97, Table I.} In most cases the requisite change was minor and did not forfeit the objective of the legislation. The language contained in the legislative responses highlighted the legislature's consideration and evaluation of the judicial decisions.\footnote{Ibid 101.}

These statistics indicate that the Canadian Charter may prompt a dialogue between the courts and the legislature, “but it rarely raises an absolute barrier to the wishes of the democratic institutions.”\footnote{Ibid 81.} Hogg and Bushell conclude that judicial review, as an exercise in dialogue, is democratically legitimate: ‘Judicial review is not “a veto over the politics of the nation,” but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the [Canadian] Charter with the accomplishment of social and economic policies for the benefit of the community as a whole.’\footnote{Ibid 105 (citation omitted).}

This study focuses on the Canadian Charter which differs from the Charter in two ways: the former is constitutional and empowers the judiciary to invalidate legislation. These differences, however, do not render the study irrelevant in Victoria for two reasons. First, the key to dialogue is legislative sequels to judicial decisions. In Victoria, the legislature is able to reverse or modify s 32 judicial interpretations by ordinary legislation, reverse or modify legislation in response to s 36 declarations, ignore s 36 declarations altogether, or override the operation of ss 32 and 36 altogether with respect to legislation. These options are, in Hogg and Bushell terminology, legislative sequels. Secondly, the study is relevant because the main features of the Canadian Charter that are identified as facilitating the dialogue are adopted by the Charter – those being, the general limitations power under s 1 of the Canadian Charter\footnote{See Charter 2006 (Vic), s 7, Hogg and Bushell also include the internal limits placed on some Charter rights as a dialogue feature: Hogg and Bushell, above n 42, 88.} and the adoption of mechanisms which allow parliament to respond to judicial decisions and thereby preserve parliamentary sovereignty. Indeed, the Victorian model\footnote{See Charter 2006 (Vic), s 31, 32 and 36. Another feature of the Canadian Charter that facilitates dialogue is s 15 dealing with rights to equality: Hogg and Bushell, above n 42, 90-1.} preserves parliamentary sovereignty more than the Canadian model by adopting the British mechanisms for preserving parliamentary sovereignty (the limited judicial powers of interpretation and declaration) in addition to the Canadian s 33 override power.\footnote{Charter 2006 (Vic), s 31.}
be reasonable and demonstrably justified in a free and democratic society. The judgment of Dickson CJ, in the leading case of *R v Oakes*, laid down a two step test for s 1. The first step is to ensure the reasonableness of the limitation, in that the object of the rights-limiting legislation must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. According to statistical analysis of the *Oakes* test from 1982 to 1997, of legislation that has violated Canadian Charter rights, 97 per cent has been held to be reasonable by the Supreme Court of Canada (the 'SCC'). The SCC has rarely interfered with the representative arms' assessment of the legislative objectives to be pursued. The retention of freedom to choose policy and legislative objectives is vital to democracy and parliamentary sovereignty.

The second step is to demonstrate that the limit is justified in a free and democratic society, which Dickson CJ held to be best verified by a three-pronged proportionality test. The first component is a rationality test. The rights limiting measures adopted must be carefully designed to achieve the objective in question. Statistically, a significant majority of limitations on rights were found to possess a rational connection to the legislative objective, with 86% of invalidated legislation satisfying the first component of the proportionality test.

The second component is the minimum impairment test. The rights limiting legislative means chosen by the legislature must 'imperil as little as possible' the right or freedom in question. It is this second component which most invalidated legislation failed. Of the 50 (out of 87) limitations of Canadian Charter rights that have failed the *Oakes* test, 86 per cent (43 out of 50 infringements) failed the minimum impairment test. All legislation that passed the minimum impairment test passed the *Oakes* test. Minimum impairment is 'the heart and soul of s 1 justification.' The third component requires that there to be

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56 A limitation must also be prescribed by law. For a limit to be prescribed by law, there must be 'some positive legal measure imposing a discernible standard sufficient to guide with reasonable clarity the individual whose rights are limited and the State officials responsible for enforcement'; Robert Sharpe, 'The Impact of a Bill of Rights on the Roles of the Judiciary: A Canadian Perspective' in Philip Antin (ed), Promoting Human Rights Through Bills of Rights: Comparative Perspectives (1999) 43, 445. This test is relatively straightforward, uncontroversial and of little consequence to this debate.

57 *R v Oakes* [1986] 1 SCR 103 ('Oakes').

58 *Oakes* [1986] 1 SCR 103, 138. At a minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society.


61 *Oakes* [1986] 1 SCR 103, 139.

62 Hogg and Bushell, above n 42, 48.

63 *Oakes* [1986] 1 SCR 103, 139.

64 Hogg and Bushell, above n 42, 100.

65 Trakman, Cole-Hamilton and Gatien, above n 59.
proportionality between the deleterious effects of the rights-limiting legislative means and the legislative objective identified as being of sufficient importance, and 'proportionality between the deleterious and the salutary effects of the measures.' Statistically, this component was of no consequence.66

According to Hogg and Bushell, reliance on the minimum impairment test facilitates dialogue. If, according to the judiciary, the impugned legislation was not the least rights-restrictive means of achieving the otherwise legitimate objective, the executive and legislature have room to manoeuvre. There are three options. First, the legislature can achieve a valid legislative objective by a different legislative means. This comes down to a refinement of the application of a s 1 limitation: 'it will usually be possible for the policymakers to devise a less restrictive alternative' which still achieves the objective and 'that is practicable.'68

The heavy reliance on minimum impairment means that the judiciary does not permanently preclude the pursuit of valid legislative objectives.69 Secondly, the legislature may decide to do nothing, leaving the judicial invalidation in place.70 This, by far, has not been the characteristic response in Canada.71 Thirdly, in the 3% of cases where the legislation is invalidated because the legislative objective fails the reasonableness test, the legislature must resort to the s 33 override power, allowing parliament to legislate notwithstanding the charter for a five-year, renewable period.72 Resort to an override of the protected rights does not

67 The third component – the proportionality requirement – seems 'redundant' because 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: Trakman, Cole-Hamilton and Gatien, above n 59, 103. For criticism of this treatment of the third component, see 102-103.
68 Hogg and Bushell, above n 42, 85.
69 Hogg and Thornton (Bushell), above n 43, 534.
70 See Morgentaler v R [1988] 1 SCR 30 ('Morgentaler'), where the SCC invalidated the restriction on abortion under the Criminal Code as an unjustified limitation on women's rights of liberty and security of the person under s 7. The legislative objective was not impugned, allowing the legislature to achieve its objective by a different legislative means. Far from precluding dialogue, Hogg and Bushell argue that 'the Charter decision forces a difficult issue into the public arena that might otherwise have remained dormant, and compels Parliament ... to address old laws that had probably lost much of their original public support': Hogg and Bushell, above n 42, 96. The lack of legislative response 'is considered more a failing of democratic governance, than of the Canadian Charter or the judicial decision: Hogg and Bushell, above n 42, 96; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001), 204.
71 Janet L. Hiebert, 'Wrestling With Rights: Judges, Parliaments and the Making of Social Policy' (1999) 5(3) Choices 1, 25. Other cases which could be expected to be avoided by the representative arms have generated responses, such as the response to the tobacco-regulation litigation of RJR-MacDonald Inc v A-G (Canada) [1992] 3 SCR 199, 10-15.
72 Refining s 1 limits is not an option because of the impugned legislative objective. The s 33 override is available for legislation which has reasonable legislative objects but whose legislative means fail the proportionality test if the legislative means are of "important" to the legislature – although s 1 refinement is available (the first option). There is a fourth small category of cases where s 1 and s 33 are not available. If legislation is invalidated because of an unreasonable legislative objective, s 33 is not available for democratic (s 3-5), mobility (s 6) and language rights (ss 16-23). The only representative response available in this scenario is constitutional amendment. This fourth scenario is not relevant to Victoria as no categories of rights are excluded under the s 31 override power. A case example of the fourth category in Canada is Somerville v A-G (Canada) (1996) 184 DLR (4th) 205, see further: Hogg and Bushell, above n 42, 94-5.
permanently stifle debate. Dialogue at this point continues between the legislature and the electorate, with the electorate benefiting from the judicial assessment that the legislature plans to circumscribe rights on their behalf. Moreover, this is a temporary measure – after five years, the issue is on the table again and all viewpoints must be re-considered.

Beyond this statistical analysis, many commentators agree that s 1 reinforces democracy, via establishing an institutional dialogue about rights. According to David Beatty, 'constitutional review [can] be likened to a dialogue or debate between citizens and the State about the reasonableness of each law.' Beatty considers the proportionality test to be at the centre of the dialogue and to be 'highly supportive of ... democratic values and aims.' The predominance of minimum impairment 'allows the elected branches of Government virtually unfettered freedom in deciding what their agendas will be,' whilst inquiring whether other less-rights restrictive legislative means could achieve that agenda as effectively.

According to Kent Roach, s 1 'is the true engine of dialogue under the [Canadian Charter]' and produces 'an expanding and constructive conversation that avoids the extremes of either legislative or judicial supremacy.' The dialogue under s 1 proceeds according to an appropriate 'institutional division of labour.' The representative arms contribute explanations about the need to restrict rights in particular contexts and the alternative measures considered but rejected, which are based on their institutional roles and expertise. The judiciary contributes dialogue reminders 'about rights that are liable to be neglected in the legislative

73 Mark Tushnet, "Policy Distortion and Democratic Depletion: Comparative Illumination of the Countermajoritarian Difficulty," in Vicki Jackson and Mark Tushnet (eds), Comparative Constitutional Law (1990) 415, 418: "Section 35... might actually invigorate majoritarian politics by providing the people and their representatives with a way of engaging in direct discussion of constitutional values in the ordinary course of legislation."

74 See, eg, Martha Jackson, "Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the Charter", (1996) 64 Osgoode Hall Law Journal 661, 662-3, 680; Jeremy Webber, "Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)" (2003) 9 Australian Journal of Human Rights 135. Janet L. Heibert was an early supporter of dialogue theories: see Janet L. Heibert, "Policy Making in a Different Venue: Judicial Discretion, Normative Preferences and Uncertainty Masquerading as Principled, Objective Criteria" (Paper presented at the Centre for Public Policy Workshop on The Changing Role of the Judiciary, University of Melbourne, Melbourne, 7 June 1996). Heibert, above n 35. In her more recent work, she acknowledges the dialogic potential of the Canadian Charter, although she is skeptical about its realization to date in practice in Canada. Consequently, Heibert distances her analysis from dialogic approaches toward relational approaches: see Heibert, above n 9. However, her relational approach is not significantly different to the preferred dialogue approach that emphasizes the distinct, yet complementary, roles played by the institutional contributors to the debate discussed in section II.E below. Further, see Debnik, Human Rights and Institutional Dialogue, above n 43, ch 3.

75 David Beatty, Talking Heads and the Supreme: The Canadian Production of Constitutional Review (1990) 25. Beatty's comments are confined to the dialogue which occurs in the courtroom, as distinct from the institutional dialogue established under the Canadian Charter as a whole.

76 Ibid. 116.

77 Ibid.

78 Roach, above n 70, 156.

79 Ibid 293.

80 Ibid.
and administrative processes, based on its institutional role and expertise. When this dialogue produces a judicial invalidation of legislation, in all but rare cases the representative arms can utilise response mechanisms under the Canadian Charter which validly allow them to depart from the judicial assessment. When this occurs, "[d]emocracy is enhanced ... by requiring legislatures to clearly articulate, justify, and be held accountable for their decisions to limit or depart from the constitutional ... principles articulated by the Court."

2 Critiques of the Canadian Experience

The characterisation that the Canadian Charter creates an institutional dialogue, and particularly the type of dialogue proposed by Hogg and Bushnell, is disputed by some commentators. The essence of the critique is the judicial-centricity of the theory. There are two aspects to the criticism. First, some commentators, including Manfredi and Kelly, argue that dialogue models assume that judicial interpretation is the only legitimate interpretation of the protected rights, such that dialogue is more like a judicial monologue, whereby the representative arms are subject not to the Canadian Charter, but to judicial interpretations of the Canadian Charter. Moreover, Morton and Knopff warn against underestimating the 'staying power of a new, judicially created policy status quo,' which may make legislative sequels to judicial nullifications of legislation politically difficult or impossible, such that the judicial interpretation of the Canadian Charter gains an unwarranted ascendancy.

Hogg and Bushnell deny this contention. They re-iterate that their thesis asserts 'that the decisions of courts, whether right or wrong, rarely preclude a legislative sequel and usually get one.' Hogg and Bushnell do not regard the judiciary as the legitimate interpreters of the Canadian Charter; rather, they emphasise the s 1 limit and s 33 override mechanisms that allow the legislature and executive to advocate their own understandings of the Canadian Charter rights, guarding against judicial-centricity. Whether at the initial policy-making and law-making

81 Ibid.
82 Ibid 294.
83 The overarching criticism is that '[w]hat Hogg and [Bushed] describe as dialogue is usually a monologue, with judges doing most of the talking and legislatures most of the listening': Morton and Knopff, above n 43, 166. For a critique of this perspective, see Roach, above n 70, 75-6, 79-81; Robin Elliot, "The Charter Revolution and the Court Party": Sound Critical Analysis or Bunkered Political Polemic? (2002) 35 University of British Columbia Law Review 271, 325-6.
84 According to Manfredi and Kelly, legislatures, in effect, 'are never subordinating themselves to the Charter per se, but to the Court's interpretation of the Charter's language': Manfredi and Kelly, above n 43, 523. See also Manfredi, above n 43, 179-81; Rainer Knopff and F L Morton, Charter Politics (1992) 199-193, especially 199.
85 Morton and Knopff, above n 45, 162. They illustrate the point by discussing the judicial decisions and legislative responses to Morgentaler [1988] 1 SCR 30 and Viens v Alberta [1988] 1 SCR 493 at 162-5. For a critique of this claim, see Elliot, above n 33, 319-20, 325-6. Elliot notes that Hogg 'notes on the basis of data showing that on 45 of 64 occasions on which a law had been struck down, a new law had been enacted, that "the staying power of the judicially-created policy status quo is not very strong at all."' 323 (citations omitted).
86 Hogg and Thornton (Bushnell), above n 43, 535.
stage, or after a judicial ruling, ss 1 and 33 ensure that judicial interpretations are not final determinative interpretations. If advantage is not taken of ss 1 and 33, 'the fault seems to lie more in the public's acceptance of the infallibility of judicial declarations of rights or the government's lack of will than in the structure of the [Canadian] Charter or the Court.'

Moreover, the understandings of dialogue proffered to remedy the perceived defects create other problems. For example, Manfredi and Kelly sanction a coordinate construction approach to interpretation. They envisage that 'a judicial decision [be] just one particular interpretation of the constitution, and not entitled to any more respect than a rival interpretation made by the executive or the legislatures.' The problems with this type of dialogue will be discussed further in section III.B.2; in essence, however, coordinate construction sanctions a legislative monologue, which forfeits the benefits of educative exchanges with the judicial arm and undermines the rights-accountability element of rights instruments. Furthermore, explicit in their analysis is a purely majoritarian concept of democracy and the non-absorption by the representative arms of judicial understandings of protected rights. Implicit in this analysis is the assumption that the judiciary respect majoritarian choices and accept legislative interpretations of rights. Dialogue is thus about judicial accountability to majoritarian concerns, rather than a robust educative exchange between differently skilled, motivated and tooled institutions. The problems with this type of dialogue will be discussed further in section III.B.1.

Secondly, some commentators argue that insufficient attention is given to the policy distortion caused by judicial interpretations of the Canadian Charter. The representative arms' legislative objectives and the legislative means chosen to pursue them are distorted, so they argue, by judicial-centric views of the Canadian Charter. They claim that excessive deference of the representative arms to judicial interpretations results in a hierarchical institutional relationship, which more closely resembles judicial supremacy rather than legislative supremacy or a genuine relationship between equals. Examples of distortion are when the legislature adopts a judicial interpretation of rights despite its own conflicting views, when the legislature does not pursue a policy because it mistakenly believes the policy is outside the judicially sanctioned range of Canadian Charter options, or when a judicial ruling forces an issue onto the political agenda thereby challenging the status quo.

In reply, Hogg and Bushell re-iterate the costs and benefits of rights protection: when legislatures adopt judicial interpretations of the Canadian Charter ... no

87 Rouch, above n 70, 78.
88 Ibid 242.
89 Manfredi and Kelly, above n 43, 525: 'While negative legislative sequels are independent actions on the part of democratic actors, they ensure a hierarchical relationship between judges and legislators because legislative compliance through legislative sequels allows the judiciary's interpretation of the Charter to go unchallenged.'
90 Ibid 528-21, 522; Manfredi, above n 43, 178-9, 250; Morten and Knopff, above n 43, 165. For a critique of this claim, see Elliot, above n 83, 319-26.
major democratic objective is defeated at the same time that civil libertarian value is respected. Judicial review under the Canadian Charter is supposed to force the legislature to pay more regard to rights than it otherwise necessarily would. Any consequential potential to distort policy is part of the design of human rights instruments. In any event, policy distortion is minimal according to their study, which demonstrates that legislative policy is seldom overridden by judicially-imposed constitutional norms — the constitutional norms 'generally operate at the margins of legislative policy, affecting issues of process, enforcement, and standards, all of which can accommodate most legislative objectives'.

Moreover, the Canadian Charter and dialogue theories do not require the representative arms to manipulate their own behaviour to accommodate judicially sanctioned visions of rights. On the contrary, dialogue is predicated on critical assessment of alternative understandings of the rights and robust exchanges between the dialogue partners. Under the Canadian Charter, if a legitimate legislative objective is that important, it can be pursued by different legislative means; and if impugned legislative means are an imperative part of a policy or if the legislative objective itself was impugned, the representative arms can 'reassert the status quo as the will of the majority if [is] willing to do so in a clear and transparent manner' using s 33. The capacity of the representative arms to place reasonable limits on rights or to override rights should not be underestimated. If the representative arms succumb to a judicial-centric approach, that can only be blamed on the timidity of the representative arms. Such a judicial-centric approach is not dictated by the Canadian Charter, the dialogue approach, or the judiciary.

Furthermore, again, the solution proffered creates other problems. Manfredi and Kelly regard the subordination of the legislature's view of the correct balance between rights and other values as illegitimate. They implicitly sanction an interpretative approach that allows the legislature to ignore judicial interpretations in favour of its own interpretation — a coordinate construction approach to dialogue. Furthermore, a logical conclusion to draw from the supposed illegitimacy of subordinating the legislature's views of rights is that dialogue should be based on judicial accountability. That the legislature's views should not be subordinated implies the judiciary should strive for interpretations that reflect majoritarian sentiment.

A valid concern of these commentators is that the Canadian Charter creates a judicial monologue, rather than a dialogue. Dialogue as a theory is not rejected outright; rather, dialogue in practice reflects a judicial monologue. Although dialogue based on judicial ascendancy is flawed, so too are the alternative types of dialogue proffered — dialogue as co-ordinate construction and as a mechanism

91 Hogg and Thornton (Bushell), above n 43, 534. Hogg and Bushell also dismiss this argument as an extremist's position: 'the dialogue characterisation will not sway those that reject any judicial influence over the legislature as illegitimate' (at 534).
92 Ibid.
93 Roach, above n 70, 221.
for judicial accountability. If the representative arms too readily defer to judicial interpretations of rights and justifiable limits, in truth there will be a judicial monologue. Similarly, if the judiciary is unduly deferential to the representative arms, in truth there will be a majoritarian monologue. A type of dialogue that guards against both judicial-centricity and representative ascendancy is required, the contours of which will be discussed in sections II.D and II.E. 95

3 Conclusion

The validity or otherwise of the Hogg and Bushell critiques are less pressing in the Victorian context because the Victorian Government has explicitly attempted to establish a dialogue model irrespective of whether commentators think the Canadian Charter in fact establishes a dialogue model. Moreover, the Victorian model is unique, incorporating aspects from the British (ss 32 and 36) and Canadian (ss 7(2) and 31) models, such that the debates surrounding Hogg and Bushell’s precise claims about the Canadian Charter do not have as much traction with the unique model adopted in Victoria. Furthermore, dialogue theories are less controversial in non-constitutional domestic rights instruments, such as the Victorian model, compared to constitutional domestic rights instruments, such as the Canadian model. For the purposes of this article, the Hogg and Bushell discussion serves a general purpose — to illustrate the basic claims and operation of dialogue models — and a specific purpose — to illustrate how the limits and override mechanisms adopted in Victoria can contribute to dialogue.

D INSTITUTIONAL DIALOGUE UNDER THE VICTORIAN CHARTER

Whether or not one agrees that the Canadian Charter has the theoretical potential to create an institutional dialogue and that the potential is being realised in practice, the notion of institutional dialogue as a means for preserving parliamentary sovereignty was one driver behind the HRA model adopted in the United Kingdom. Moreover, building on the Canadian theory and borrowing from the Canadian Charter and the HRA, the Charter is designed to establish an institutional dialogue. The HRA and the Charter employ four mechanisms to establish a dialogue between the arms of government about protected rights.96 They are: (a) the open-textured statements of rights; (b) the non-absoluteness of rights; (c) the judicial remedies available in situations of judicially-assessed violation; and (d) the mechanisms available to the representative arms to respond to judicial assessments. The first two mechanisms focus on ‘rights issues’, whilst the second two mechanisms focus on ‘HRA/Charter issues’. These mechanisms will be considered in turn.97

95 That is, a dialogue that models embrace the distinct, yet complementary, role of each institution of government: Roach, above n 70, 246-50.
96 The Canadian Charter adopts mechanism one, two and four.
97 The HRC Committee discusses the dialogue model and aspects of the dialogue in its report: HRC Committee, above n 4, ch 4, especially 66-67, 85, and Figs 4.1 – 4.4.
1 Mechanism 1 and 2: Open-Textured and Non-Absolute Rights

The first institutional dialogue mechanism relates to the articulation of rights. Modern human rights instruments articulate the protected rights in broad and open-textured terms. This is deliberate. It accommodates the uncertainty associated with unforeseeable future situations and needs, and manages the diversity and disagreement within pluralistic communities. Things that cannot be known and/or agreed upon in any verifiable manner are 'left undefined and allowed to remain "sufficiently obscure to allow them to retain an approximate appearance of internal coherence and clarity, while at the same time accommodating several potentially conflicting and quite unresolved points of issue."' This lack of specificity is required because of the features associated with 'grand narratives' such as rights — rights are indeterminate, the subject of irreducible disagreement, continuously evolving and, as tools to critique governmental actions, rights are intended to orient discussion rather than prescribe institutional arrangements, processes and outcomes.

The protected rights, however, must be applied in concrete situations. This requires the refinement of the open-textured rights. Institutional dialogue is about securing the most broad and diverse input into the process of refinement. There is no single true meaning of rights; nor can we expect an ideal consensus to emerge within pluralistic, diverse polities; nor can we expect our understanding of rights to remain static. These 'truths' are best acknowledged and accommodated by ensuring the inclusion of a diverse range of views based on distinct, yet complementary, motivations, methods of reasoning, and institutional strengths in the process of refinement. This should produce better answers concerning the meaning of rights.

The second institutional dialogue mechanism is the non-absoluteness of rights. Under the Charter, rights are balanced against and limited by other protected rights, as well as other non-protected values and communal needs. This capacity to limit rights is imperative given the features of rights — those being the indeterminate, irreducibly debatable and evolving nature of rights, and the conception of rights as tools for critique of governmental actions rather than ends in themselves. A plurality of values is accommodated through the limitations power, and the specific resolution between conflicting rights, and conflicts between rights and


102 For a discussion of "better" answers, see section II.E below.

103 Values including and beyond those articulated in the rights themselves.
values, should be assessed by a plurality of institutional perspectives through the
dialogue mechanism. All arms of government ought to provide their unique
assessment of the appropriate balance to be struck when conflicts over rights
rise. Again, this should produce better answers to conflicts over rights.\textsuperscript{104}

The Charter contains various limitations powers. First, it contains a general
limitations clause based largely on the Canadian Charter.\textsuperscript{105} Section 7(2)
provides that the protected rights may be subject 'to such reasonable limits as can be
demonstrably justified in a free and democratic society based on human dignity,
equality and freedom.' Section 7(2) lists the factors to be balanced when assessing
limits, as follows: (a) the nature of the right; (b) the importance of the purpose of
the right; (c) the nature and extent of the limitation; (d) the relationship between the
limitation and its purposes; and (e) any less restrictive means reasonably available
achieve the purpose that the limitation seeks to achieve—a minimum impairment
test. The articulation of these factors is intended to aid the executive and parliament
in their rights assessments of policy and legislation.\textsuperscript{106} It also acts as a template for
judicial decision-making. The wording of the factors is borrowed from the South
African model,\textsuperscript{107} and is not dissimilar to those used under the Canadian Charter\textsuperscript{108}
and the HRA.\textsuperscript{109} Second, some individual rights contain limitations powers, either as
qualifications to the breadth of the right,\textsuperscript{110} or as specific articulations of limitations
relevant to that right.\textsuperscript{111} The general limitations power still applies to rights that are
also subject to a specific qualification or limitation.\textsuperscript{112} In addition, there is also the

\textsuperscript{104} See generally Marks, above n 99; Marks, above n 100, 540; Tully, above n 100, 204.

\textsuperscript{105} The Explanatory Statement notes that the limitations clause is based on the New Zealand Bill of Rights
Act 1990 (NZ): Explanatory Statement, above n 16, 9. However, it is more honest to acknowledge
the influence of the Canadian Charter, which predates the NZ legislation by eight years and upon
which the NZ legislation was based. There is a glaring resistance to acknowledge any influence of the
Canadian Charter. One can only assume this is because of its constitutional status.

\textsuperscript{106} Williams, above n 3, 898-99: 'The direct invocation of the relevant factors in the Charter makes its
operation more transparent and accessible and lessens the need for non-lawyers and political actors to
place heavy reliance upon legal advice.'

\textsuperscript{107} Constitution of the Republic of South Africa 1996 (RSA), s 36.

\textsuperscript{108} See section II.C.1 above.

\textsuperscript{109} A limitation is valid if it is: first, prescribed by law; secondly, intended to achieve a legitimate objective, as
listed within the article itself; and thirdly, necessary in a democratic society. There are two elements to
assessing necessity in a democratic society: (a) necessity, which comes down to a pressing social need
(see The Sunday Times v United Kingdom (1979) 30 Eur Court HR (ser A) 31 [59]; Handside v United
Kingdom (1976) 24 Eur Court HR (ser A) 23 [44]; Goodwin v United Kingdom (1996) 11 Eur Court HR
48); and (b) proportionality (see R v A (No 2) [2002] 1 AC 45 [38] ("R v A"); R v Secretary of State for
the Home Department; Ex parte Daily [2001] UKHL 26, 25 - 28 ("Daily"); R (Farokhman) v Secretary of State
[61] ("Shayler"); International Transport Roth Gmbh v Secretary of State for the Home Department
185 [132] ("Prolife Alliance"). Assessing the lawfulness of qualifications to rights usually proceeds
similarly to that for limitations, with prescription by law, rationality and reasonableness being the
elements that need to be satisfied.

\textsuperscript{110} See Charter 2006 (Vic), s 11(3) (Freedom from Forced Work) and s 21 (Right to Liberty and Security of
Person).

\textsuperscript{111} See Charter 2006 (Vic), s 15. The right to freedom of expression may be subject to restrictions
necessary to protect the reputation of others, and for the protection of national security, public order,
public health or public morality.

\textsuperscript{112} See, eg, Explanatory Memorandum, above n 16, 14.
override power which may override the application of any or all of the rights,\footnote{The broad application of section 7, when read with the override provision in s 31, is problematic from an international human rights perspective. Some rights are absolute, such as, the prohibition on torture, the prohibition on slavery, and the right to be free from punishment without law. Such rights cannot be derogated from and no circumstance justifies a qualification or limitation of such rights under international law.} which will be discussed under mechanism four.

These two mechanisms not only promote dialogue between the arms of government, but they also structure the dialogue. In relation to the latter, when any arm of government considers a rights issue, they must answer the ‘classic rights questions’. First, they must ask whether legislation limits rights. This involves an assessment of the scope of the protected right, an assessment of the scope of the legislation, and a comparison of the two. Second, if the legislation limits rights, they must ask whether that limit is justified under the general or a specific limitations power.\footnote{Another relevant question to consider under limits is whether there is an override declaration in place. This will be considered more fully under mechanism four.} All arms of government should use this common framework when analysing rights issues.

In relation to the former, let us explore how the two mechanisms are designed to promote an institutional dialogue. The executive normally makes the first contribution to dialogue through policy formulation and legislative drafting.\footnote{By and large, bills are usually proposed by the executive. However, it should be acknowledged that private members can also introduce bills into parliament.} This contribution is formally recognised through the s 28 statement,\footnote{Statements of (in)compatibility ensure ‘that someone has thought about human rights issues during the process of drafting a Bill’. David Feldman, ‘Whitehall, Westminster and Human Rights’ (2001) 21(3) Public Money and Management 19, 22.} with additional contributions being made through other executive communication tools, such as, public discussion papers, exposure drafts of legislation, explanatory memorandum, and the like. A statement must either state that, in the member’s opinion, the Bill is compatible with protected rights and how it is so, or that the Bill is not compatible and the nature and extent of the incompatibility.\footnote{Charlier 2006 (Vic) s 28(3). Section 29 provides that a failure to comply with s 28 does not affect the validity, operation or enforcement of the Act.} Section 28 statements allow the executive to identify its understanding of the open-textured rights because an assessment of whether a right is limited by legislation contains information about the executive’s assessment of the scope of the right. Section 28 statements also divulge whether the executive, in pursuing its policy agenda, had to strike a balance between competing rights, or between rights and non-protected values, by limiting a right. The executive must be able to defend any limitations, which involves a global assessment of a limit as being reasonable and necessary in a democratic society, and a specific assessment of at least each of the s 7(2) factors. It may also involve defending an individual limitation or qualification. Thus, dialogue output of the executive, via s 28 statements or other communication tools, explicitly or implicitly contain information about the executive’s understanding of the scope of rights and the justifiability of limits on rights. Being the first to contribute, the executive is in a prized position because it ‘sets the agenda’ by initially establishing the parameters of
the rights debate and thereby potentially influencing the legislature’s and judiciary’s analysis of the issue.

Parliament then contributes to the institutional dialogue through its constitutional roles of legislative scrutineer and law-maker. When scrutinising proposed legislation and deciding whether to enact it, Parliament has the responsibility of ensuring that the proposed legislation is compatible with its view of the scope of rights and justifiable limitations thereto. The scrutineer role affects Parliament’s relationship with the executive, and the law-making role affects Parliament’s relationship with the courts.118 The Charter structures these relationships. First, Parliament receives input from the executive via the s 28 statement and its other communication tools. Under s 30, the Scrutiny of Acts and Regulations Committee (‘SARC’) must scrutinise the executive’s assessment of the scope of rights, the proposed legislation, any identified limits to rights, and the justifiability of any such limits, and report to Parliament. In doing so, SARC is also communicating its view of the scope of rights and the justifiability of limits. Parliament then undertakes its own analysis of the rights, the legislation, and the justifiability of any limits on rights through parliamentary debate and voting. Parliament is armed with the executive’s and SARC’s respective viewpoints. If SARC and/or Parliament disagree with the assessment of the executive, the latter must defend its legislative objectives and means against the protected rights, or alter the legislative objectives or means if Parliament refuses to enact the proposed legislation.

Secondly, the parliamentary output is new legislation which may be subject to judicial interpretation or declaration. Parliament should demonstrate to the judiciary that it has assessed the legislative objectives and means against the protected rights, and considered the justifiability of any limitations imposed on rights. This serves two purposes. First, it is necessary for Parliament in the discharge of its new legislative/quasi-constitutional duty to protect rights. Second, it serves to shape the way the judiciary perceives and assesses the legislation, and demonstrates to the judiciary that parliament has taken rights seriously: ‘the judiciary will have little incentive to be sensitive to [Parliament’s] perspective’ if it ‘is seemingly cavalier’ about rights.119 Parliament can do both through the SARC process and reports, parliamentary debate, amendments to proposed legislation, the enacted legislation and the like.

In making these contributions, the representative arms will bring to bear their unique understanding of the requirements of, and balance between, democracy and rights. These perspectives will be informed by their distinct role in mediating between different interests and values within society, their responsibilities to their representatives, their motivation to stay in power, and their distinctive institutional strengths. These are all legitimate influences in their decision matrix. Moreover, there is strong incentive for the executive and Parliament to engage in a constructive, educative dialogue with the judiciary about the

119 Hiebert, above n 9, 219.
pressures and motivations driving their respective assessments of rights. They should be motivated to avoid judicial interpretations of legislation under s 32 because an unexpected interpretation may risk the realisation of the legislative objectives. They should also be motivated to avoid judicial declarations under s 36: whilst Parliament can legally enact rights-incompatible legislation, the threat of a declaration ‘serves as a political and perhaps moral disincentive to legislate incompatibly.’ A declaration ‘impl[ies] a degree of legal impropriety in what Parliament has done even if it does not amount to illegality.’

The judiciary contributes to the institutional dialogue if legislation is challenged. The judiciary itself must answer the ‘classic rights questions’. The first step is to refine the open-textured rights and to decide whether the impugned legislation limits a right. If the Victorian judiciary takes the lead of comparative jurisdictions, which it is empowered to do under s 32(2), it will adopt a purposive analysis of the rights which affords them a generous, substantive, not legalistic, interpretation. The second step is to decide whether any limitation is justified under the general or a specific limitations power. If the Charter is implemented similarly to the Canadian Charter and the HRA, minimum impairment (s 7(2)(c)) will be the focus of the judicial assessment, followed by rationality (s 7(2)(d)).

The analysis of the judiciary will proceed from its distinct institutional perspective, which is informed by its unique non-majoritarian role, and its particular concern about principle, reason, rationality, proportionality, and fairness. In answering the “classic rights questions”, the judiciary is expected to respectfully listen to and critically analyse the representative perspectives, review its own pre-conceived ideas against the representative perspectives, and be open to the persuasion of the representative arms. The executive and the parliamentary outputs educate the judiciary about their legislative objectives, the realisation of objectives through particular legislative means, the impact of the legislative objective and means on protected rights, their justifications for any limitations, and the pragmatic ramifications they confront in executing their policies.

Most importantly, however, dialogue does not require timid judicial contribution, which would be out of line with judicial culture in Victoria and the ideal of institutional dialogue. The judiciary must not simply defer to the executive and legislative viewpoints or consider itself bound by them. Any pressure to defer due to the creative role the judiciary has in refining the open-textured rights and resolving conflicts over rights must be resisted. Any creative role of the judiciary is adequately tempered by other means, such as, the robust, educative outputs of the representative arms, and by the limited powers conferred upon the judiciary under


13 For Canada, see above section II.C. For UK, see Nicholas Blake, ‘Importing Proportionality: Clarification or Confusion’ [2002] European Human Rights Law Review 19, 23.
the Charter. For dialogue to work, the judiciary must robustly contribute its view on the scope of the rights and the justifiability of limits. Indeed, given its inability to invalidate rights-incompatible legislation, the strongest tool the judiciary has is the persuasiveness of its arguments. The strongest motivation for robust judicial contributions is the fact that the judiciary does not have the final say. Mechanism one and two are apt to produce an institutional dialogue about the ‘classic rights questions’. Each institution must contribute its understanding of the rights and justifiable limits, thereby increasing each institution’s understanding of the differing perspectives about the open-textured, highly contested, non-absolute rights. The refinement of rights is a ‘process of careful adaptation ... carried out by all three branches of government’, as is the balance struck between rights and justifiable limits. The ‘maximum participation by [the] different sectors’ of government is vital.

2 Mechanisms 3 and 4: Limited Judicial Remedies and Representative Response Mechanisms

The third institutional dialogue mechanism is the limited powers conferred on the judiciary under the Charter. The judiciary has the s 32 interpretative obligation; however, it is not empowered to invalidate legislation that is not amenable to a s 32 rights-compatible interpretation. Rather, under s 36, the SCV or the VCA are empowered to make a declaration of inconsistent interpretation, after notice and an opportunity to intervene is given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission. A declaration does not affect the validity, operation or enforcement of the legislation, or create in any person any legal right or give rise to any civil cause of action. In other words, a declaration will not affect the outcome of the case in which it is issued, with the judge compelled to apply the incompatible law; nor does it impact on any future applications of the incompatible law. Under ss 36(6) and (7), the SCV must cause a copy of the declaration to be sent to the Attorney-General, who must give a

124 See further, sections II.D.2 and III
127 For the position of subordinate legislation, see Charter 2006 (Vic), s 32(3)(b). Section 32(3)(b) provides that rights-incompatible subordinate instruments will remain valid, as will rights-incompatible subordinate instruments where the parent legislation permits the subordinate instruments to be so made. Where a subordinate instrument is rights-incompatible and the primary legislation did not sanction the incompatibility, the subordinate instrument will simply be ultra vires the parent legislation. See Explanatory Memorandum, above n 16, 24. For a discussion on how UK declarations of incompatibility impact on the prerogative powers as exercised under Orders in Council: see Peter Billings and Ben Pontin, ‘Prerogative Powers and the Human Rights Act: Elevating the Status of Orders in Council’ [2001] Summer Public Law 21.
128 Charter 2006 (Vic), s 36(3) and (4).
129 Charter 2006 (Vic), s 36(5). The latter part of this subsection is linked to the legal proceedings available under s 39.
copy to the relevant Minister within various timeframes. Within six months of receiving the declaration, the relevant Minister must prepare a written response to the declaration and cause it to be laid before both Houses of Parliament and published in the Government Gazette under s 37.130

The issue of judicial interpretation versus judicial law-making arises here. Combining the analysis for mechanisms one, two and three, the judicial task is thus twofold. First, the judiciary must refine the scope of the rights and assess whether the impugned legislation is an unjustifiable limitation on the rights (the ‘classic rights questions’). If this analysis results in a judicial assessment of an unjustifiable limitation on a right, secondly, the judiciary must exercise its s 32 interpretative or s 36 declaratory obligations (the ‘HRA/Charter questions’).

The British jurisprudence on the ‘HRA/Charter questions’ is instructive.131 In the Donoghue case, Woolf CJ outlined an approach to interpretative obligations.132 First, the court must decide whether, regardless of the interpretative obligation, the legislation unjustifiably limits a right by comparing the right and justifiable limitations thereto with the impugned legislation (the ‘classic rights questions’). Second, if a violation would occur, the court must alter the meaning of the legislative words (a ‘HRA/Charter question’). The court must, however, ‘limit the extent of the modified [legislative] meaning to that which is necessary to achieve compatibility.’133 Third, the court must decide whether the altered legislative interpretation is ‘possible’ (a “HRA/Charter question”) and consistent with statutory purpose (a ‘Charter question’). In so deciding, the court’s task is still one of interpretation.134 If the court must ‘radically alter the effect of the legislation’ to secure compatibility, ‘this will be an indication that more than interpretation is involved.’135 In this process, a great deal depends on getting the distinction between judicial interpretation and ‘judicial legislation’ correct — including the preservation of parliamentary sovereignty, the reputation of the judiciary, the establishment of the dialogue, and the effectiveness of rights protection. We will return to this issue in section III.

In terms of institutional dialogue, the judicial output under the third mechanism will be one of three things. First, the law may be upheld as not limiting rights in an unjustifiable manner. Second, s 32 may be used to produce a rights-compatible interpretation of the otherwise incompatible legislation. Third, a s 36 declaration may be issued where a rights-compatible interpretation is not possible or not

130 This is an improvement on the Canadian Charter and HRA which do not have this requirement. This requirement is borrowed from the Human Rights Act 2004 (ACT), s 33.
131 In the interests of length, not all cases to date can be referred to. For updates on cases, reference should be made to the European Human Rights Law Review, which is periodically publishing an updated ‘Table of Cases under the Human Rights Act’, along with the occasional ‘Commentary’.
132 Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48 (“Donoghue”). This approach has been approved in later cases, such as, R v A (2002) 1 AC 45 [58].
133 Donoghue [2004] QB 48 [75].
135 Donoghue [2001] QB 48 [76].
consistent with statutory purpose. These judicial outputs feed back into the dialogue loop via the fourth mechanism.

The fourth institutional dialogue mechanism is the representative response mechanisms to the judicial outputs. After an open yet critical consideration of the judicial perspective, as well as a critical re-evaluation of their own prior positions, the legislature and executive may respond to s 32 judicial interpretations and must respond to s 36 judicial declarations. Let us explore the range of available responses. First, parliament may decide to do nothing, leaving the s 32 judicially-assessed interpretation in place or the s 36 judicially-assessed incompatible law in operation. There is no compulsion to respond to a s 32 rights-compatible interpretation. If the executive and parliament are pleased with the new interpretation, they do nothing. In terms of s 36 declarations, although s 37 requires a written response to a declaration, it does not dictate the content of the response. The response can be to retain the judicially-assessed rights-incompatible legislation, which indicates that the judiciary’s perspective did not alter the representative viewpoint. The debate, however, is not over: citizens can respond to the representative behaviour at election time if so concerned, and the individual complainant can seek redress under the ICCPR.

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

136 For a discussion of examples of the first response mechanism under the HRA, see Julie Debeljak, above n 43, ch 5.3.6(a).
137 Indeed, the very reason for excluding parliament from the definition of public authority was to allow incompatible legislation to stand.
139 For a discussion of examples of the second response mechanism under the HRA, see Debeljak, above n 43, ch 5.3.6(b).
Parliament may legislate in response to s 32 interpretations for many reasons. Parliament may seek to clarify the judicial interpretation, address an unforeseen consequence arising from the interpretation, or emphasise a competing right or other non-protected value it considers was inadequately accounted for by the interpretation. Conversely, Parliament may disagree with the judiciary’s assessment of the legislative objective or means and legislate to re-instate its initial rights-incompatible legislation using express language and an incompatible statutory purpose in order to avoid any possibility of a future s 32 rights-compatible interpretation. Institutional dialogue models do not envisage consensus. Parliament can disagree with the judiciary, provided Parliament listens openly and respectfully to the judicial viewpoint, critically re-assesses its own ideas against those of the differently motivated and situated institution, and respects the culture of justification imposed by the Charter – that is, justifications must be offered for any limitations to rights imposed by legislation and, in order to avoid s 32 interpretation, Parliament must be explicit about its intentions to limit rights with the concomitant electoral accountability that will follow.

Third, under s 31, Parliament may choose to override the relevant right in response to a judicial interpretation or declaration, thereby avoiding the rights issue. The s 32 judicial interpretative obligation and the s 36 declaration power will not apply to overridden legislation.142 Given the extraordinary nature of an override, such declarations are to be made only in exceptional circumstances and are subject to a five yearly renewable sunset clause.143 Overrides may also be used ‘pre-emptively’ – that is, Parliament need not wait for a judicial contribution before using s 31. Pre-emptive use, however, suppress the judicial contribution, taking us from a dialogue to a representative monologue.

It is unclear why an override provision was included in the Charter. Although it is vital in the Canadian Charter to preserve parliamentary sovereignty, it is not necessary in Victoria because of the circumscribed judicial powers. Under the Charter, use of the override will never be necessary because judicially-assessed incompatible legislation cannot be invalidated, unwanted judicial interpretations can be altered by ordinary legislation, and judicial declarations are non-enforceable. Admittedly, an override may be used to avoid the controversy of ignoring a judicial declaration. However, use of the override itself would surely cause equal, if not more, controversy. Nevertheless, it remains as a third response

142 See legislative note to Charter 2006 (Vic), s 31(6).
143 Charter 2006 (Vic), ss 31(4), (7) and (8). The ‘exceptional circumstances’ include ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria’. Explanatory Memorandum, above n 16, 21.
mechanism.\textsuperscript{144} In brief, for the purposes of comparison, the \textit{HRA} has the ‘do nothing’ and legislation options available, and its equivalent of the override is the ability to temporarily derogate from the protected rights.\textsuperscript{145}

The third and fourth institutional dialogue mechanisms lock the arms of government into a relationship of ongoing dialogue about rights and democracy. Each arm shares the responsibility for assessing governmental actions against rights standards – the representative arms make an initial assessment of legislation against rights and justifiable limits thereto; the judiciary then contributes its perspective; and the representative arms can then respond. Moreover, this relationship is not monopolised by any one institution. Rather, all contributors to the dialogue have important, legitimate and influential perspectives to offer, but none monopolise the debate. Further, parliamentary sovereignty is preserved – although the judiciary’s contribution should prompt a response by the representative arms, it cannot dictate the content of the response. Furthermore, in exchanging views, each arm must respectfully listen to opposing perspectives, be open to persuasion and be willing to change their pre-conceived ideas, but not be deferential. If it were otherwise, dialogue would descend into a judicial monologue or representative monologue. Finally, the contributing institutions should be motivated to contribute to the debate because no institution can conclude the dialogue. The judiciary does not have the final say; nor do the representative arms, because any ‘legislative sequels’ are themselves subject to the four dialogue mechanisms.

\textit{E The Preferred Type of Dialogue for Victoria}

Having committed itself to an institutional dialogue model, the Victorian arms of government must identify the precise type of dialogue to be pursued. The benefits of the institutional dialogue theory flow from an honest, robust and respectful exchange of institutional perspectives – perspectives that are based on diverse motivations, reached through distinct processes, and supported by different institutional strengths. The institutional dialogue should promote constructive and educative exchanges designed to expose each arm of government to views that otherwise would not necessarily influence their decision-making. The contribution of distinct perspectives to the shared task of refining the limits of

\textsuperscript{144} Williams defends inclusion of the override provision as an alternative to the temptation to amend the \textit{Charter} itself in times of crisis: Williams, above n 3, 899. This author disagrees with Williams’ assessment of the ‘high political cost’ of using an override and the Canadian reluctance to use their s 33 equivalent: 899-900. According to statistics published in 2001, the Canadian s 33 override provision has been invoked on sixteen occasions and three provincial governments have been re-elected after using the override clause: Tsui Kahana, ‘The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the \textit{Charter}’ (2001) 44 Canadian Public Administration 255, 257-9, Tables 1-5 at 260-7. See also Roach, above n 70, 191-2; F L. Morton, ‘Can Judicial Supremacy be Stopped?’ [2003] October Policy Options 25, 27.

\textsuperscript{145} There is a fourth mechanism, the remedial order, which was not adopted in Victoria. A remedial order may be made if a declaration of incompatibility is issued, or if it appears that, having regard to a European Court decision against the United Kingdom, a provision of domestic legislation is incompatible with the Convention: \textit{HRA 1998 (UK)} c 42, ss 10(1)(a) and (b). If either condition is satisfied, and if the relevant Minister considers there are compelling reasons, the Minister may, by order, make such amendments to the legislation as is considered necessary to remove the incompatibility: s 10(2). Remedial orders must ultimately receive the approval of both Houses of Parliament: s 10 and sch 2.
democracy and rights should produce a more complete understanding of the competing values, interests, and concerns at stake. This, in turn, should allow better resolutions of conflicts to emerge. ‘Better’ resolutions are those based on an appreciation of the concerns of each arm of government (rather than just one arm, whichever one that may be); those made after each institution critically reassesses its pre-conceived views against the views of the differently motivated, tooled and skilled institutions; those made by institutions that are willing to listen to alternative views and are open to persuasion and change; and those founded on rationality, proportionality and reason.

Many models of dialogue have been developed with varying degrees of clarity and success. Some of the less attractive models were identified in section II.C.1. and will be explored in our discussion of deference in section III. A model that captures the benefits that institutional dialogue has to offer is articulated by Kent Roach as dialogue based on the distinct, yet complementary, institutional roles of the arms of government.

Let us explore these distinct roles – in particular, the distinct motivations, responsibilities and strengths of each institution. The distinct role of the representative arms is to identify policy objectives and pursue legislative programmes designed to promote the common good or mediate between competing legitimate public interests. In performing this role, the legislature is directly, and the executive is indirectly, responsible to the represented. Because of this, the concerns of the represented influence the policy objectives and legislation pursued – the representative arms must be mindful of majoritarian sentiment. This is not to say that rights considerations are not and cannot be accounted for by the representative arms; but merely to highlight that majoritarian preferences correctly compete with rights concerns. This is also not to say that rights considerations are the only or even primary basis for decision-making. The representative arms should incorporate rights considerations into a larger policy inquiry that defines and evaluates the merits of proposals to address social concerns, anticipates factors that might undermine the attainment of objectives, and identifies alternative ways to pursue objectives to minimize ... conflicts.

146 See eg, Hogg and Bushell, above n 42; Hogg and Thornton (Bushell), above n 43; Beatty, above n 75; Hiebert, above n 35. For critiques of dialogue theories, see above n 43 and discussion in section II.C.2.

147 It also captures the benefits of Hiebert’s relational approach. Hiebert developed the relational approach, which is her slant on dialogue theories: see above n 74.


150 The self-interested and non-rights preferences of the majority correctly compete with the protected rights. If representatives hold different opinions to those they represent, it is understandable that the former defer to the latter in order to retain power.

151 Hiebert, Charter Conflicts, above n 9, 53.
with rights. When undertaking such evaluations, ‘[r]eflection on judicial concerns, and the reasons for contrary judgment, are important considerations’; however, ‘these should not be the entire focus of, or a substitute for, Parliament’s [or the executive’s] reasoned judgment.’ The reasoned and reflective representative judgments about the values underlying the rights, their definition, and justified limitations thereto are legitimate contributions to the ongoing debate.

In contrast, the distinct role of the judiciary is to adjudicate disputes and uphold the rule of law. It is concerned with legal principle, reason and fairness, rather than policy objectives and reconciling competing public interests. Moreover, the judiciary is the independent arm of government. Being immune from majoritarian pressure, the judiciary can more easily concern itself with the fairness and rationality of the treatment of minorities and the unpopular. The judiciary is not motivated by the will of the majority, but this does not mean it can ignore the concerns of the representative arms. The judiciary must ‘try its best to understand the legislature’s [and executive’s] objectives and justifications for limiting rights’; but, in the end, it ‘must insist on principles and proportionality’ even if this results in disagreement between the arms of government.

The complementary nature of the dialogue refers to the shared nature of the project. All arms of government share the responsibility for refining rights and limitations thereto. Modern rights instruments reinforce this complementarity by ensuring no arm has the final say over these matters. An important feature of complementarity is the focus on educative exchanges – an educative mechanism being the clear preferences of the Victorian Government. It allows courts to educate legislatures and society by providing principled and robust articulations of the values of the Charter ... while allowing legislatures to educate courts and society about their regulatory and majoritarian objectives and the practical difficulties in implementing those objectives.

Through the dialogue, each arm has the opportunity to educate and be educated about the concerns, responsibilities and pressures that motivate the other. It allows each arm to ‘add their own distinctive voice, talents and concerns to the conversation’, such that ‘a more enriching and sophisticated dialogue is produced than could be achieved by a judicial or legislative monologue or a dialogue in which courts and legislatures engage in the same task’. Moreover, the educative effect should produce ‘better’ – more fully informed and considered – resolutions to conflicts. At best, the outcomes will account for the broadest competing

152 Ibid 55.
153 Being removed from the ‘immediate conflict may provide judges with more liberty to identify legislative decisions that impose unwarranted or undue restrictions on [human] rights’. Ibid 53.
155 Tliebert, above n 9, xii.
156 Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 1984 (Ms D’Ambrosio); Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 1995 (Ms Barker); Office of the Attorney General, above n 7, [12].
158 Ibid.
visions of society, as encapsulated by the varying institutional responsibilities and concerns. At worst, the institutional perspective of one arm will temporarily prevail, say, with a s 31 override or a s 36 declaration that does not inspire legislative review. However, the cost in rights-terms of allowing one perspective to prevail will have been assessed and articulated by the competing arms of government, such that the citizenry will be fully aware of the positive and negative impacts of the decision.

Another feature is the necessity for robust contributions. Given that rights and democracy are indeterminate, evolving and subject to legitimate disagreement, no arm of government should be timid or deferential to the other arms. In fact, the opposite is true, with the success of the dialogue depending on vigorous and honest exchanges. Judicial reverence or deference will result in an ‘under-enforcement’ of rights, which can turn dialogues between litigants, the court, legislatures, and societies into complacent monologues that fail to generate self-criticism or moral growth. The judiciary should speak confidently and authoritatively about its unique vision of rights, a task made easier in the knowledge that their vision is not the final word on the subject. Indeed, an element of judicial activism is required, but this is not problematic because the dialogue model balances judicial activism with representative activism.

The same commitment is expected of the representative arms. The representative understandings of rights and justifiable limits will frame the debate and legitimately influence the judiciary. To be in a position to frame the debate is advantageous. The pre-legislation processes provide an opportunity to develop persuasive justifications for representative actions, which may include challenges to pre-conceived judicial perspectives on rights and limits thereto. If the representative arms identify a reasonable starting point and offer a rational framework for resolving a conflict over rights, it will be difficult for the judiciary to change the starting point and alter or undermine the framework. If the representative arms fail to take this opportunity, the dialogue may become a judicial monologue. Moreover, if the representative arms simply Charter-proof their activities, the dialogue will become a judicial monologue. Charter-proofing is the notion that the representative arms of government alter their policy objectives and legislative programs in order to avoid Charter challenges, s 32 judicial interpretations, or s 36 declarations. Central to this notion is a judicial-centric approach to Charter interpretation and enforcement. Most importantly, for each institution to benefit from exposure to diverse perspectives, they all must be willing to freely express

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159 Roach, above n 70, 284. Dialogue requires ‘a strong judicial voice that defends principles such as minority rights, fair process, and fundamental values’: 239.

160 Traditionally, judicial independence was, in part, justified because the judiciary was merely understood to declare the law. Declaring the law is considered an apolitical function that does not involve substantive value judgments. Under an inter-institutional dialogic model, the judicial role will require creative, substantive judgments to be made – it will require an element of judicial activism. However, this increase in activism should not be balanced by an increase in judicial accountability (or decrease in judicial independence), as this would undermine the robust, educative inter-institutional dialogue. Rather, judicial activism ought to be balanced by the activism of the representative institutions.

161 The notion of Charter-proofing comes from the Canadian Charter debate. Hiebert, above n 5, 224.
their institutional views, especially in the context of disagreement. Deference of the representative arms to the judiciary, or vice-versa, is contrary to this.

The strength of creating a dialogue based on distinct, yet complementary institutional roles, is highlighted when alternatives are considered. For example, a dialogue theory that endorsed the domination of one voice over another would, in truth, be a monologue that sacrificed the benefits of dialogue. Moreover, a dialogue theory that denied the exchanging institutions of the opportunity to make contributions based on their unique institutional strengths would be problematic, primarily because the benefits of exposing decision-makers to the diverse perspectives of those institutionally differently placed would be forfeited. These alternatives will be further explored in section III, particularly when we consider the use of judicial deference as a tool to retain parliamentary sovereignty.

III RETAINING PARLIAMENTARY SOVEREIGNTY THROUGH JUDICIAL REMEDIAL POWERS

With this theoretical and contextual background, let us consider some difficulties associated with the mechanism adopted under the Charter to preserve parliamentary sovereignty — that being, the adoption of judicial interpretative and declaratory powers. Our discussion necessarily turns to the British model at this point because the mechanisms were borrowed from this model. The Canadian debate about institutional dialogue informs this discussion.

As identified in the Introduction, there are three inter-related difficulties. First, there is no clear line between ‘proper’ judicial interpretation and ‘improper’ judicial law-making leaving the judiciary vulnerable to claims of illegitimate judicial activism. Second, because of the difficulty with line-drawing and because there is arguably more power in judicial interpretation than in declaration (at the very least, there is power involved in judicial interpretation that impacts on parliamentary sovereignty), calls for judicial deference are inevitable, which has consequential implications for the type of dialogue produced. Third, judicial interpretations may be unduly preferred to judicial declarations because of the power differential between the two. In total, these difficulties may undermine parliamentary sovereignty, threaten the educative dialogue amongst the differently placed, skilled and motivated arms of government, erode the justificatory and accountability aspects of rights instruments, and undermine the protection of rights. These issues will be addressed in turn.

A The Line Between Judicial Interpretation and Judicial Law-Making

Under s 32 of the Charter, the power of judicial interpretation is not absolute. There are two important provisos on judicial interpretation, being that a s 32 rights-compatible interpretation must be (a) ‘possible’ and (b) ‘consistent[] with

162 See discussion under section II.C.2.
[statutory] purpose'. In other words, a s 32 rights-compatible interpretation that was not possible and that was inconsistent with statutory purpose would, in truth, be an act of judicial law-making which is not permitted under s 32; in this situation, a s 36 declaration of inconsistent interpretation ought to be made. We will consider both provisos to s 32 in turn.

1 The British Experience with 'Possible' Interpretations

The ‘possible’ interpretation limit under s 32 and the s 36 declaration power are based on ss 3 and 4 of the HRA. Accordingly, the British experiences with ‘possible’ interpretations and declarations are highly instructive for Victoria. Indeed, the distinction between proper judicial interpretation (possible interpretation) and improper law-making (not possible interpretation) has proved ‘elusive’; with s 3 being described as ‘dangerously seductive, for there is bound to be a temptation to apply the section beyond its proper scope and trespass upon the prerogative of Parliament in what will almost invariably be a good cause.” This threatens parliamentary sovereignty, exposes the judiciary to allegations of illegitimate judicial activism and law-making, and will predictably produce calls for judicial deference.

During debate on the Human Rights Bill, the Lord Chancellor stated that the HRA, ‘while significantly changing the nature of the interpretative process’, does not allow the courts ‘to construe legislation in a way which is so radical and strained that it arrogates to the judges a power completely to rewrite existing law: that is a task for the Parliament and the Executive.” The Home Secretary stated that ‘it is not our intention that the courts, in applying [s 3], should contort the meaning of words to produce implausible or incredible meanings.” Rather, s 3 is supposed to enable ‘the courts to find an interpretation of legislation that is consistent with Convention rights, so far as the plain words of the legislation allow.” Both statements fail to illuminate the point, in practice, where judicial interpretation ends and law-making begins, yet both statements clearly identify judicial law-making as illegitimate.

The judicial interpretations of the s 3 obligation shed dim light.” Let us return to Woolf CJ in Donoghue.” His Honour emphasised that if the court must ‘radically alter the effect of the legislation’ to secure compatibility, ‘this will

163 Gbadamosi [2004] 2 AC 557, 570 (Lord Nicholls).
164 Ibid, 584 (Lord Millibou).
166 United Kingdom, Parliamentary Debates, House of Commons, 3 June 1998, col 421 (Jack Straw MP, Secretary of State for the Home Department).
167 Ibid, col 421-3 (emphasis added).
168 In the interests of length, not all cases to date can be referred to. For updates on cases, reference should be made to the European Human Rights Law Review, which is periodically publishing an updated ‘Table of Cases under the Human Rights Act’, along with the occasional ‘Commentary’.
be an indication that more than interpretation [improper judicial legislation] is involved.\textsuperscript{170} Woolf CJ acknowledged that ‘[t]he most difficult task which courts face is distinguishing between legislation and interpretation’ and that ‘practical experience of seeking to apply section 3 will provide the best guide.’\textsuperscript{171}

In \textit{R v A (No 2) (‘R v A’)},\textsuperscript{172} Lord Steyn confirmed that s 3 required a ‘contextual and purposive interpretation’ and that ‘it will be sometimes necessary to adopt an interpretation which linguistically may appear strained.’\textsuperscript{173} His Lordship held that s 3 empowers judges to \textit{read down} express legislative provisions or \textit{read in} words so as to achieve compatibility,\textsuperscript{174} provided the essence of the legislative intention was still viable. Judges could go so far as the ‘subordination of the niceties of the language of the section.’\textsuperscript{175} His Lordship justified this interpretative approach by reference to the parliamentary intention in enacting the \textit{HRA}: Parliament clearly intended that a declaration be ‘a measure of last resort’,\textsuperscript{176} with ‘a clear limitation on Convention rights [to be] stated \textit{in terms}.’\textsuperscript{177} Lord Hope was more restrained, holding that any modified legislative interpretation should not conflict with the express language of the legislation, nor any necessary implications thereto, as both are ‘means of identifying the plain intention of Parliament.’\textsuperscript{178}

In \textit{Lambert},\textsuperscript{179} Lord Hope recognised that s 3 may require an explanation of ‘the effect of the provision ... without altering the ordinary meaning of the words used’ or require the statutory words adopted ‘to be expressed in different language in order to explain how they are to be read in a way that is compatible.’\textsuperscript{180} His Lordship also stated that ‘it may be necessary for words to be \textit{read in} to explain the meaning that must be given to the provision if it is to be compatible.’\textsuperscript{181}

\textsuperscript{170} Ibid,\textsuperscript{76}. For case examples on this distinction, see \textit{Adon} [2001] EWCA Civ 1916 [42]; \textit{Roth} [2003] 1 QB 728, [156].

\textsuperscript{171} Ibid.

\textsuperscript{172} \textit{R v A (No 2) [2002] 1 AC 45}. This case dealt with the admissibility of evidence in a rape trial under \textit{Youth Justice and Criminal Evidence Act 1999 (UK)} c 23, s 41.

\textsuperscript{173} Ibid, 68 (Lord Steyn).

\textsuperscript{174} Ibid. For examples of ‘\textit{reading in},’ see \textit{Goode v Martin} [2001] EWCA Civ 1809, especially at [461]–[477]; \textit{R (Whitehead) v Chief Constable of Avon & Somerset} [2001] EWHC Admin 433, [19]–[29].

\textsuperscript{175} \textit{R v A} [2002] 1 AC 45, 68 (Lord Steyn).

\textsuperscript{176} Ibid.

\textsuperscript{177} Ibid (emphasis in original). Lord Steyn’s approach has been followed in numerous cases, including \textit{Adon} [2001] EWCA Civ 1916 [42], [87] – [92]; \textit{Roth} [2003] 1 QB 728, 782; \textit{R (Hooper) v Secretary of State for Work and Pensions} [2002] EWHC Admin 191 [157] (‘Hooper No 1’); \textit{R (Hooper) v Secretary of State for Work and Pensions} [2003] EWCA Civ 813 [26] (‘Hooper No 2’). Lord Hope was more restrained in this case: [110]. Other judges have expressed a preference for the approach of Lord Hope: see, eg, \textit{Adon} [2001] EWCA Civ 1916 [93] (David Steele J).

\textsuperscript{178} \textit{R v A} [2002] 1 AC 45, 87 (Lord Hope). His Lordship preferred to read down any language that threatened compatibility.87 Other judges have expressed a preference for the approach of Lord Hope: see, eg, \textit{Adon} [2001] EWCA Civ 1916 [93] (David Steele J).

\textsuperscript{179} \textit{R v Lambert} [2002] 2 AC 545 (‘Lambert’).

\textsuperscript{180} Ibid, 586. See eg, \textit{Cochia v Fathi} [2001] EWCA Civ 998, [29], where the word ‘\textit{action’} was taken to mean ‘\textit{served process’ in order to ensure compatibility of s 2(3) of the \textit{Road Accidents Act 1976 (UK)’}, c 30, with the art 6(1) right to access to a court.

\textsuperscript{181} \textit{Lambert} [2002] 2 AC 545, 584. This has been approved in later cases, including \textit{Hooper No 1} [2002] EWHC Admin 191 [158]; \textit{Hooper No 2} [2003] EWCA Civ 813 [26].
but that reading in ‘will not’ be possible if the legislation contains provisions ... which expressly [or by necessary implication] contradict the meaning which the enactment would have to be given to make it compatible." Lord Hope also emphasised that ‘reading words in to give effect to the presumed intention must always be distinguished carefully from amendment’. His overarching concern was that s 3 be used in a manner that ‘respect[s] the will of the legislature so far as this remains appropriate’. In Lambert, the majority of the House of Lords retained the original words used by the legislator, but altered the meaning of the words. Rather than reading the legislative words as imposing a legal burden of proof on the defendant in violation art 6(2), the majority read the legislative words as imposing only an evidential burden of proof on the defendant which the prosecution had the legal burden of rebutting.

The House of Lords in re S," however, reined in the s 3 interpretative obligation. This case concerned provisions of the Children Act 1989, under which a court could issue a care order for a child based upon, inter alia, a care plan presented by a local authority. The Court of Appeal saved the care scheme from incompatibility with arts 6 and 8 of the European Convention on Human Rights (‘ECHR’) by, inter alia, reading an innovation into the legislation. The Court was to ‘star’ the essential goals of the local authority’s care plan if the starred items were not realised within a reasonable time, the local authority had to inform the child’s guardian, which then empowered the guardian or the local authority to seek further direction from the Court.

Lord Nicholls, writing unanimously for the House of Lords, overturned the Court of Appeal decision. Lord Nicholls identified a clear parliamentary intent to divide responsibility for care of children between the courts and local authorities.

182 Lambert [2002] 2 AC 545, 583 (emphasis added). His Lordship emphasised that the power to read in ‘does not give power to the judges to overrule decisions which the language of the statute shows have been taken on the very point at issue by the legislator’: 586. This has been approved in later cases, including Hooper No 1 [2002] EWHC Admin 191 [158]; Hooper No 2 [2003] EWCA Civ 813 [26].

183 Ibid 584.

184 Ibid 585 (Lord Hope).


186 In re S (Minors) (Care Order: Implementation of Care Plan); In re W (Minors) (Care Order: Adequacy of Care Plan) 2 AC 291 (‘re S’).

187 Children Act 1989 (UK) c 41.

188 The proceedings related to two cases: in the first case the local authority failed to implement the care plan and, in the second, the court issued a final care order based on an uncertain care plan.

189 W and R (Children): W (Children) [2001] EWCA Civ 757 [30] (‘W and R’). The other judicial innovation read into the legislative scheme was the articulation of guidelines which gave judges wider discretion to make an interim care order: at [29]. The House of Lords rejected these guidelines in favour of a more flexible approach which was consistent with the legislation and conformed to the requirements of art 8 re S [2002] 2 AC 291, 323-6.

190 re S [2002] 2 AC 291, 310, 312.
Under the legislation, the court functions as 'the gateway into care', considering whether the threshold requirements for a care order are satisfied and whether a care order is in the best interests of the child. The local authority then became responsible for the care of the child; the court was not to retain any supervisory role over the care of the child.

Lord Nicholls noted that s 3 was stated in 'uncompromising language' and 'a powerful tool whose use is obligatory'; however, 'the reach of this tool is not unlimited.' The outer limit of s 3 precludes legislation by the judiciary. Identifying the outer limit of s 3 was acknowledged as the challenge, with the following guidance given:

[A] meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation.

The outer limit of s 3 interpretation 'may be crossed even though a limitation on Convention rights is not stated in express terms', with Lord Nicholls expressly stating that 'Lord Steyn's observations in R v A ... are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise.' Applying s 3, the 'starring' system innovation was inconsistent with a fundamental feature of the care scheme—that courts do not retain a supervisory role—such that it was improper judicial amendment, not interpretation.

In Bellinger, the House of Lords held that the traditionally gendered definition of marriage under s 11(c) of the Matrimonial Causes Act was incompatible with the rights of post-operative transsexuals and could not be saved by s 3 interpretation. Therefore a declaration of incompatibility was granted. Lord Hope approved

191 Ibid 311.
192 Ibid 313
193 Ibid.
194 Ibid.
195 Ibid (emphasis added).
196 The 'far-reaching practical ramifications for local authorities and their care of children' under such a "starring" system is a 'matter ... for decision by Parliament, not the courts': Ibid 314. Additional ramifications included the additional administrative work and expense, and the impact on the discharge by authorities of their duties to children: at 314. Turning to compatibility, Lord Nicholls held that the legislative scheme did not violate the art 8 right to respect for family life: at 318. However, his Lordship held that the art 6(1) right to fair trial could be violated in certain circumstances relating to decisions taken by the local authority while a care order is in force (at 322); however, the solution for such a violation lies in the grant of judicial remedies under s 8 of the HRA and, on the facts, no violation was found (at 323).
197 Bellinger v Bellinger [2003] 2 AC 467 ("Bellinger").
198 Matrimonial Causes Act 1973 (UK), c 18.
199 Bellinger [2003] 2 AC 467, 475, 478, 481-2
of the entirety of Lord Steyn’s assessment of s 3 in R v A,\textsuperscript{200} including the view that incompatibility will arise ‘if a clear limitation on Convention rights is stated in terms’,\textsuperscript{200} Lord Hope also referred to Lord Nicholls’ judgment in re S, but interestingly did not cite his refinement of Lord Steyn’s observations.\textsuperscript{202} Despite Lord Hope’s support in Bellinger, Lord Steyn in Anderson accepts the views expressed in re S. His Lordship stated that ‘s 3(1) is not available where the suggested interpretation is contrary to the express statutory words or is by implication necessarily contradicted by the statute.’\textsuperscript{203}

In Ghaidan v Godin-Mendoza (‘Ghaidan’),\textsuperscript{204} a provision of the Rents Act 1997\textsuperscript{205} which secured a statutory tenancy by succession for survivors in heterosexual relationships, whether married or unmarried, was held to violate the rights of cohabiting homosexual couples – in particular, the right to respect for home under art 8 when read with non-discrimination rights under art 14 of the ECHR. The rights-incompatible provision was the definition of ‘spouse’: ‘a person who was living with the original tenant as his or her wife or husband.’\textsuperscript{206} The House of Lords, in upholding the Court of Appeal, saved this provision through s 3 interpretation by reading in three words, so the definition became ‘as if they were his wife or husband...’\textsuperscript{207} [or her omitted]

Lord Nicholls admitted that ‘section 3 itself is not free from ambiguity’\textsuperscript{208} because of the word ‘possible’. His Lordship pondered what ‘standard’ or ‘criterion’ should be used to construe ‘possibility’, admitting that a ‘comprehensive answer to this question is proving elusive.’\textsuperscript{209} Describing s 3 as ‘unusual and far-reaching in character’, Lord Nicholls opined that s 3 may require ‘a court to depart from the unambiguous meaning the legislation would otherwise bear’ and depart from ‘the intention reasonably to be attributed to Parliament in using the language in

\textsuperscript{200} See also Shaylor [2003] 1 AC 247 [52], where Lord Hope reiterates his previous understandings of s 3.


\textsuperscript{202} See Bellinger [2003] 2 AC 467, 486. Lord Hope cited [38] and [39] only of Lord Nicholls’ judgment; his Lordship did not cite Lord Nicholls, above n 194 and 196 and accompanying text. His Lordship did agree that the judiciary could not resolve the incompatibility between the legislative and Convention rights ‘judicially by means of the interpretative obligation in s 3(1): at 486.

\textsuperscript{203} R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837, 894 (‘Anderson’). Again, interestingly, although Lord Steyn referred to re S is support of this proposition, he did not refer to Lord Nicholls’ statement that directly related to his opinion in R v A. Lord Steyn cited [41] rather than [40] which directly addressed his comments: Anderson [2003] 1 AC 873, 894.

\textsuperscript{204} 2 AC 557.

\textsuperscript{205} Rents Act 1977 (UK).

\textsuperscript{206} Rents Act 1977 (UK), Sch 1, para 2(2).

\textsuperscript{207} Ghaidan [2004] 2 AC 557 [35], [36] (Lord Nicholls); [51] (Lord Steyn); [129] (Lord Rodger); [144], [145] (Baroness Hale). Lord Millett dissented. His Lordship agreed that there was a violation of the rights [55], and agreed with the approach to s 3 interpretation [69], but did not agree that the particular s 3 interpretation that was necessary to save the provision was ‘possible’: see espec [57], [78], [81], [82], [96, [99], [101].

\textsuperscript{208} Ibid [27].

\textsuperscript{209} Ibid.
question." The elusive question is 'how far, and in what circumstances, section 3 requires the court to depart from the intention of the enacting Parliament' which, in turn, depends on Parliament's intention in enacting s 3 of the HRA. According to Lord Nicholls, the parliamentary intention in enacting s 3 allows courts to interpret legislative language 'restrictively or expansively', 'to read in words which change the meaning of the enacted legislation', to 'modify the meaning, and hence the effect' of legislation, and to imply words provided they 'go with the grain of the legislation'. However, the parliamentary intention in enacting s 3 does not allow courts to 'adopt a meaning inconsistent with a fundamental feature of legislation' or 'the underlying thrust of the legislation being construed', nor 'to make decisions for which they are not equipped.'

Lord Steyn considered s 3 in its context as the 'principal remedial measure' in the HRA, and identified two problems with its use. First, his Lordship resisted claims that reading in or reading down undermined the parliamentary intention in enacting the impugned legislation. According to his Lordship, such claims fail to account for the 'countervailing will of Parliament as expressed in the HRA', and the fact that the British Parliament rejected the New Zealand model which would have required s 3 interpretations to be reasonable interpretations. Second, Lord Steyn criticised the 'excessive concentration on linguistic features' of legislation. If the 'core remedial purpose of s 3(1) is not to be undermined a broader approach is required', an approach 'concentrating ... in a purposive way on the importance of the ... right.' This approach reinforces 'that resort to [a declaration of incompatibility] must always be an exceptional course.'

This review indicates the difficulty in identifying 'possible' s 3 interpretations. The judiciary has retreated from the 'boldest exposition' of Lord Steyn, who initially signalled 'that the interpretative obligation is so powerful that [the judiciary] need scarcely ever resort to s 4 declarations', suggesting that 'interpretation is more in the nature of a 'delete-all-and-replace' amendment.' This has been moderated

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210 Ibid, [30]. 'Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the parliament which enacted the legislation': at 571.
211 Ibid.
212 Ibid [32]-[33]. Lord Rodger agreed with these propositions ([121], [124]), as did Lord Millet ([67]).
213 Ibid [33]. Lord Rodger agreed with these propositions ([121]), as did Lord Millet ([585]).
214 Ibid [39].
215 Ibid [40].
216 Ibid [44].
217 Ibid [41].
218 Ibid [41] and [49] respectively.
219 Ibid [50]. Lord Millet held that s 3 allows a court to give legislative language 'a meaning which, however unnatural or unreasonable, is intellectually defensible': Ibid [67]. Indeed, courts 'can do considerable violence to the language and stretch it almost (but not quite) to breaking point': Ibid [67]
by Lord Hope in Lambert, the Law Lords in Re S and Lord Steyn himself in Anderson. These decisions indicate s 3 allows the judiciary to clarify the meaning and effect of ordinary legislative words, to express legislative words in different language, to read down over-broad legislation and to read in legislative provisions. Section 3, however, excludes the de facto enactment or amendment of legislation. Accordingly, s 3 cannot save incompatible legislation if its use would contradict the express or implicit will of Parliament, or alter the fundamental features or underlying thrust of a legislative scheme.\(^{222}\)

The salient point is that, no matter how many judicial expositions are offered, there is no clear line between judicial interpretation and judicial law-making. Woolf CJ admits its clarity lies in application rather than exposition. But even in its application, s 3 causes controversy. One need look no further than the commentary provoked by R v A. This case addressed the admissibility of evidence in a rape trial. Section 41 of the Youth Justice and Criminal Evidence Act 1999\(^{223}\) prohibited the leading of prior sexual history evidence, without the leave of the court; that is, there was a general prohibition with some narrowly defined exceptions.\(^{224}\) The House of Lords held that the provision unjustifiably limited the defendant’s right to a fair trial under art 6 of the ECHR\(^{225}\) — although the legislative objective was beyond reproach, the legislative means were excessive. The provision was saved through s 32 ’possible’ interpretation, with the House of Lords interpreting the provision as being ‘subject to the implied provision that evidence or questioning which is required to ensure a fair trial ... should not be treated as inadmissible.’\(^{226}\) Accordingly, a non-discretionary general prohibition on evidence was re-interpreted to allow discretionary exceptions.

The main criticism of R v A is that injecting discretion back into a non-discretionary, prohibitory rule of evidence goes against the intention of Parliament.\(^{227}\) Kavanagh disagrees with this assessment because it exaggerates what the s 3 re-interpretation achieves in that particular case.\(^{228}\) Nevertheless, she acknowledges that s 3 re-interpretations may go against the parliamentary intention behind the impugned legislation, but that this must be balanced against the parliamentary intention behind the HRA. If there is a clash between the parliamentary intentions in the HRA (rights-compatibility) and the impugned legislation (rights-incompatibility),


\(^{223}\) Youth Justice and Criminal Evidence Act 1999 (UK) s 23.

\(^{224}\) The court could grant leave to lead evidence where the sexual behaviour was contemporaneous to the alleged rape (s 41(3)(b)) or the sexual behaviour is similar to past sexual behaviour (s 41(3)(c)).

\(^{225}\) The ECHR, opened for signature 4 November 1950, 213 UNTS 222, arts 6 and 8 (entered into force 3 September 1953).

\(^{226}\) R v A [2001] 1 AC 45, 68. In particular, Section 41(3)(b) was interpreted so as to admits evidence of contemporaneous sexual behaviour, only if it was truly contemporaneous to the alleged rape. Section 41(3)(c) was interpreted so as to admit evidence of similar past sexual behaviour, only if it was so relevant to the issue of consent, that to exclude it would endanger the fairness of the trial.

\(^{227}\) For a review of and critique of the criticisms, see Kavanagh, above n 220.

\(^{228}\) ibid 267-8.
Kavanagh argues that the HRA takes priority. Section 3 may require judges to create a compatible interpretation when Parliament enacts incompatible legislation. To many, this will look more like judicial legislation than judicial interpretation. Lords Nicholls and Steyn acknowledge this clash of intentions in Ghaidh.

Scrutiny of the judiciary and debate about whether judges merely interpreted or actually legislated in particular cases, per se, is not a problem. Indeed, it will be legitimate to criticise the judiciary if it strays into the territory of judicial legislation, as this undermines the preservation of parliamentary sovereignty under the Charter. However, because the difference between judicial interpretation and judicial law-making is imprecise, there will be no clear answer: at what point does expressing legislative intent in different language become judicial law-making? At what point does reading down, or reading in, parliamentary language by the judiciary become judicial law-making? How substantial a change from the fundamental features of legislation must judges make before s 3 interpretation is 'likely' to be judicial amendment? It will be impossible to determine such debates in an objective fashion, making allegations of improper judicial activism and law-making easy to make and very difficult to defend or resolve.

This has the real potential to undermine the independence and standing of the judiciary, the administration of justice, and the rights project. Recall the public and media reactions in Australia to previous rights-based judicial decisions. The decision in Dietrich was 'denounced as an unwarranted judicial interference'. The cases developing the implied freedom to political communication garnered 'a considerable amount of criticism of the High Court [as] acting beyond its proper function'. It was Mabo and Wik, the land rights cases which attracted the

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229 Ibid 269. This is because the concept of implied repeal – that later inconsistent legislation impliedly repeals earlier legislation – is not contained in the HRA. The s 3(1) interpretative obligation applies to legislation whenever enacted. This is the same under the Charter because the interpretative obligation applies to all statutory provisions: Charter 2006 (Vic), s 32.


232 Ibid 396.

'loudest and most shrill' allegations of judicial activism. The criticism of *Mabo* went beyond legitimate advocacy for legislative alteration of the legal principles established in the case, to illegitimate 'subject[ing of] judges to personal abuse, and that is to be deplored'. It has been described as 'scathing criticism, sometimes descending to the personal'. The *Wil* decision attracted a 'torrent of abuse'; the criticism of the decision has been described as 'extreme and ... irresponsible', a 'strident attack' that 'was not only intemperate; it could reasonably be construed as inciting contempt for the Court'; it 'went beyond criticism of the majority reasoning ... and [was] damaging to public confidence in the High Court'. The integrity of the Court was challenged in this process, with the descent 'to abuse and personal attack'.

If the *Charter* creates anxiety about judicial activism, care is needed in response. In particular, various beliefs fuel perceptions of judicial activism, including: that in a liberal democracy, 'real' rights are rarely threatened; that rights are trumps for the judiciary to enforce against the elected arms of government; and that true democracy requires parliamentary supremacy. Each of these assumptions represents views that people may validly hold. However, it is these assumptions that need to be discussed and debated, not slogans such as 'judicial activism', which 'hints at, if not judicial impropriety, at least judicial overreaching, while hiding controversial assumptions about judging, rights, and democracy'. Allegations of judicial activism will also undoubtedly result in calls for increased judicial deference, with the concomitant risks for the institutional dialogue and under-enforcement of rights, issues further explored in Section III.A.

234 Zines, above n 231, 403. The allegations included the improper appeal to the expectations of the international community, the improper judicial (rather than parliamentary) assessment of contemporary Australian values, the uncertainty cast over property law, the fact that the court did not confine itself to the facts before it, and the improper use of history and emotive language. At 406–7. The High Court came under attack by Tim Fischer (then Deputy Prime Minister) before the decision, who complained of an unjustifiable delay in handing down the decision: Hong Phun Lee, 'Subverting Judicial Independence' (1998) *Constitutional Law and Policy Review* 35, 56.


237 Zines, above n 231, 408.


239 Lee, above n 234, 56.

240 Mason, above n 238, [16]. See also King, above n 236, 455–6. Daryl Williams (Attorney-General) considered that 'the recent debate following *Wil* has fallen well short of undermining public confidence in the ability of the judiciary to deal with cases impartially, on their merits and according to law', such that it was not 'proper [or] incumbens on an Attorney-General to intervene': King, above n 236, 457 (citation omitted).


243 Roach, above n 70, 207.
These points are, again, no better illustrated than by \( R \text{ v } A \). Although criticism was primarily launched at the \( HRA \) itself and the judicial application of the \( HRA \), the real problems with \( R \text{ v } A \) lie elsewhere. First, the subject matter (sexual history evidence) and the outcome of the case (that conviction in rape cases may be more difficult) are inherently controversial. That there were strong competing interests to be balanced — those of defendants and of victims — amplified the controversy.244 ‘Real’ rights were at stake here, even though the rights of defendants in sexual assault cases failed to garner public sympathy. Secondly, \( R \text{ v } A \) confirmed fears that the \( HRA \) would expand judicial power — in this case, by judges injecting discretion back into a non-discretionary evidentiary rule.245 This perpetuates the myth that judges trump the representative arms with rights under the \( HRA \). Thirdly, it was difficult to accept \( R \text{ v } A \) because the impugned legislation was enacted after the \( HRA \).246 This reaction, however, fails to acknowledge that the \( HRA \) makes no differentiation between pre- and post-\( HRA \) legislation and, that in enacting the \( HRA \), Parliament acknowledged that democracy and parliamentary supremacy must be tempered by rights that are partly enforceable by judges. The salient point is that debate should focus on the underlying issues — the precise balance of rights between competing rights-holders, that the representative arms can trump the judicial interpretation under the \( HRA \), and that the meaning of democracy is contested — rather than simply court- or \( HRA \)-bashing.

The ambiguity of the interpretative obligation and the elusiveness of the distinction between proper judicial interpretation and improper judicial law-making have been inherited under the \( Charter \). Even though the s 32 interpretative power states explicitly that the statutory interpretation must be compatible ‘so far as it is possible to do so consistently with [statutory] purpose’, the debate about ‘possible’ interpretations may not be avoided. Let us now consider the additional proviso placed on the judicial interpretative power under the \( Charter \).247

2 ‘Consistently With [Statutory] Purpose’?

We need to establish whether the additional phrase ‘consistently with [statutory] purpose’ is an additional, unique proviso placed on the s 32 judicial interpretative power, or simply a codification of the British jurisprudence. Let us explore what ‘consistently with [statutory] purpose’ means, how it interacts with the other provisions of the \( Charter \) and how, if at all, it differs from the British jurisprudence.

The additional phrase ‘consistently with [statutory] purpose’ in s 32 is at odds with other relevant provisions under the \( Charter \). Section 1(2) states that:

244 Kavanagh, above n 220, 270.
245 Ibid 271.
246 Ibid.
247 Lord Nicholls clearly states that conceptually, there is only one limit under s 3 of the \( HRA \) in \( Ghaidan [2004] 2 AC 557 \) [32] as follows: ‘the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is “possible”, a court can modify the meaning, and hence the effect, of primary and secondary legislation’.
"[The main purpose of this Charter is to protect and promote human rights by: ... (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as it possible in a way that is compatible with human rights; (c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; ... and (e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right...'] [emphasis added]. Section 36(2) states that ‘if... a statutory provision cannot be interpreted consistently with a human right, the [Supreme] Court may make a declaration to that effect.’ (emphasis added)

The first matter to note is that ss 1(2) and 36 do not include the additional phrase ‘consistently with [statutory] purpose’. Most importantly, there is a clear discrepancy between the interpretation obligation as stated in the purposes provision which does not refer to consistency with statutory purpose (s 1(2) (b)) compared with the substantive provision which requires consistency with statutory purpose (s 32). Secondly, the pre-condition to issue a judicial declaration as stated in both the purposes provision (s 1(2)(c)) and the substantive provision (s 36) is that a statutory provision cannot be interpreted ‘consistently’ with protected rights, whereas the wording of the interpretative obligation as stated in the purposes provision (s 1(2)(b)) or the substantive provision (s 32) refers to statutory interpretations that are ‘compatible’ with protected rights. Moreover, it is unclear why s 32 uses the word ‘consistently’ with respect to the statutory purpose of the impugned legislation, whilst the declaration provisions use the word ‘consistently’ with respect to the protected rights.

These discrepancies will have to be clarified by the judiciary come 1 January 2008. Some guidance on this clarification comes from the Explanatory Memorandum to the Charter, which states that the reference to statutory purpose is to ensure ‘courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.’ This is no more than a codification of the British jurisprudence to date, which categorises displacement of parliamentary purposes and displacement of legislative objectives as examples of impossible interpretations. The HRC Committee recommended the inclusion of ‘consistently with [statutory] purpose’ and it expressly acknowledged that the inclusion of this phrase was ‘consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured’. The HRC Committee cited the case of Ghaidan, particularly Lord Nicholls’ opinion that s 3 interpretation ‘must be compatible with the underlying thrust of the legislation being construed’ and Lord Rodger’s opinion that s 3 ‘does not allow the courts to change the substance of a provision completely, to change a provision from

248 Explanatory Memorandum, above n 16, 23. The parliamentary debate was silent on the matter.
one where Parliament says that x is to happen into one saying that x is not to happen.\textsuperscript{230}

Beyond \textit{Ghaidan}, many British cases support ‘consistently with [statutory] purpose’ as an example of \textit{impossible} interpretations. In relation to the concern evident in the Explanatory Memorandum to preserve parliamentary intention, there is growing British jurisprudence that a displacement of parliamentary intention would not constitute a possible interpretation. Indeed, even in the ‘high water mark’\textsuperscript{231} judgment of Lord Steyn in \textit{R v A}, his Lordship recognised the need to ensure the viability of the essence of the legislative intention of the legislation being construed under s 3.\textsuperscript{232} Lord Hope in \textit{R v A} emphasised that a s 3 interpretation is not possible if it contradicted express or necessarily implicit provisions in the impugned legislation because express legislative language or necessary implications thereto are the ‘means of identifying the plain intention of Parliament.’\textsuperscript{233} His Lordship further highlighted in \textit{Lambert} that interpretation involves giving ‘effect to the presumed intention’\textsuperscript{234} of the enacting parliament. Lord Nicholls in \textit{re S} identified a clear parliamentary intent to give the courts threshold jurisdiction over care orders with no continuing supervisory role, which the s 3 interpretation of the Court of Appeal improperly displaced.

In relation to the concern evident in the Explanatory Memorandum to preserve legislative objects, the British jurisprudence has held that s 3 interpretation will not allow displacement of the fundamental features of legislation. This is clear in \textit{Ghaidan}, \textit{re S} and in \textit{R v Anderson}.\textsuperscript{235} Overall, the additional phrase ‘consistent with [statutory] purpose’ in the \textit{Charter} simply codifies the British jurisprudence, such that the main operative limit on the s 3/s 32 judicial interpretation power is that an interpretation must be ‘possible’, with an interpretation that is \textit{inconsistent} with statutory purpose being an example of an \textit{impossible} interpretation. With the

\textsuperscript{230} \textit{Ghaidan} [2004] 2 AC 357 [33] (Lord Nicholls), [100] (Lord Rodger). Pamela Tate SC, the Solicitor-General, further explains that the focus on the \textit{Ghaidan} decision and the more purposive approach to interpretation was to avoid judicial interpretations, such as, \textit{R v A} [2002] 1 AC 45: Pamela Tate, \textit{The Charter of Human Rights and Responsibilities} (Paper presented at the Australian Institute of Administrative Law (Victorian Chapter), Melbourne) 19-20; Pamela Tate, ‘Some Reflections on Victoria’s Charter of Human Rights and Responsibilities’ (2007) 52 Australian Institute of Administrative Law Forum 18, 28. See also Williams, above n 3, 902.


\textsuperscript{232} \textit{R v A} [2002] AC 45[44]–[45].

\textsuperscript{233} ibid [108] (Lord Hope) (as above).

\textsuperscript{234} \textit{Lambert} [2001] 2 AC 545, [81].

\textsuperscript{235} \textit{Ghaidan} [2004] 2 AC 357 and \textit{re S} [2002] 2 AC 291 are discussed above. In \textit{Anderson} [2003] 1 AC 837, the imposition of a sentence, which includes the tariff period, was held to be part of the trial such that the involvement of the Home Secretary in tariff setting violated the convicted murderers’ art 6(1) right ([20] – [29] (Lord Bingham), [49], [54] – [57] (Lord Steyn), [67], [78] (Lord Hutton). The House of Lords then concluded that the legislative provision on tariff setting could not be interpreted compatibly with Convention rights under s 3 of the HRA. Under legislation ‘the decision on how long the convicted murderer should remain in prison for punitive purposes is [the Home Secretary’s] alone’ ([30] (Lord Bingham), [30] (Lord Hutton). To interpret the legislation ‘as precluding participation by the Home Secretary... would not be judicial interpretation but judicial vandalism’ ([40] (Lord Bingham), giving the provision a different effect from that intended by Parliament. See also [39] (Lord Steyn), [81] (Lord Hutton). The House of Lords issued a declaration of incompatibility.
focus of s 32/3 being on 'possibility', the debates identified in section III.A.1 will be alive in Victoria.

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

Applying the idea of two competing purposes to the additional phrase ‘consistently with [statutory] purpose’ in s 32 is illuminating. If the Supreme Court was to follow the reasoning in Ghaidan, the discrepancy between s 1(2)(b) and s 32 becomes highly relevant. Ghaidan clearly indicates that, in pursuing the purpose of the impugned legislation, the purpose behind the s 3's s 32 interpretative power itself cannot be ignored. The purpose behind the Charter as expressed in s 1(2)(b) is to achieve rights-compatible interpretation without explicit reference to consistency with statutory purpose. How is this purpose to be balanced against both the express language of s 32 and the purpose in impugned legislation? Regarding s 32, a legitimate interpretation could be to read ‘consistently with [statutory] purpose’ as a mere codification of British jurisprudence, including Ghaidan. This means that the statutory purpose of impugned legislation is not an automatic override of the Charter statutory purposes. Regarding balancing competing purposes, when balancing the purposes of the Charter with an inconsistent purpose contained in impugned legislation, one simply looks to the rules on ‘possibility’, which include rules about not undermining the statutory purpose; that is, one follows the formula on possibility and impossibility in the British jurisprudence, including Ghaidan. Accordingly, the additional phrase ‘consistently with [statutory] purpose’ will not mute the debate which occurs in Britain over which of the two parliamentary purposes ought prevail. Again, the debates identified in section III.A.1 will be alive in Victoria.

If the Supreme Court was to reject that the inclusion of ‘consistently with [statutory] purpose’ is a codification of the British jurisprudence and particularly the Ghaidan authority, numerous problems and anomalies arise. Is it open for the Supreme Court to hold that ‘consistently with [statutory] purpose’ requires the judiciary to automatically favour the statutory purposes of the impugned legislation over the purposes of the Charter when interpreting under s 32? If yes, this significantly reduces the impact of an already relatively weak human rights instrument. This would basically emasculate the s 32 interpretative power from a rights perspective. It would become too easy for the majoritarian legislature.

to restrict the protection and promotion of the rights of the weak, the vulnerable and the minority. Moreover, it would also undermine s 32, which is indeed the primary remedial mechanism in the Charter. Section 36 does not affect the statutory provision, nor create any legal rights or give rise to any civil cause of action. Section 39 does not create any free-standing relief or remedies where a public authority acts unlawfully, by breaching its statutory duty to act compatibly with protected rights or give proper consideration to human rights when making decisions. Section 32 is a complete remedy for incompatible legislation: a rights-compatible interpretation is a complete remedy for a person whose rights would have otherwise been violated by incompatible law. Section 32 is also a complete remedy against public authorities who act unlawfully, as it prevents a public authority relying on the major exception to the obligation to act lawfully in s 38(2), being that the public authority was simply giving effect to incompatible legislation. Indeed, Lord Steyn in Ghaidan recognises that the interpretation power is the primary remedy under the HRA and the remedial reach of the interpretative power will be undermined if a broad approach to interpretation is not adopted. If the purpose of the protected right is automatically overridden by the purposes of the impugned legislation under the Charter because of the phrase 'consistently with [statutory] purpose', s 32 loses much of its remedial thrust.

Further, can the purpose of impugned legislation be properly assessed without any reference to the purpose of the Charter in protecting and promoting rights? Surely the commitment to the protected rights – which are 'essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom' – contained in the quasi-constitutional Charter must have some weight when assessing the purposes behind legislation enacted after 1 January 2007, being the date when ss 28 and 30 came into effect. For legislation enacted before 1 January 2007, is it fair to allow the purposes behind pre-Victorian Charter legislation to trump the operation of the Charter, particularly given the fact that pre-Victorian Charter legislation could not have been enacted with avoidance of protected rights in mind? Furthermore, how would such a restricted reading of s 32 interact with statements of compatibility? Would a statement of compatibility that was contradictory with an incompatible statutory purpose simply be ignored, rendering s 28 farcical and one dialogue tool unreliable? This outcome is not far-fetched when you consider that statements of compatibility are not binding on courts or tribunals, but an automatic preference for the statutory purpose of impugned legislation over Victorian Charter purposes would be. Again, this outcome seems untenable. Surely it is preferable to allow the later in time statement of compatibility (which suggests that the intended statutory purpose was to uphold rights) to be used to ensure that compatible statutory purposes of impugned legislation are identified in the s 32 interpretation process, such that any apparent competing contrary statutory purpose behind impugned legislation

257 Human Rights Law Resource Centre, above n 249, ch 5, 46.
258 Ghaidan [2004] 2 AC 557 [39], [41], [46], [49]. See also above n 214, 217,218.
259 Charter 2006 (Vic) perambulatory paragraph 2.
260 Charter 2006 (Vic) s 28(4).
does not prevail. Finally, such a restrictive reading of s 32 is not consistent with the Explanatory Memorandum that states that ‘the object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to give effect to human rights’. \(^{261}\) A narrow reading of s 32 will reduce the ability of courts and tribunals to give effect to the protected rights.

Another argument that may arise in support of giving ‘consistently with [statutory] purpose’ prevalent status is that s 32 ought to be limited to allowing ‘reasonable interpretations’. Use of the word ‘reasonable’ is another way of limiting the interpretative power of the judiciary: ‘the meaning of “possible” [interpretations] are not necessarily “reasonable”’,\(^{262}\) such that a reasonable interpretation gives the judiciary a less radical interpretative obligation than ‘possible’ interpretation. The idea of ‘reasonable’ interpretations comes from the New Zealand Bill of Rights Act.\(^{263}\) Section 6 of that Act states that a meaning consistent with the protected rights is to be preferred if the legislation ‘can be given’ that meaning. This ‘only authorises consistent meanings that can be “reasonably” or “properly” given, or that are “fairly open” and “tenable”... [It] does not authorise a “strained interpretation”’.\(^{264}\) This approach is significantly different to s 32 of the HRA.

Indeed, a proposed amendment to adopt the New Zealand approach was rejected by the House of Commons when enacting the HRA, with the difference between ‘reasonable’ interpretations and ‘possible’ interpretations being fully recognised and the latter preferred.\(^{265}\) Victorian too was free to choose between the New Zealand and British models and chose the British model. Thus, any arguments based on ‘reasonable’ interpretations should be dismissed.

Finally, reference to the ICCPR may help to clarify the meaning of ‘consistently with [statutory] purpose’. Art 2(3) of the ICCPR imposes an obligation on States parties to provide effective remedies for violations of rights. The narrower the s 32 judicial power of interpretation, the less likely Victorians will be provided with effective remedies. This not only risks a violation of international human rights law, it also undermines the international rule of law which, according to the first perambulatory principle in the Charter, is an essential part of a democratic society.\(^{266}\)

In any event, the suggested approach to identifying statutory purpose by Evans and Evans has much to commend it. Rather than identifying statutory purpose from the plain, natural and literal meaning of the legislation, Evans and Evans argue that a purposive approach should be used. That is, the judiciary should

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261 Explanatory Memorandum, above n 16, 23.
263 Bill of Rights Act 1990 (NZ) s 6.
265 United Kingdom, Parliamentary Debates, House of Commons, 3 June 1998, col 421-3 (Mr Jack Straw MP, Secretary of State for the Home Department). The Home Secretary stated ‘[i]f we had used just the word “reasonable”, we would have created a subjective test. “Possible” is different. It means, “What is the possible interpretation? Let us look at this set of words and the possible interpretations”’: at col 422-3. This was confirmed in Ghaidan [2004] UKHL 30 [44] (Lord Steyn).
266 Charter 2006 (Vic), preamble.
look to the purpose, or the mischief, that the legislation sought to achieve when attributing statutory purpose to the impugned legislation. This approach is supported by Ghaidan. Lord Nicholls opines that too much emphasis has been placed on the 'language of a statute, as distinct from the concept expressed in that language' under s 3 analysis.\(^{267}\) This obsession with the form of words chosen by a draftsperson is nonsensical 'once it is accepted that s 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear'.\(^{268}\) Similarly, Lord Steyn laments the 'excessive concentration on linguistic features'\(^{269}\) of legislation.

Let us turn to the drafting discrepancy between ss 32 and 36. There is no explanation in the Explanatory Memorandum,\(^{270}\) the second reading speech or parliamentary debate about why s 32 refers to compatibility of human rights, whilst s 36 uses the word consistency with human rights. The HRC Committee draft Charter did not make such a distinction, with both ss 32 and 36 using compatibility terminology. The terminology of the draft Charter is preferable to the terminology of the Charter because consistent use of terminology between ss 1(2)(b) and (e), 32 and 36 is most sensible. It remains to be seen if the judiciary place any weight on the different terminology. Evans and Evans have argued that the difference in terminology may be intended to ensure that s 36 declarations are viewed 'merely as disagreements between parliament and the courts over interpretation rather than acknowledging that declarations are evidence of problems with human rights compliance'\(^{271}\) of the State. This difference in terminology could thus promote the dialogue model because it supports the idea that interpretation of rights is not exclusively for the judiciary. If this proves to be the reasoning, it may be undermined if a generous reading is given to 'consistently with [statutory] purpose', as this restriction on the judicial task of interpretation will reduce the potential for dialogue.

3 Conclusion

Section III.A.1 explored the British jurisprudence on the proper scope of s 3 judicial interpretation. It highlighted that s 3 has the potential to result in allegations of improper judicial law-making and activism, which consequently threatens the standing of the judiciary. To avoid such allegations and judicial disrepute thereby created, the judiciary may become deferential to the representative arms of government which compromises the judicial contribution to the dialogue, undermines the protected rights, and threatens the system of rights accountability introduced under the Charter, are issues to be addressed in Section III.B. The

\(^{267}\) Ghaidan [2004] 2 AC 557 [31]. This is supported by Lord Steyn: at [41] and [49].

\(^{268}\) Ibid [31]. Indeed, Lord Nicholls describes the natural outcome of a linguistic obsession as making 'the application of s 3 something of a semantic lottery': at [31].

\(^{269}\) Ibid [41].

\(^{270}\) The Explanatory Memorandum discussion of s 36 is of no assistance: 'The Supreme Court must be of the opinion that a statutory provision cannot be interpreted consistently with a human right'. See Explanatory Memorandum, above n 16, 26.

\(^{271}\) Evans and Evans, above n 256, 271. See also Williams, above n 3, 902-3.
discussion in section III.A.2 confirms that s 32 of the Charter is a codification of the British jurisprudence on s 3 of the HRA or, at the very least, that both s 32 and s 3 consider a rights-compatible interpretation that undermines the explicit or implicit statutory purpose of the legislation being construed to be an impossible interpretation. In other words, the inclusion of ‘consistently with [statutory] purpose’ will not avoid the controversy over ‘possible’ interpretations in Victoria that the inclusion of this phrase does not render the British jurisprudence irrelevant, and that this phrase ought to be construed with care, lest it operates to undermine the primary remedial provision of the Charter.

B Judicial Deference and Institutional Dialogue

Let us now consider judicial interpretation and judicial declarations. There is more power for the judiciary in interpretation than declaration: through judicial interpretation, a law could operate in a manner differently to that enacted by the representative arms, whereas a declaration does not impact on the validity, operation and enforcement of the law. 272 This may influence where the judiciary draws the line between interpretation and legislating; in particular, one could expect interpretation to be favoured over declaration. 273 Two matters flow from this. First, once the power differential is recognised, there may be calls for judicial deference to control the judicial power. This matter is linked to discussion in Section III.A – the antidote to perceived judicial activism and law-making under s 32 is to require the extension of judicial deference. Judicial deference as a tool to prevent judicially-activist s 32 interpretations, and to prevent an abuse of power in the judicial choice between using s 32 interpretations rather than resorting to s 36 declarations, will be explored in this section. Secondly, the power differential between ss 32 and 36 may result in the over-use of interpretation and the under-use of declaration, a matter to be addressed in section III.C.

The judiciary acquires substantial power under a judicial interpretative model of domestic rights protection. Moreover, the line between proper judicial interpretation and improper judicial law-making is opaque. The British experience highlights that the challenge is to find the correct balance between achieving compatibility through proper interpretations and using declarations. The British judiciary began by adopting judicial deference techniques as the tool to achieve this balance: Jonathan Parker LJ opined that ‘the interpretative obligation in s 3 is the corollary of “deference”, in that the point at which interpretation shades into legislation will inevitably be affected by the degree of “deference” which the courts should accord to the legislative body in recognising its discretionary area of judgment’. 274

273 A prime example is the case of Hooper, where the Court of Appeal, in effect, required extra-statutory payments to be made in order to avoid incompatibility in preference to issuing a declaration of incompatibility: Hooper No 2 [2003] EWCA Civ 813. R v A [2001] 1 AC 45 is another case which highlights the extremes to which the judiciary will go to avoid incompatibility: see Nicol, above n 221, 442.
274 Root [2003] QB 728 [144].
An unquestioning resort to judicial deference, and the basis upon which deference is extended, must be challenged. In relation to the latter, some approaches to judicial deference sanctioned by the British judiciary reflect a desire to make the judiciary democratically accountable and, at times, produce tensions associated with coordinate construction of rights. In relation to the former, judicial deference threatens to undermine the structure and spirit of the British and Victorian models. When judicial deference is extended, legislation is too readily construed as compatible. This means that (a) the standard of justification for and accountability about limits to rights expected of the representative arms is lowered or eliminated altogether (the ‘classic rights questions’); and/or (b) the judiciary does not fulfil its duty to ensure compatible interpretations or to issue declarations (the ‘HRA/Charter questions’). Moreover, judicial deference can undermine the establishment of the sought after institutional dialogue, because the judicial voice is non-existent or too deferential.

1 Judicial Deference and Problematic Dialogue

Let us begin by examining the types of dialogue promoted by the application of judicial deference in the British jurisprudence. This discussion serves as a lesson for the application of the Charter. Individual instances of judicial deference have sanctioned problematic forms of dialogue. On numerous occasions the extension of judicial deference has been linked to the democratic imperative. Democratic accountability has justified judicial deference in decisions regarding numerous subject areas, including the allocation of resources, the eviction of tenants by registered social landlords, the quality of public housing, immigration control, planning decisions, the discriminatory provision of social security benefits, the regulation of mounted foxhunting with dogs, the denial of

277 R v Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions; Ex parte Holding and Barnes PLC [2003] 2 AC 295 (’Alconbury’). This decision has been described as a ‘striking illustration of judicial deference’. Nicol, above n 221, 447. See, eg, Hooper No I [2002] EWHC Admin 191 [115].
279 Lee v Leeds City Council; Ratcliffe and Orr v Sandwell Metropolitan Borough Council [2002] EWCA Civ 6 [49].
280 R v Secretary of State for the Home Department; Ex parte Isiko [2001] 1 FCR 633 [31]; R (Farrokhian) v Secretary of State for the Home Department [2002] QB 1391 [74].
281 Alconbury [2003] 2 AC 295 [71] – [72], [129], [159].
283 Adams v Lord Advocate (Unreported, Outer House, Court of Session, S55/02, 31 July 2002) [92] (’Adams’).
prisoners’ right to vote, and the treatment of suspected terrorists. Laws LJ stated that clashes between rights and legislation should ‘be exceptional, not least for the good reason that distribution of the Convention rights goes hand-in-hand with deference to the democratic legislature.’

Regardless of whether judicial deference is extended when answering the ‘classic rights questions’ or the ‘HRA/Charter questions’, extending deference based on democratic imperatives encourages institutional dialogue based on judicial accountability to the majority. Dialogue based on judicial accountability proceeds with all arms of government speaking ‘in similar voices that reflect and defer to majority sentiment.’ The aim of this type of dialogue is consensus. Because the representative arms more closely reflect majority will, the courts should defer to their judgments and the representative arms should respond to judicial decisions that are unacceptable to the democratic mainstream by re-asserting the majority will.

There are many weaknesses with this type of institutional dialogue. First, this type of dialogue precludes the judiciary from making its distinct contribution; rather, this model requires the legislature and judiciary to ‘devote their different talents to the same exercise: the discovery and reflection of majority sentiment.’ This is particularly problematic; the non-majoritarian perspective that the judiciary brings to the rights debate is legitimate and its inclusion is imperative – if not for the judiciary, this perspective may not be heard. Second, this model of dialogue forfeits the educative effect judicial perspectives may have on the representative arms and the concomitant critical self-reflection this engenders. Third, it incorrectly presumes that consensus is the aim of the dialogue, and that consensus about resolutions to conflicts over rights exists. Fourth, there is ample opportunity for the expression of democratic concerns within the structure of the HRA. The representative arms in policy-making and law-making can place limits on rights to further non-protected democratic values. If majoritarian-inspired limits are questioned by the judiciary through interpretations or declarations, there are numerous representative responses available to re-assert majority sentiment, as discussed in section 11.D.2 above.

Fifth, rights instruments require transparent justifications for representative decisions that limit rights. Too readily deferring to representative decisions does

284 R (Pearson and Martinez) v Secretary of State for the Home Department EWHC Admin 239 [20] (‘Pearson’).
286 Sheffield City Council [2002] EWCA Civ 04 [41] (emphasis added).
287 Roach, above n 94, 495.
288 Ibid 496.
289 Roach, above n 70, 245.
not ensure an independent review of the scope given to the relevant rights and the justifications offered for limits placed on rights. Indeed, the ‘most damaging form of deference’ is where the subject matter itself is considered to warrant deference, because questions of rights and justifiable limits are not even asked (the ‘classic rights questions’), let alone questions of interpretation or declaration (the ‘HRA/Charter questions’). This may eventually weaken the justificatory aspects of public decision-making as the representative arms realise that their reasons for justification are never thoroughly scrutinised and assessed. Sixthly, there is an advantage in democratic sentiment being expressed by the representative arms through policy-making, law-making, and the response mechanisms, rather than by relying on judicial deference – that is, accountability. Allowing judges to contribute their perspective about rights and their limits to the debate, unfiltered by deferential niceties, highlights the judicially-assessed cost of democratic action in rights-terms. The judicial perspective may be unacceptable from the democratic viewpoint and not prevail, but at least the representative arms are forced to acknowledge and take responsibility for the judicially-assessed rights implications of their actions. Finally, this may result in the ‘under-enforcement’ of rights. Rights protect all, including the minority within a majority. If rights standards are ultimately dictated by the majority, minorities and the unpopular are in a precarious position.

There are also examples of judicial deference encouraging a co-ordinate construction approach to the institutional dialogue in the British jurisprudence. A co-ordinate construction model envisions that all arms of government are empowered to define rights and limits thereto, with the judicial, executive and legislative interpretations of rights being equally valid. Moreover, there is no ordering of the rival opinions, such that ‘what the Court has concluded to be illegal and unconstitutional may be considered by the legislature and the executive to be perfectly legal and constitutional.

Co-ordinate construction is evident in relation to the definition of rights (mechanism one: the first ‘right question’), with numerous examples of deference being extended ‘as part of the initial determination as to the scope of the right in question, and as to whether there has been a breach of it.’ When the judiciary defers to the legislative understandings of rights, it does not voice its opinion on the scope of rights and it potentially subjugates its rival interpretation. Co-ordinate construction is also evident in the judiciary’s assessment of

293 See Roach, above n 70, 230.
294 Roach, above n 94, 490.
representative justifications for limitations on rights (mechanism two: the second ‘classic rights question’). The judiciary has regularly upheld the objective of a limitation, and held that the necessity, rationality and proportionality of a limitation “is obvious or self-evident”,297 without articulating its reasoning for so holding298 or requiring ‘convincing evidence’.299 Indeed, the limitations analysis in the Brown case has been described as ‘superficial and attenuated’, there being ‘a rather haphazard approach to the issue of proportionality’, with ‘no application of the [proportionality] test at a level of sophistication that might reasonably have been expected’.300 The lack of reasoning and supporting evidence301 in these cases indicates that the judiciary is not rigorously seeking justifications for limits, and may be succumbing to rival interpretations of rights.

Co-ordinate construction is problematic from an institutional dialogue perspective, and is an unworkable compromise between parliamentary and judicial supremacy. First, rather than respecting the distinct and unique roles of the different governmental institutions, it requires each institution to perform the same role – the interpretation of rights. This requirement does not account for the different motivations of the institutions. For instance, it assumes that the majoritarian institutions will selflessly protect the rights of the unpopular, vulnerable and minority. Nor does the requirement account for the different roles of the institutions. The role of the judiciary is to adjudge the fairness and proportionality of governmental action based on principle and rationality, not to rubber stamp decisions of the representative arms based on policy, the mediation of conflicting views and expediency. Nor does co-ordinate construction account for the different strengths of the institutions. The representative arms are well placed to identify pressing legislative objectives and assess the least-rights restrictive ways of achieving them, whereas the judiciary is well placed to assess the substantive content of rights.302

Second, dialogue such as co-ordinate construction pits the rival interpretations against one another without a de jure rule dictating which interpretation is to be preferred.303 This will inevitably inflate tensions between the representative arms.

A close analysis of the factual justification for the decisions of public authorities is the only practical method of achieving a proper balance between respect for the democratic will and the protection of human rights. As the Canadian case law makes clear, protection of fundamental rights will only become effective if the courts engage in a detailed and penetrating examination of the facts where public authorities seek to justify restrictions placed upon them.
301 Edwards, above n 292, 871.
302 The Canadian Charter requires those who pursue legislative objectives in a way that denies ‘bedrock values of our democratic tradition’ to ‘justify their action by evidence and reasoned argument’: Sharpe, above n 56, 452.
303 See Roach, above n 94, 492-3; Roach, above n 94, 490-3. Although in non-constitutional domestic rights instruments, the representative arms are more likely to win out.
and the judiciary and does not encourage a respectful exchange. If each arm can insist on the validity of its own interpretation of rights, there is no incentive to be open to the persuasion of other perspectives, and to genuinely critique one’s own preconceived ideas against those of rivals. Third, allowing the rival interpretation of the representative arms to prevail without judicial input and engagement forfeits the benefits associated with an educative dialogue.

Fourth, too readily accepting the representative arms’ conception of rights undermines the accountability mechanisms within the HRA. Despite the preservation of parliamentary sovereignty under the HRA, ‘judges have gone further than is necessary in dismissing human rights claims by asserting the importance of the intentions of Parliament.304 The dialogue does not even engage the ‘classic rights questions’, let alone the ‘HRA/Charter questions’. This undermines rights, is ‘inimical to the culture of justification’305 under rights instruments, and mutes the judicial contribution on these matters. Finally, no institution should be able to determinatively assert its understanding of the rights against the other institutions. A co-ordinate construction approach to dialogue, de facto, produces a legislative monologue about rights.

However, rejecting a co-ordinate construction version of dialogue by no means sanctions judicial supremacy vis-à-vis rights enforcement. The representative arms can enact laws based on their own understanding of rights, but they must proceed within the structures set down by the rights instruments, including properly justifying limits placed on rights, and utilising the representative response mechanisms when there is disagreement with the judiciary.306

2 General-Application Principles of Deference

Let us now consider how general-application principles of deference in Britain impact on the institutional dialogue, which again provides valuable lessons for Victoria. There have been numerous attempts at elaborating general-application deference principles. These attempts suffer from the problems associated with dialogue as judicial accountability and co-ordinate construction. They also create their own unique difficulties. Let us consider the model proposed by Laws LJ in the Roth case in detail.

Laws LJ associates the need for deference with the democratic legitimacy of the representative arms of government and envisages a spectrum – at times deference will be almost absolute and at other times it will be minimal.307 His Lordship then identifies four principles. The first principle envisages dialogue as judicial accountability – ‘greater deference’ is to be extended to primary legislation than to

305 Edwards, above n 292, 870.
307 Roth [2003] QB 728 [75].
subordinate legislation or executive decisions, because where the decision-maker is Parliament the tension between democracy and rights is at its most acute. His Lordship’s second principle requires more deference “where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified.” As discussed above, too readily deferring to the balance struck by the representative arms undermines the requirements of accountability and justification, and stifles the judicial contribution to the debate. Elements of judicial accountability and co-ordinate construction emerge.

His Lordship’s third principle – ‘that greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts’ is simply unworkable. Examples given of uniquely representative matters are defence of the realm and immigration control; examples given of uniquely judicial matters are maintenance of the rule of law and criminal matters. However, subject matters cannot be so easily categorised. For example, criminal matters, which are supposedly clearly within the realm of the judiciary, have regularly been classified as social problems justifying the extension of judicial deference. For instance, sentencing is part of the trial process, but the severity of penalty has been classified as a social problem justifying deference. The rules relating to admissibility of evidence in criminal trials have also been classified as addressing a social problem thereby justifying deference. The denial of the vote to prisoners provoked a deferential response, despite its intimate link to crime and punishment. The third principle allows ad hoc, rather than principled, exercises of judicial discretion. The emerging dialogue centres on democratic accountability and ready acceptance of the representative point of view – or co-ordinate construction. The fourth principle is that greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic

308 Ibid [83]. See also Holder v Law Society [2003] EWCA Civ 39 [31].
310 Roth [2003] QB 728 [85]. This has been supported in other cases, see eg, R v A (No 2) [2002] 1 AC 45 [36] (Lord Steyn).
312 Ibid [183] (Jonathan Parker LJ): R v Licmiak; R v Pryah [2003] 1 AC 903 [14]. There are strong arguments that the seriousness of a crime cannot dictate the amount of deference afforded: Friedman, above n 275, 222-3.
313 R v A (No 2) [2002] 1 AC 45 [99] (Lord Hope).
314 Pearson (Unreported, Queen’s Bench Division (Divisional Court), CO/31/01, CO/448/01, 4 April 2001).
315 It is not easy to distinguish the criminal law from the social policy issues being addressed under the criminal law, such that ‘deciding when exactly the courts will resort to deference has become a speculative business as they adopt the doctrine on a largely subjective basis’: see Edwes, above n 292, 864. In Canada, the criminal law is no longer characterised as a matter between the State and individual, but about the competing rights of victim and accused thereby justifying greater judicial deference: see Rouch, above n 70, 165-6.
powers or the courts. The third principle seems to be a particular instantiation of the fourth principle. The problems associated with the third principle are applicable to the fourth.

3 Dialogue Based On Distinct Yet Complementary Institutional Roles

Despite the tendency of judicial deference to promote dialogue as co-ordinate construction and judicial accountability, and the unworkable general-application principles of judicial deference, there are signs that the preferred dialogue approach is gaining favour in Britain. The House of Lords, in *R (on the application of Prolife Alliance) v BBC*, recognises that the HRA requires an institutional dialogue which relies on the distinct, yet complementary, roles of the differently situated and motivated arms of government, and that automatic and undue judicial deference may be contrary to such a dialogue. This case concerned whether a registered political party, Prolife Alliance, could use its party election broadcast to broadcast graphic images of aborted and mutilated foetuses.

Lord Walker sought to apply Laws LJ’s principles of deference when judicially reviewing the proportionality of the broadcasters’ decision refusing to broadcast the images. Lord Walker could only apply the second principle. Criticism of Laws LJ’s deference principles is implicit in Lord Walker’s explanation of the inapplicability of the other principles:

In this case (as in many cases raising human rights issues) responsibility for the alleged infringement of human rights cannot be laid entirely at the door of Parliament or ... the ... executive decision-maker. Responsibility ... is ... spread between the two ... Moreover the court’s ... role as the constitutional guardian of free speech is a proposition with which many newspaper publishers might quarrel ... A third difficulty is that the principles stated by Laws LJ do not allow, at any rate expressly, for the manner (which may be direct and central, or indirect and peripheral) in which Convention rights are engaged in the case before the court.

Lord Walker cites with approval commentators who warn that “[t]he need for deference should not be overstated” and states that “[i]t remains the role and responsibility of the Court to decide whether, in its judgment, the requirement


317 *Prolife Alliance* [2004] 1 AC 185.

318 Only some of the Law Lords considered the earlier question of whether the art 10 freedom of expression was violated by subjecting the content of party election broadcasts to restrictions on offensive material: ibid [54] (Lord Hoffman), [86] (Lord Scott), [125] (Lord Walker). Lord Nicholls, with whom Lord Millet agreed, did not (at [9] – [10]).

319 Ibid [137].

320 Ibid.
of proportionality is satisfied.\textsuperscript{321} Indeed, his Lordship suggests that the word deference ‘may not be the best word to use, if only because it is liable to be misunderstood.’\textsuperscript{322} Lord Walker warns that it is too early for the judiciary ‘to go too far in attempting any comprehensive statement of principle. But it is clear that any simple ‘one size fits all’ formulation of the test would be impossible.’\textsuperscript{323}

In direct response to Laws LJ, Lord Hoffman rejected the idea that deference — with ‘its overtones of servility, or perhaps gracious concession’\textsuperscript{324} — appropriately describes the new relationship between the judiciary and representative arms. Rather, his Lordship insisted that the rule of law and the separation of powers dictate that the judiciary decide which arm of government has the power to act and the limits of that power.\textsuperscript{325} The judicial allocation of decision-making power and the articulation of its limits are based on ‘principles of law’, not ‘courtesy or deference.’\textsuperscript{326} His Lordship recognised the different motivations and strengths of the arms of government, and linked the allocation of responsibilities to these.\textsuperscript{327} However, his Lordship insisted that ‘[t]he allocation of these decision-making responsibilities is based upon recognised [legal] principles’: that judicial independence ‘is necessary for a proper decision of disputed legal rights or claims of violations of human rights is a legal principle’, just as the necessity for majority support ‘for a proper decision on policy or allocation of resources is also a legal principle.’\textsuperscript{328} When the judiciary allocates decision-making responsibility to the executive or legislature, ‘it is not showing deference’ but ‘deciding the law.’\textsuperscript{329} Lord Hoffman captures the essential — yet vital — difference between deference as respect, which is acceptable within the preferred institutional dialogue framework, and deference as submission, which is not.\textsuperscript{330}

\textsuperscript{321} Ibid [138] (emphasis added) (citation omitted).
\textsuperscript{322} Ibid [144].
\textsuperscript{323} Ibid. Whatever the test or principles of deference, there will always be holes. The version proposed by Rabinder Singh, Murray Hunt and Marie Demetriou, ‘Is There a Role for the “Margin of Appreciation” in National Law after the Human Rights Act?’ (1999) European Human Rights Law Review 15, 21-2 includes aspects of deference as judicial accountability (whether the body under review is elected or otherwise accountable to the electorate, whether there is a fairly constant standard throughout democratic societies regarding this issue), elements of co-ordinate construction (whether the right is important, whether the interference is serious, whether aim of law is to promote human rights), and elements of the distinct, yet complementary, role approach (the relevant specialist knowledge of the body under review compared with the court, whether we have unpopular or vulnerable people). The version described by Friedman, above n 275, 219-24, eschews closely with the distinct, yet complementary, role approach (e.g. deference should not frustrate s3; popular opinion should not sway constitutional interpretation), but seems too judicial-centric. Edwards suggests that the British judges should adopt the Canadian Charter approach. Edwards, above n 292, 871-80.
\textsuperscript{324} Profile Alliance [2004] 1 AC 185 [75].
\textsuperscript{325} Ibid.
\textsuperscript{326} Ibid [76].
\textsuperscript{327} Ibid. ‘The courts are the independent branch of government and the legislature and the executive are ... the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others.’
\textsuperscript{328} Ibid.
\textsuperscript{329} Ibid. In this particular case, it was proper for Parliament, as representative of the people, to decide whether the pursuit of freedom of expression should be subject to taste and decency: at [77]. Lord Hoffman’s view has been approved in later cases, such as, Carson [2003] EWCA Civ 797 [70].
\textsuperscript{330} See also Edwards, above n 292, 879; Lord Irvine, above n 118, 314.
In *Bellinger*, Lord Nicholls also adopts the preferred dialogue model. As discussed above, the House of Lords held that the legislative definition of marriage, as being between parties that were respectively male and female, was incompatible with rights in the context of post-operative transsexuals. His Lordship could not interpret away the incompatibility because to recognise Mrs Bellinger, a post-operative female, as a female under the legislation "would necessitate giving the expressions "male" and "female" in [the] Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex." Such an interpretation went beyond the legitimate task under s 3. In so concluding, Lord Nicholls held that such an interpretation "would represent a major change in the law, having far-reaching ramifications", raising issues that "are altogether ill-suited for determination by courts and court procedures" but which are "pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation". His Lordship concluded judicial intervention "would be peculiarly inappropriate" given: first, the uncertainty of the criteria for recognising when gender reassignment has occurred; secondly, that legal recognition of gender re-assignment should not be approached in a piecemeal fashion given the many areas of regulation affected; and, thirdly, the long-standing social and religious understanding of marriage.

There was nothing in Lord Nicholls’ analysis indicating judicial deference was extended on democratic grounds or sanctioning a rival interpretation, despite the obvious sensitivity of the subject matter. Rather, his Lordship recognised that Parliament ought to begin the conversation on this matter because of its relative institutional strengths. The House of Lords granted a declaration of incompatibility, rather than avoiding the rights issue altogether by refusing to assess the "classic rights questions" because of the sensitivity of the subject-matter or the democratic mandate, or by refusing to disagree with the representative arms by twisting the interpretative obligation.

331 *Matrimonial Causes Act 1973* (UK), c 18, s 11(c).
333 Ibid [30]. See also Lord Hope: at [56], [57], [69]; Lord Hobhouse: at [71], [77]; Lord Scott: at [80]; Lord Rodger: at [81], [83].
334 Ibid [78] (Lord Hobhouse).
335 Ibid [77].
336 Ibid [38].
337 Ibid [39]-[46]. In relation to the first consideration, concern was expressed about the flow-on effects of nominating the criteria: at [41].
338 Ibid [53]-[55], [70], [78] –[79], [80], [81].
339 The legislature responded by enacting the *Gender Recognition Act 2004* (UK) c 7. The legislation allows someone to apply for a "gender recognition certificate" if the person is living in the other gender, or has changed gender. It then lists a range of consequences flowing from the issue of a certificate. The basic rule is that the person’s gender becomes, for all purposes, the acquired gender. In particular, the legislation amends the *Matrimonial Causes Act* to recognise the acquired gender. It also goes beyond the judicial decision by exempting clergymen from having to solemnize a marriage of a person in an acquired gender and allowing annuities of marriages if, at the time of the marriage, one party to the marriage did not know the other party was previously of another gender.
4 Deference and Justificatory and Accountability Requirements

The HRA and the Charter impose requirements of justification and accountability vis-à-vis protected rights. When creating policy and legislation that impact on rights, the representative arms must justify their views on rights and limits thereto. When legislation is judicially reviewed, the judiciary must scrutinise the justifications offered. If the judiciary disagrees with the justifications of the representative arms, it can resolve incompatibilities by interpretations or issue declarations. If parliament wishes to retain the incompatibility, it can enact legislation that negates the interpretation and bolster this was an executive statement of incompatibility, or retain legislation irrespective of a declaration. This process requires the representative arms to confront the judicially-assessed rights implications of their decisions and to justify their choices. Unfortunately, the British judiciary’s ‘preoccupation … with leaving an area of discretion to the executive and legislature has frustrated the development of a culture of justification’. The extension of judicial deference means that the representative arms are not required to justify their decisions and the judiciary relinquishes its responsibility to scrutinise. This weakens rights protection and the citizenry does not get the benefits of an educative institutional dialogue with its justificatory teachings.

Fortunately, there is increasing judicial recognition in Britain that the HRA introduces a requirement of justification which, in turn, creates an institutional dialogue about rights and their limits. Lord Steyn opined that ‘a culture of justification now prevails: it requires constitutional arrangements which differ from constitutional principles to be justified in the public interest’. Lord Hoffman recognised that although the retention of parliamentary sovereignty allows parliament to legislate incompatibly with rights, there are political constraints on power: ‘the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.’ Woolf CJ recognised that ‘the courts must carefully scrutinise the explanations given by the executive for its actions.’ Morriss VC also refused to allow judicial deference ‘to be equated with unquestioning acceptance’ of representative actions and justifications: ‘It

340 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1293 (Mr Hulls, Attorney-General); Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 1990 (Ms Neville); Victoria, Parliamentary Debates, Legislative Council, 19 July 2006, 2556 (Mr Madden, Minister for Sport and Recreation); Victoria, Parliamentary Debates, Legislative Council, 20 July 2006, 2658 (Mr Scheffer.)

341 Edwards, above n 292, 882.
342 Klug, above n 316, 132.
343 Edwards, above n 292, 867.
344 Lester, above n 125, 688, citing Lord Steyn.
345 R v Secretary of State for the Home Department; Ex parte Simms and Anor [2000] 2 AC 115, 131.
347 Wilson v First Country Trust Ltd [2002] QB 74 [33] (Morriss VC, with Chadwick and Rix LLJ agreeing).
is one thing to accept the need to defer to an opinion which can be seen to be the product of reasoned consideration based on policy; it is quite another thing to be required to accept, without question, an opinion for which no reason of policy is advanced.\footnote{348}

5 Deference and Under-Enforcement of Rights

The final issue is the under-enforcement of rights. Whenever deference is extended, the standard of justification is reduced and rights are under-enforced. This is evident from the British experience.\footnote{349} For example, according to Kebilene, judicial deference may be necessary in relation to all of rights.\footnote{350} Such an expansive deference rule promotes parliamentary sovereignty, but substantially undermines rights. The problems with under-enforcement of the rights are manifold.

First, to extend judicial deference with respect to the ‘classic rights questions’ may result in judicial sanctioning of dubious interpretations of rights, illegitimate legislative objectives, or irrational, unreasonable, overly restrictive or disproportionate legislative means. The judiciary basically abdicates its responsibility as a guardian of rights.\footnote{351} If the judiciary does not even engage with the ‘classic rights questions’, the “HRA/Charter questions” will too go unanswered. Second, under-enforcement undermines the authority of the democratically-mandated rights instrument, which requires policy and legislative decisions to be justified against rights.\footnote{352} Third, it may have longer-term consequences, such as reducing the motivation of the representative arms to consider rights issues in planning policy and legislation if there is no real threat of accountability.

Fourth, this outcome is not necessary given the structure of modern rights instruments. Judicial deference is used to avoid judicial supremacy (or at least undesirable judicial activism).\footnote{353} Given the structure of the HRA and the Charter, however, one could expect the opposite – that is, vigorous judicial contributions. Both instruments protect parliamentary sovereignty by giving judges powers of interpretation and declaration only: “The issue of judicial deference to the legislature was settled through the intersection of”\footnote{354} judicial interpretation and declaration. Parliament can override judicial interpretations by ordinary legislation, simply ignore declarations, and override the operation of the Charter.

\footnote{348} Ibid. The Lord Chancellor also recognises that judicial deference should not result in a lack of accountability: Lord Irvine, above n 118, 314.
\footnote{349} Kug and O’Brien, above n 222, 653; Clapham, above n 126, 131.
\footnote{350} Kebilene [1999] 3 WLR 972, 994. That is, deference is applicable to all categories of rights: absolute, qualified and limited rights.
\footnote{351} Roth [2003] 1 QB 728 [81].
\footnote{352} Lord Irvine, above n 118, 314: ‘The [UK] Human Rights Act constitutes a promise to the citizens that public bodies will ... act compatibly with their rights.’
\footnote{353} Many commentators have noted that the judiciary seems intent on making the rights fit with the common law, rather than vice-versa: Alasdair Maclean, ‘Crossing the Rubicon on the Human Rights Party’ (2001) 64 Modern Law Review 775, 787; Waelchlin, above n 304, 631.
\footnote{354} Kug, above n 316, 128. ‘There is no need ... to develop complex theories of judicial deference if the scheme of the Act is properly appreciated.’ at 133.
Given this, 'in principle it should follow that, other things being equal, the courts ought to be willing to apply the proportionality test more rigorously and critically to [legislation]',\textsuperscript{356} rather than deferentially. Moreover, under the structure of the HRA and Charter, judicial activism can be readily balanced by legislative activism via the representative response mechanisms, reducing the need for complex theories of judicial deference: '[constitutional dangers exist no less in too little judicial activism as in too much.]

\textbf{6 Conclusion}

The search for a rule of judicial deference to protect against judicial activism in implementing the interpretation power, or by favouring judicial interpretation over judicial declaration, is unwarranted because of the structure of the HRA and Charter. Moreover, the judicial deference strategy has its risks: it has the tendency to sanction problematic forms of institutional dialogue, undermines the culture of justification, and weakens the protection afforded by rights. The British experience with judicial deference ought to provide valuable lessons for Victoria.

\textbf{C The Balance Between Interpretation and Declaration}

Let us consider the interaction between judicial interpretations and judicial declarations. If the power of interpretation vis-à-vis declaration is superior, there is an incentive for the judiciary to unduly favour interpretation resulting in the under-use of declarations. The British judiciary has, on occasion, pushed interpretation to its extremes to avoid legislative incompatibility.\textsuperscript{357} The under-use of declarations may undermine parliamentary sovereignty and hinder the representative arms' ability to contribute to the institutional dialogue.

The British parliamentary debates indicate that judicial interpretation and declaration are to operate in tandem. A preference for rights-compatible interpretations, rather than frequent declarations, was emphasised to preserve parliamentary sovereignty.\textsuperscript{358} The Lord Chancellor stated that the courts should 'strive to find an interpretation of legislation which is consistent with convention rights so far as the language of the legislation allows and only in the last resort to conclude that the legislation is simply incompatible with them.'\textsuperscript{359} His Lordship stated that 'in 99 per cent. of the cases ... there will be no need for judicial

\textsuperscript{355} Edwards, above n 291, 867-8 (citation omitted).
\textsuperscript{357} See above n 273.
\textsuperscript{358} This is evident in United Kingdom, Rights Brought Home: The Human Rights Bill (1997) Cm 3782, [2.13]. It was also confirmed in debate: United Kingdom, Parliamentary Debates, House of Lords, 19 January 1998, col 1294 (Lord Irvine, Lord Chancellor).
\textsuperscript{359} United Kingdom, Parliamentary Debates, House of Lords, 18 November 1997, col 535 (Lord Irvine, Lord Chancellor) (emphasis added). See also United Kingdom, Parliamentary Debates, House of Lords, 3 November 1997, col 1240 (Lord Lester).
declarations of incompatibility.\textsuperscript{360} The Home Secretary expected ‘that, in almost all cases, the courts will be able to interpret legislation compatibly with the Convention. However, we need to provide for the rare cases where that cannot be done.’\textsuperscript{361}

The British judiciary have been mindful of this sentiment. In the first couple of years, the judiciary focussed more heavily on interpretations than declarations. There was arguably a reluctance to use declarations. The judiciary viewed s 4 ‘as a measure of last resort’ because it presumed a declaration ‘effectively forces [the executive, through Parliament, to change the law.’\textsuperscript{362} There was a misconception ‘that legislative amendment must follow a declaration.’\textsuperscript{363} This is simply not true. Certainly, the representative arms may respond, but a response is not obligatory, and a response need not be the wholesale adoption of the judicial perspective. Indeed ‘[i]t will not be a sign that the [HRA] has failed when the day comes … that the Government, with strong Parliamentary backing, refuses to amend a statute that the courts declare breaches fundamental rights.’\textsuperscript{364}

In contrast, statistics from the first four years of jurisprudence indicate a different picture. Lord Steyn, in \textit{Ghaidan}, highlighted that the interpretative power was used in 10 cases, and the declaration power was used in 15 cases, of which five were reversed on appeal.\textsuperscript{365} In His Lordship’s opinion, the statistics reveal ‘a question about the proper implementation’\textsuperscript{366} of the HRA, given that interpretation was supposed to be the primary remedial mechanism. The British parliamentary debate is often cited to support Lord Steyn’s sentiment. This position is flawed. As Klug and Starmer highlight, this parliamentary debate is not ‘a statement of law, nor … an actuarial prediction’, but rather a ‘political assertion’ about the state of British law at the HRA enactment date: that it is compatible and that neither interpretation or declaration would be needed often.\textsuperscript{367} Despite the primacy of interpretation over declaration, no assumptions can be made about the frequency of the use of either.\textsuperscript{368} Indeed, if we go back to parliamentary sovereignty and institutional dialogue, the frequent use of declarations is expected. Declarations

\text\textsuperscript{1} United Kingdom, \textit{Parliamentary Debates}, House of Lords, 5 February 1998, col 840 (Lord Irvine, Lord Chancellor).
\text\textsuperscript{2} United Kingdom, \textit{Parliamentary Debates}, House of Commons, 16 February 1998, col 778 (Mr Jack Straw MP, Secretary of State for the Home Department) (emphasis added).
\text\textsuperscript{3} Klug, above n 316, 131 (emphasis added).
\text\textsuperscript{4} Ibid (emphasis in original). See also Wadhams, above n 304, 629: ‘The judiciary’s cautious approach to the Act may in part be explained as an attempt to distance itself from accusations of the judiciary usurping parliament’s function (never a realistic prospect).’
\text\textsuperscript{5} Klug, above n 316, 132.
\text\textsuperscript{7} \textit{Ghaidan} [2004] 2 AC 557, [39].
\text\textsuperscript{8} Klug and Starmer, above n 365, 722.
\text\textsuperscript{9} Ibid.
preserve parliamentary sovereignty and are one trigger for continuing contributions to the dialogue by the representative arms.969

The salient point is that the right balance must be struck between interpretation and declaration, and that balance is difficult to predict and, at times, difficult to justify. Declarations have a vital role to play; they are "a vehicle for cross-institutional dialogue between the limbs of government over what constitutes ... rights compliance."970 To achieve dialogue based on the distinct, yet complementary, roles of the arms of government requires robust use of declarations.971 Uses of declarations should not be seen as confrontational or 'activist' in themselves; nor should judges extend deference or use interpretation tools improperly to avoid declarations. The structure of the HRA and Charter, and the consequent institutional dialogue, resolve fears about illegitimate judicial activism and law-making.

IV CONCLUSION

The enactment of a domestic human rights instrument for Victoria (and Australia, for that matter) is long overdue and should be supported. The issue is not whether Victoria should have a bill of rights; but rather, which model should be adopted. The Victorian Parliament has adopted an interpretative model based heavily on the HRA. This article has sought to highlight some of the problems that have arisen under the HRA. The main problem is the precise scope of the judicial interpretative power. There is no clear distinction between proper judicial interpretation and improper judicial law-making. This could easily result in allegations of improper judicial activism, calls for extensive judicial deference, a lack of rights accountability, under-enforcement of rights, and an under-use of declarations. These difficulties must be resolved by reference to the Charter itself.

First, judicial activism ought to be expected. The judiciary cannot invalidate legislation and the representative arms can respond to any judicial interpretations or declarations. Therefore, the judiciary ought to thoroughly and critically review representative actions, and express its honest, unique and expert view without fear. Secondly, judicial activism must not be offset by the unwarranted or improper extension of judicial deference. Rather, the Charter adopts mechanisms to offset judicial activism with representative activism—namely, the representative response mechanisms. The judiciary must fully contribute its view in order to create the sought after dialogue, to promote the culture of justification, and to protect against under-enforcement—a challenge made easier in the knowledge that its perspective on rights is not the final say on the matter. Thirdly, the judiciary must acknowledge and respect the retention of parliamentary sovereignty. The judiciary must utilise declarations in appropriate circumstances, rather than extend deference

10 Ibid.
11 Klug and O'Brien, above n 222, 662.
12 Klug, above n 316, 131.
or stretch ‘possible’ interpretations as a means to avoid confrontation with the representative arms. The judiciary must also accept that usage of declarations will produce rights-incompatible outcomes in cases at hand and future uses of the impugned law. Using declarations appropriately should shield the judiciary from allegations of inappropriate acts of judicial legislation and activism, and ensure a transparent dialogue between the institutions of government: ‘dialogue based on the power of interpretation ... will be less transparent than dialogue based on clear declarations by either the courts or Parliament that legislation is incompatible with [rights].’

These difficulties are not insurmountable. Rather, the Victorian arms of government ought to be aware of them and not replicate them under the Charter. In particular, the judiciary (when developing jurisprudence on the interpretative obligation) and the representative arms (when responding to judicial decisions) ought to be mindful of the type of institutional dialogue they are creating. Moreover, the commitment to preserving parliamentary sovereignty cannot be ignored by any arm of government. The judiciary must utilise the Charter mechanisms in a manner that respects parliamentary sovereignty. And, importantly, the representative arms must also guard against simply deferring to judicial perspectives – we do not want the representative arms to simply Charter-proof their policy and legislative initiatives, which would produce a judicial monologue. The success of the Charter will come down to a fine balancing act: balancing between rights and democracy, parliamentary sovereignty and rights-accountability, dialogue and monologue, and legislative activism and judicial activism.

13 Roach, above n 73, 280, n 62.
14 Hiebert, above n 9, 224: ‘Risk-aversion epitomises a judicial-centric approach.’
INTRODUCTION

I would like to thank the Law Institute of Victoria for inviting me to speak this morning about public authorities.

This aspect of the Charter of Human Rights and Responsibilities Act 2006 (Vic) ("Charter") is probably the most unique and least understood aspect of the Charter. I hope I can clarify its operation, but I am unable to give you a conclusive opinion on many areas of operation of these provisions because some of the provisions are unique to Victoria.

One major problem with the Charter provisions relating to public authorities arises because of the determination of the Victorian Government not to give individuals whose rights have been violated by a public authority a free-standing remedy. Why? There was a fear of opening the litigation flood gates; the government did not want the focus of the Charter to be litigation; and the government did not want massive damages payouts. This has resulted in the enactment of some very complex provisions, the operation of which will certainly require test-case clarification. The real shame of this is the misdirection of public spending: public monies will be expended on litigation costs that could have otherwise been spent on compensating those whose rights had been violated had a free-standing cause of action with capped damages been enacted!

In this paper, we need to consider the impact the Charter has on public authorities. We will consider (a) the obligation for public authorities to act compatibly with human rights; (b) the definition of public authorities; and (c) the consequences if a public authority fails to do so.

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THE OBLIGATION TO ACT COMPATIBLY: s 38

Section 38(1) outlines two situations where public authorities act unlawfully. First, it is unlawful for a public authority to act in a way that is incompatible with protected rights. Under s 3, an “act” predictably includes a positive act, a failure to act, and a proposal to act. This imposes an obligation to act compatibly with the substance of the rights; that is, a substantive obligation.

Secondly, it is unlawful for a public authority, when making a decision, to fail to give proper consideration to a protected right. This is a procedural right, ensuring that the protected rights are a relevant part of the decision-making process.

There are two exceptions to unlawfulness under s 38(2). First, there is an exception where the law dictates the unlawfulness; that is, an exception to these duties is where the public authority could not reasonably have acted differently or made a different decision because of a statutory provision/the law or a Commonwealth enactment. For example, this applies where the public authority is simply giving effect to incompatible legislation.²

Secondly, under s 38(4) and (5), religious bodies have an exception to s 38(1). The obligations in s 38(1) do not require a public authority to act or decide in a way that impedes or prevents a religious body from acting in conformity with the religious doctrines, beliefs or principles, in accordance with which the religious body operates. “Religious bodies” is defined quite generously as those bodies established for religious purposes, or educational and charitable religious bodies.

Under s 38(3), these obligations only apply when a public authority is exercising a public function. In effect, the Charter creates three categories of body: (a) those that are core or wholly public; (b) those that are functional public or hybrid public-private; and (c) those that are wholly private. We will come back to these categories shortly when we discuss the definition of “public authority”.

These are quite onerous obligations for “public authorities”. There will be test case litigation to establish, inter alia, what these obligations mean, what needs to be done to comply with the obligations, and the breadth of the exceptions.

DEFINITION OF “PUBLIC AUTHORITY”

As mentioned above, the Charter essentially creates three categories of body. This comes from reading together ss 3, 4 and 38(3).

² See the notes to Victorian Charter 2006 (Vic), s 38.
Category 1: Core or Wholly Public Authorities

Under the Charter the core/wholly public authorities have the broadest rights obligations. Core/wholly public authorities are subject to the s 38 obligations in all their activities. That is, core/wholly public authorities, who only exercise public functions, are bound by the Charter obligations in all their activities (e.g., even in their private-type activities, such as contracting for the cleaning of offices or gardeners or building).

The public authorities that are considered core/wholly public authorities are defined quite specifically under the Charter. Indeed, the core/wholly public authorities are listed in s 4, as follows: public officials (see Public Administration Act 2004); the Victorian Police; local Councils and Councillors; Ministers; members of a parliamentary committee when acting in administrative capacity; an entity declared to be so by regulations; and an entity established by statute that has functions of a “public nature.” Aside from the final type of body listed, core/wholly public authorities are readily identifiable and there is little scope for argument as to which bodies are core/wholly public authorities. In relation to the final type of body listed, the scope of the meaning of “public nature” will be further explored in discussing the functional/hybrid category.

There are two exclusions from this definition. First, Parliament is excluded from the definition. This is consistent with parliamentary sovereignty. The exclusion of Parliament is aimed at preserving parliamentary sovereignty. Parliament, as sovereign law maker, is empowered to act in a manner that is incompatible with the protected rights and such acts are not to be considered unlawful.

Secondly, courts and tribunals are excluded, except in their administrative capacity. The reason for excluding courts and tribunals was to ensure that the judiciary is not obliged to develop the common law in a manner that is compatible with protected rights. This reasoning is based on the fact that Australia has a unified common law. If it was otherwise, there was concern about the risk that the High Court of Australia may strike down that part of the Charter. Whether or not one agrees with this reasoning, the outcome is clear: courts and tribunals are not public authorities under

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3 For a definition, see Victorian Charter 2006 (Vic), ss 3 and 4.
4 Victorian Charter 2006 (Vic), s 4(1)(i).
5 Victorian Charter 2006 (Vic), s 4(1)(j). The Charter provides examples of “administrative functions in the Notes to s 4(1)(j) which include: committal proceedings, issuing of warrants, listing cases, and adopting practices and procedures.
6 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 563-64.
the Charter. However, the courts and tribunals will still have a non-Charter based ability to use human rights to influence the development of the common law, as this is a general common law principle.

Category 2: Hybrid or Functional Public Authorities

Extent of Obligations and Definition

The second category of body are functional/hybrid public authorities. These part-public and part-private authorities are bound by the s 38 human rights obligations only when they exercise functions of a public nature; these bodies are not bound when exercising their private functions. This is made clear in s 4(1)(c), which defines this category to include an ‘entity whose functions are or include functions of a public nature, when exercising those functions on behalf of the State or a public authority, whether under contract or otherwise.’ This category would, for example, include a private security firm when providing security at a prison, but would not include that same private security firm when offering security to a supermarket or commercial entity.

The definition for functional/hybrid public authorities is much less definitive than for core/wholly public authorities. The Charter contains an inclusive list of factors that are relevant to determining whether a function is of a public nature under s 4(2). It should be noted that these factors are relevant to both the final body listed under the core/wholly public authority category (s 4(1)(b)) and to functional/hybrid public authorities (s 4(1)(c)). These factors are not exhaustive, and the presence of one or more factors does not necessarily mean the function is of a ‘public nature’.

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

For the purposes of functional/hybrid public authorities only, under s 4(4), a public authority may be ‘acting on behalf of the State or a public authority’ even if no agency relationship exists. Moreover, under s 4(5), the fact that an entity is publicly funded to perform the function does not necessarily mean it is exercising that function on behalf of the State or a public authority.

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The examples are articulated in ss 4(2)(a), (b) and (c) respectively.
Obvious examples in the Victorian context include a privatised utility, a non-
government organisation that undertakes government welfare services (for example, 
Hanover through the provision of services to homeless persons and community legal 
centres through the provision of legal advice), security firms running security at 
correctional facilities, self-regulating professional bodies (such as those for media 
and, potentially, those for the legal and medical professions), and public patients in 
private hospitals.

Guidance from Britain

The concept of attaching human rights obligations to hybrid public-private bodies has 
been borrowed from the Human Rights Act 1998 (UK) ("HRA UK") and slightly 
altered. There is growing jurisprudence and commentary on the functional public 
authority category in Britain which may be of assistance, but the differences between 
the Charter and HRA UK must be accounted for. The main difference in terms of the 
meaning of the functional/hybrid category is that the Charter explicitly lists factors 
relevant to assessing whether a function is a "function of a public nature". The HRA 
UK does not explicitly list factors. Rather, s 6(3)(b) simply states that 'public 
authority includes any person certain of whose functions are functions of a public 
nature...' and s 6(5) states that 'a person is not a public authority by virtue only of 
(3)(b) if the nature of the act is private.' This drafting difference may amount to little 
more than semantics, however, given that the British jurisprudence has identified 
factors very similar to those listed under s 4(2) of the Charter.

Examples of the functional/hybrid category identified in British parliamentary debate 
on the Human Rights Bill include the press complaints commissions, the BBC, the 
public telephone company (the ITC), the British Board of Film Censorship, Railtrack 
(the train operator), general practitioners, privatised utilities, and water companies.9

Much guidance (both good and bad) can be gleaned from the British jurisprudence. In 
summary, to be 'a person certain of whose functions are functions of a public nature' 
requires there to be feature(s) which impose a public character or stamp on the acts of 
the person/body. To date, the jurisprudence indicates that there will be a function of a 
public nature where there is statutory authority for what is done, statutory 
responsibility imposed on the body in question, a true delegation or sharing of powers 
or functions, a close proximity between the body and a public body, and public 
funding for the activity in question.10 A brief overview of the cases is warranted.

9 Kate Markus, ‘What is Public Power: The Courts’ Approach to the Public Authority Definition Under the 
Human Rights Act’ in Jowell and Cooper (eds), Delivering Rights: How the Human Rights Act is Working 

10 Kate Markus, ‘What is Public Power: The Courts’ Approach to the Public Authority Definition Under the 
Human Rights Act’ in Jowell and Cooper (eds), Delivering Rights: How the Human Rights Act is Working 
In *Poplar Housing v Donoghue*, a local authority had a statutory duty to directly provide or otherwise arrange the provision of housing to some homeless people. The local authority created a private housing association, and transferred its housing stock to it, with the intention that the private housing association would discharge the local authority’s statutory duty. A close connection between the two bodies was maintained: five members of the local authority were board members of Poplar Housing, and the local authority provided continual direction on the relations between Poplar Housing and its tenants.

Poplar Housing sought possession of one of its houses from Donoghue, claiming that Donoghue was intentionally homeless and thereby not entitled to be provided with public housing. Donoghue claimed that this breached her right to respect for her home under art 8, that Poplar Housing was performing a function of a public nature, and that Poplar Housing was thus bound by human rights obligations under s 6(3)(b).

The Court of Appeal held that Poplar Housing was performing a function of a public nature. The test was articulated as follows: To be a function of a public nature requires there to be feature(s) which impose a public character or stamp on the act, including statutory authority for what is done, some extent of control exercised by a public authority, an enmeshing of activities of the public and private body. The Court of Appeal recognised that this was a ‘borderline’ case, and that each case must be assessed on its facts. Taking in account all the circumstances, however, Poplar Housing was a functional public authority. Emphasis was placed on the special institutional arrangements in this case, the closeness of the relationship between the two bodies, and the fact that there was no intention to treat persons that were already tenants at the time the housing stock was transferred any differently after the transfer.

The *Leonard Cheshire Foundation* case presented a very similar fact scenario to the *Donoghue* case, but was decidedly differently. Leonard Cheshire Foundation (“LCF”) was a private charity. It provided residential accommodation to disabled people under a contract it had with a local authority. The local authority had the statutory duty to provide the residential accommodation, which it did via the LCF contract and at public expense.

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11 *Poplar Housing and Regeneration Community Assoc v Donoghue* [2001] EWCA Civ 595 (“Donoghue”).


13 *Donoghue* [2001] EWCA Civ 595 [66].

14 *Donoghue* [2001] EWCA Civ 595 [66].

LCF planned to close one residential house and transfer the residents to another residential house. Similarly to the Donoghue case, the residents claimed interference with their right to a home under art 8, that LCF was a functional public authority, and that LCF had acted unlawfully under s 6(3)(b).

The Court of Appeal held that LCF was not exercising functions of a public nature. A number of considerations influenced this decision. First, the court held that the extent of public funding was relevant, but not determinative. On the facts, LCF did receive public funding. Secondly, whether the body was standing in the shoes of the public authority was relevant, but on the facts LCF could not be said to be standing in the shoes of the local authority. Thirdly, whether the statute granted any powers to body was relevant. On the facts, LCF was not granted any statutory powers. Fourthly, whether the body was otherwise exercising statutory powers was relevant, which LCF did not. Accordingly, other than the funding criteria, none of the Donoghue criteria applied to LCF.16

Two other consequential arguments also influenced the decision. The court was concerned that if LCF was considered a functional public authority, than so too would lodging houses and small private hotels be considered functional public authorities when providing residential accommodation for local authority residents, which they do on occasion. Moreover, the courts were concerned about anomalies that would arise between private and public residents. If LCF is considered public, as the court’s reasoning goes, the LCF will be public authorities regarding residents paid for by the local authority but not others, and that this would not make sense given that there was no substantive difference between the character of the services provided to publicly-funded and privately-funded residents.17

The House of Lords decision in Aston Cantlow v Wallbank18 is of interest for its veiled criticism of the Court of Appeal decisions. In Aston Cantlow, the Parochial Church Council sought to make a private landowner (the lay rector/priest) pay for repairs to part of a church. One issue of contention was whether the Parochial Church Council was a functional public authority, which may have been contravening property rights under the HRA UK.

The House of Lords held that the Parochial Church Council was not exercising a function of a public nature; rather, the scenario was more akin to enforcing a

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restrictive covenant (that is, a property right). Although the House of Lords did not directly refer to the earlier Court of Appeal decisions and thus did not overrule them, its general discussion of the meaning of functional public authorities indicates its dissatisfaction with the earlier lower court decisions.

In particular, Lord Nicholls outlined his preference for a more generous interpretation to be given to ‘functions of a public nature’ than for the category of core/wholly public authorities. His Lordship insisted that the focus of the functional public authority test be on function, highlighting that there is a distinction between functions which are public and those which are private, with the function being the determinative factor. Lord Nichols acknowledged that s 6(3)(b) is fact sensitive and that consequently the court could not develop a single, one-size-fits-all test. Rather, his Lordship outlined relevant factors that aid in the determination of whether the function is public or private: was the body in question publicly funded, exercising statutory powers, taking the place of a central government or local authority, or providing a public service.  

In the Hampshire Farmers Markets Ltd case, the local authority originally managed the operation of a farmers market on publicly owned land. The local authority incorporated HFML as a not for profit, handed over the management of the farmers market to HFML, and supported HFML in its operations. The local authority retained ownership of the land upon which the market was held, such that the public retained the common law right of access to the land. A problem arose when HFML did not issue a stall licence to Hammer Trout Farm, although Hammer Trout Farm had held such a licence during the period in which the local authority managed the market.

The Court of Appeal held that the regulation and organisation of the common law right of access to public land was a public function, such that HFML was a functional public authority. The Court of Appeal considered the factors relating to “function of a public nature” as outlined in the Donoghue and Leonard Cheshire Foundation cases. On the negative, there was no statutory basis for the exercise of the powers, and no subjection of HFML to government oversight. On the positive side, however, HFML did further the public interest by providing access to trading outlets, HFML did manage public markets, the public retained a common law right of access to the public markets because of the continued public ownership of the land, and HFML had stepped into the shoes of the local authority.  

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20 R (Beer, trading as Hammer Trout Farm) v Hampshire Farmers Markets Ltd EWCA Civ 1056.

The final case for brief consideration is *Johnson v London Borough of Havering* (2007). When faced with a very similar fact scenario to the *Leonard Cheshire Foundation* case, the Court of Appeal considered itself bound by it because it has had not been implicitly overruled by *Astion Cantlow*. The *Johnson* case is on appeal, so hopefully the House of Lords will clarify its position as to the lower court precedent.

There has been wide criticism of the Court of Appeal approach. First, the limited application of the test has been criticised. Kate Markus argues that the Court of Appeal has improperly conflated the test for amenability to judicial review with the test for ‘function of a public nature’. Rather than developing a functional approach test, she argues that the Court of Appeal is focussing on a “public character or stamp” test (involving whether authority is derived from statute and proximity of the body to a public authority) which is a test more akin to the amenability to judicial review test.  

Secondly, the focus of the test has been criticised. Dawn Oliver argues that the test developed by the Court of Appeal is not about the nature of the functions. Oliver argues that the test focuses more on institutional factors (that is, the institutional arrangements between the bodies) and relational factors (that is, the relationship between the body in question and the public authority), whereas the test should focus rather on functional factors.  

In Victoria, at least two of the listed factors in s 4(2) of the *Charter* could have relational and institutional implications (ss 4(2)(d) and (e)). It is the application of these factors that will determine whether the criticisms of the British jurisprudence are also levelled at the Victorian jurisprudence. This is not to say that the factors should not be taken into account when deciding which bodies are functional/hybrid public authorities. Rather, it is to highlight that the factors should influence the assessment of the overall test of whether the body is performing ‘functions of a public nature’, rather than allowing the factors to be substituted for the test itself. Indeed, s 4(3)(b) of the *Charter* indicates that the presence of one of the factors alone is not conclusive of the issue.

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As already indicated, the House of Lords decision appears to have implicitly criticised the Court of Appeal jurisprudence, albeit without overruling the lower court. The House of Lords position is supported by the Parliamentary Joint Committee on Human Rights. In a lengthy report considering the application of the test to determine whether a body exercised “functions of a public nature”, the Joint Committee has suggested an alternative test. The Joint Committee has proposed that a function should be public when the government has taken responsibility for it in the public interest, for instance as part of a government programme of State provision. An example given is the provision of health care. The State has chosen to provide a health care programme in the public interest because the provision of health care is considered a worthwhile public service. Any person or body providing services within this government health program should be considered to be exercising “functions of a public nature.”

There are a number of special features to the test. The test is programmatic rather than substantive. Where private bodies perform duties which are part of a government or state programme, they will be considered to be performing functions of a public nature. The test does not rely on the identification of substantive subject matters that are considered inherently public, rather than private, such as health, education, environmental protection or residential care. The programmatic focus acknowledges that very few functions are inherently public. Again, let us focus on health care. Many persons or entities can care for the sick – government, private institutions, religious bodies, charities. The provision of health care services is not inherently a function of a public nature. However, if the services are provided as part of a government programme of health care provision, the private body providing the services should be considered to be exercising “functions of a public nature.”

The Joint Committee also recognised that certain factors are not determinative. For example, the statutory basis for power is not determinative of whether a function is of


a public nature. Indeed, the Joint Committee opined that there should be no difference in the treatment of a body that has a statutory duty to deliver services, and another body providing services under contract to the body that has the statutory duty to deliver the services: ‘[t]he loss of a single step in proximity to the stat duty does not change the nature of the function.’ Moreover, institutional proximity may be evidence of the body’s role in delivering a government programme but is not determinative of whether the function is of a public nature.

[Note: Since delivering this paper on 18 May 2007, the House of Lords have delivered their judgment on the appeal from the Johnson case. In the YL case, three of the five Law Lords gave a narrow reading to the term “functions of a public nature”. Lords Scott, Mance and Neuberger held that Southern Cross Healthcare Ltd was not performing a function of a public nature when providing accommodation and care to YL under arrangements with Birmingham City Council, who had made a determination that YL was eligible for assistance under the National Assistance Act 1948 (UK). Influential factors included: Southern Cross Healthcare Ltd was a private, for profit organisation; that although the local council partly funded YL’s place in the care facility, the care home and its operations were not publicly funded; and the fact that Southern Cross Healthcare Ltd did not exercise statutory powers in relation to YL. The majority essentially held that the contractual relations between YL and Southern Cross Healthcare Ltd, and YL’s claim against the Birmingham City Council as a core public authority under the HRA UK, were the correct avenues of redress.

The minority judges, Lord Bingham and Baroness Hale, gave a much broader, purposive meaning to “functions of a public nature” and found that Southern Cross Healthcare Ltd was a functional public authority. Without seeking to catalogue an exhaustive list of relevant factors, Lord Bingham was influenced by: the role and responsibility of the State in relation to the subject matter; the nature and extent of statutory obligations in relation to the function; the extent to which the State regulates, supervises and inspects the performance of the function; whether or not criminal penalties can be imposed on those who do not properly perform the function; and whether the State, as a matter of course or by last resort, is willing to pay for the function. The minority opinion better reflects the intention behind imposing human rights obligations on functional public authorities, and it is hoped the Victoria jurisprudence favours the minority opinion.]


32 YL (by her litigation friend, the Official Solicitor) (FC) v Birmingham City Council and Others [2007] UKHL 27
Category 3: Wholly Private Entities

For the sake of completeness, there are “wholly private” entities that are never subject to the Charter obligations. An example of such is a private corporation that undertakes no public functions.

LEGAL CONSEQUENCES

Causes of action: s 39(1) and (2)?

Let us turn to the legal consequences for public authorities. Section 39 outlines the legal consequences of unlawfulness. No new cause of action is created under the Charter. A person will not be able to independently and solely claim breach of statutory duty, with the statute being the Charter. Rather, s 39 links relief to pre-existing relief or remedy. Section 39 contains a general statement of principle, and the provides some examples.

The general statement of principle in s 39(1) states that ‘if, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the basis that it was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising under the Charter.’ The person must only be able to “seek” a pre-existing, non-Charter relief or remedy. The person does not have to succeed on the non-Charter relief or remedy in order to be able to secure the relief or remedy based on the Charter unlawfulness. In practical terms, this means that an applicant needs to be able to survive a strike out application on their non-Charter ground, but need not succeed on the non-Charter ground.

Section 39(2) of the Charter, through the device of a savings provision, then specifies two types of pre-existing relief and remedies that may be available. Section 39(2) is inclusive. The first example is contained in s 39(2)(a) and refers to judicial review of

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33 This is in contrast to the British model. Under the HRA, where a public authority acts unlawfully, a victim can bring a proceeding for breach of statutory duty (with the HRA itself being the statute) or a victim can rely on the unlawfulness in any legal proceedings, whether as a defence to proceedings brought by public authorities, or as the basis for an appeal against a decision of a court or tribunal: HRA 1998 (UK) c 42, s 7(1).

34 Section 39(2) is clearly a saving provision, but in its context should be read as containing specific examples of the general principle listed in s 39(1). Section 39(1) articulates that a pre-existing relief or remedy for unlawfulness can be used for Charter unlawfulness. Directly following is the savings provision of s 39(2). It appears that a savings provision is only necessary because the two examples of pre-existing relief or remedy articulated in s 39(2) fall within the pre-existing relief or remedies envisaged by s 39(1). Moreover the use of the phrase ‘otherwise than because of this Charter’ in both sections indicates that the Charter may provide an element of the pre-existing relief or remedy required under ss 39(1) or (2). See also Simon Evans and Carolyn Evans, ‘Legal Redress Under the Charter of Human Rights and Responsibilities’ (2006) 17 Public Law Review 264, 275-6; Human Rights Law Resource Centre, ‘The Victorian Charter of Human Rights and Responsibilities’, Human Rights Law Resource Manual (2006) ch 5, 55-56.
an administrative decision under the Administrative Law Act 1978 (Vic) ("ALA") or the common law.\textsuperscript{35}

There are various threshold issues to consider, including: (a) satisfaction of standing requirements; (b) the clarification of how the meaning of “public authority” under the Charter will interact with the meaning of “tribunal” under the ALA, with the former being much broader in scope than the latter; and (c) whether the impugned decision is the kind of “decision” that can be reviewed under s 2 of the ALA.

In terms of the grounds of review, various grounds of unlawfulness will be open to Charter argumentation. In terms of error of law (that is, narrow ultra vires and traditional jurisdictional error), a public authority may incorrectly interpret the enabling law as allowing rights-incompatible actions, and thus act beyond it authorised power. A Charter based argument will come down to requiring a rights-compatible interpretation of the enabling law and ensuring that the public authority behaves consistently with this.

In terms of improper exercise of power (that is, broad ultra vires, extended jurisdictional error or non-jurisdictional error), a number of grounds will be arguable. The ground of failure to take into account a relevant consideration will take centre stage. It will be argued that a public authority failed to take into account relevant human rights considerations. Indeed, this argument is central to s 38(1) itself, which defines unlawfulness to include a failure ‘to give proper consideration to a relevant human right.’ The inclusion of the word “proper” in s 38(1) was a deliberate choice in order to avoid a “tick-a-box” approach to human rights. When assessing the relevant consideration ground in a Charter context, a “tick-a-box” approach which might withstand Peko-WallSEND scrutiny, will not withstand Charter scrutiny. The Charter requires proper consideration to be given to relevant human rights, which may translate into human rights being a dominant relevant consideration and may allow courts to assess whether sufficient weight is given to the relevant human rights consideration.\textsuperscript{36}

Another obvious improper exercise ground will be unreasonableness. It will be argued that a public authority has acted unreasonably by not giving adequate weight to the human rights considerations. In this context, it is important to consider proportionality. Will the Charter lead to the development of a free-standing ground of proportionality? That is, will the Charter allow an applicant to claim that given the human rights considerations, the decision of a public authority was disproportionate and accordingly unlawful.

\textsuperscript{35} Order 56 of Chapter 1 of the Rules of the Supreme Court.

The best guidance on this issue is from the Daly case in the United Kingdom.\textsuperscript{37} In Daly, a number of Law Lords held that the equivalent provision to s 38 of the Charter, s 6 of the HRA UK, imposes an obligation on the courts to review the proportionality of an administrative decision that interferes with a qualified or limited right. Moreover, their Lordships opined that such proportionality review does not constitute merits review.\textsuperscript{38} Further, their Lordships drew a distinction between review on the ground of proportionality and review on the ground of Wednesbury unreasonableness. The threshold for illegality/unlawfulness under Wednesbury was considered too high to satisfy human rights requirements.\textsuperscript{39} Lord Steyn outlined three ways in which proportionality review differs from Wednesbury unreasonableness. First, ‘the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable.’ Secondly, proportionality ‘may go further’ than unreasonableness, in that ‘it may require attention to be directed to the relative weight accorded to interests and considerations.’ Thirdly, ‘even the heightened scrutiny test’, introduced into the Wednesbury unreasonableness test where human rights are in issue, ‘is not necessarily appropriate.’\textsuperscript{40} In other words, ‘the intensity of review is somewhat greater under the proportionately approach.’\textsuperscript{41}

The musings about proportionality in Daly were the obiter of only a minority of Law Lords.\textsuperscript{42} Some later cases do introduce the concept of proportionality into judicial review, such as R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital and R (Prolife Alliance) v British Broadcasting Corporation.\textsuperscript{43} In the pre-Daly case of Alconbury, Lord Slynne stated:

\begin{quote}
R (on the application of Daly) v Secretary of State for the Home Department [2001] 2 WLR 1622 (‘Daly’). This case replaces the court’s first attempt to introduce proportionality into administrative law. The first attempt was in R (on the application of Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840. In the latter case, the court held that a reviewing court must ask whether the primary decision-maker had reached a reasonable decision as to whether an interference with a Convention right was necessary to achieve a legitimate aim and was proportionate. The reviewing court should use anxious scrutiny when making this assessment. This test was reject in Daly as it was too close to the Wednesbury unreasonableness test, a test whose threshold for interference was too high.
\end{quote}

\textsuperscript{37} As per Lord Steyn (at para 28): ‘This does not mean that there has been a shift to merits review... [T]he respective roles of judges and administrators are fundamentally distinct and will remain so.’

\textsuperscript{38} That is, threshold for irrationality under Wednesbury unreasonable is considered so high as to effectively exclude any consideration by the court of whether the interference with the right was necessary to meet a pressing social need or was proportionate.

\textsuperscript{39} Ibid, para 27.

\textsuperscript{40} Id.

\textsuperscript{41} Although Daly was vis-à-vis HRA review, not judicial review, it is showing the judges taking proportionality seriously as a legal concept.

\textsuperscript{42} R (Wilkinson) v Responsible Medical Officer Broadmoor and Others (2001) EWCA Civ 1545 and R (Prolife Alliance) v British Broadcasting Corporation (2003) UKHL 23 respectively.
I consider that even without reference to the [HRA UK] the time has come to recognise that this principle of proportionality is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the [HRA UK] however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied.  

[Note: Since delivering this paper on 18 May 2007, the House of Lords have resolved the issue in favour of a free-standing ground of proportionality in Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department [2007] UKHL 11. In brief, the Huang decision confirms the obiter in Daly as good legal principle. It also improves the test of proportionality used by the British courts by bringing the British test of proportionality as outlined in the de Freitas case, in line with the proportionality test adopted under the Canadian Charter of Rights and Freedoms 1982 in R v Oakes.]

It is unclear whether or not the Daly arguments will hold sway in Victoria. There are a few considerations. First, the drafters of the Charter did not appear to intend there to be a free-standing proportionality ground of unlawfulness. According to the drafters’ arguments, the ALA only codifies common law grounds, and proportionality is not a common law ground, such that human rights and proportionality must be assessed as part of Wednesbury unreasonableness. Secondly, there are differences between the HRA UK and Charter that may undermine a free-standing ground of proportionality in Victoria. The classification of the judiciary as a public authority under the HRA UK (meaning that the British judiciary has a HRA UK obligation to develop the common law consistently with human rights) is in contrast to the Charter. Thirdly, the High Court of Australia has indicated that Australia has a unified common law, which may potentially make it difficult for Victorian judges to unilaterally develop the common law grounds of review to include proportionality. Fourthly, Victoria does not have an external body like the European Court of Human

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45 De Freitas v Permanent Secretary of Agriculture [1999] 1 AC 69.
47 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 563-64.
48 But then again, it may not be all that difficult. After all, each jurisdiction is free to abrogate the common law with statute, such that the principle of a unified common law admits of jurisdictional differences. Evans also muses that if more jurisdictions adopt human rights instruments, this may be the impetus for the common law to develop: Carolyn Evans, ‘Administrative Law and Australian Bills of Rights’ (Presented at the Annual Forum, Australian Institute of Administrative Law, 14 June 2006) 19.
Rights imposing the proportionality standard from outside. The European influence in
Britain on this matter is acknowledge by Paul Craig: ‘It is clearly important that [the
British] courts develop a test for scrutiny which is in conformity with the
requirements laid down by the Strasbourg Court in Smith and Grady. To do otherwise
would be to invite claimants to pursue their case before the Strasbourg court.’

On balance, it seems that the development of a free-standing ground of
proportionality is more sensible than subsuming human rights considerations under
Wednesbury unreasonableness. First, proportionality is core to all human rights
analysis. It is an integral part of the fundamental assessment of limits to rights. It
makes no sense to shy away from this fact, and to dress a proportionality assessment
up as a Wednesbury unreasonableness argument. Secondly, a free-standing right to
proportionality recognises the substance of the analysis rather than hiding behind
formality. If the intention of the drafters was to accept proportionality as a ground for
review, whether proportionality is recognised as part of Wednesbury
unreasonableness or a free-standing ground is an issue of form. The substance is the
same: allowing courts to assess proportionality. Why not call a spade a spade?
Thirdly, the jurisprudence from the European Court and the British judiciary is
compelling.

It is important to briefly consider the relevance of Craig v SA. By definition, courts
and tribunals are not public authorities. Presumably, all other “categories” of public
authorities will be considered either administrative decision makers or non-courts. In
terms of Craig, “courts” proper are not public authorities, such that the retention of
jurisdictional error and non-jurisdictional error is neither here nor there in this setting.
“Non-courts”, as in administrative tribunals, are not public authorities, such that
collapsing all errors into jurisdictional errors is also neither here nor there in this
setting. If public authorities are classed as administrative decision makers, all narrow
and broad ultra vires grounds are available against them. Alternatively, if public
authorities are classed as “non-courts” all errors are jurisdictional errors. The choice
of classification for public authorities remains a strategic decision, based on the
availability of remedies, the existence of privative clauses, and the like.

The final point of note regarding the first example under s39(2) is that the entire
range of administrative law remedies under the common law and the ALA are
available.

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50 Craig v South Australia (1995) 184 CLR 163.
51 For example, an order that the authority cease pursuing the conduct or action; an order setting aside a decision;
an order requiring a public authority to perform a duty; a declaration that a decision or action is unlawful; and
an injunction compelling action or stopping action.
The second example of unlawfulness is contained in s 39(2)(b), which allows a person to seek a declaration that the public authority acted unlawfully (that is, incompatibly with rights)\textsuperscript{52} and associated relief, such as, an injunction to stop the unlawful conduct, a stay of proceedings, or an exclusion of evidence.

A thoroughly explored example of the operation of s 39(2)(b) relates to the exercise of judicial discretions. Let us consider the judicial discretion to ensure the fairness of court proceedings. This includes a discretion to exclude evidence that is obtained unlawfully or improperly. An accepted example of the exercise of this discretion is to exclude from evidence a confession that is obtained under duress. Under the Charter, the pre-existing ground of duress should be extended to include duress resulting from cruel or degrading treatment (s 10). Human rights issues already inform the exercise of discretions, and the Charter merely formalises this more fully. This is not a new remedy; it is an existing remedy that will be extended to include a new set of circumstances.\textsuperscript{53}

Another judicial discretion is the discretion to stay proceedings where it is unfair for the proceedings to continue, or to prevent an abuse of process. A Charter example of the exercise of this discretion would be a stay of proceedings to prevent double jeopardy, which violates the right not to be tried twice for the same offence (s 26).\textsuperscript{54}

**Damages: ss 39(3) and (4)?**

Under s 39(3) of the Charter, a person is not entitled to damages because of a breach of the Charter. A person may only seek damages if they have a pre-existing right to damages under s 39(4). These sections read together mean that a person could not sue for damages for inhuman treatment in prison *per se*, but could argue that a civil tort, such as assault or battery or false imprisonment was committed, using Charter rights to bolster the claim, and seek damages.\textsuperscript{55}

\textsuperscript{52} This looks like a free-standing remedy. Evans and Evans argue that s 39(2) puts the availability of this free standing remedy beyond doubt. The right to seek the injunction or declaration in relation to unlawful government conduct exists under the general law, and is clearly within the inherent jurisdiction of the Supreme Court. Given that not statement has been made to reduce this jurisdiction of the Supreme Court, as is required under s 85, it is argued that s39(2)(b) creates a free-standing remedy. See Simon Evans and Carolyn Evans, ‘Legal Redress Under the Charter of Human Rights and Responsibilities’ (2006) 17 Public Law Review 264.


\textsuperscript{55} Simon Evans, ‘What Difference Will the Charter of Rights and Responsibilities make to the Victorian Public Service’ (Presented at Clayton Utz, Melbourne, 13 June 2006): ‘Section 39 can hardly be taken to have excluded the right to seek compensation for these torts. Section 39(4) can be regarded as preserving precisely these rights.’ See also See Human Rights Law Resource Centre, ‘The Victorian Charter of Human Rights and Responsibilities’, in Human Rights Law Resource Manual (2006), ch 5 at [8.1].
It is important to distinguish the New Zealand experience with damages. Under the Bill of Rights 1990 (NZ), the Court of Appeal used its inherent powers to award damages in Bagient’s case, although there was no explicit right to damages provided for under the Bill of Rights. The Charter has attempted to avoid a Bagient-type outcome, by attempting to override this inherent power to award damages under s 39(3). This is clear from the Government’s Statement of Intent, the Explanatory Memorandum to the Charter, and the second reading speech of the Attorney-General.56

**Essential Message of s 39?**

There are two essential messages flowing from s 39. First, the Charter does not create an independent cause of action. That is, a person will not be able to independently and solely claim breach of statutory duty, with the statute being the Charter (in contrast to the HRA UK, which does allow a free-standing claim).

Secondly, for a person to have any chance of securing any relief or remedy (including damages) for an unlawfulness of a public authority, that person must link the public authorities unlawfulness to a pre-existing relief or remedy (or right to damages).

**CONCLUSION**

Because the remedial provisions under ss 38 and 39 are so weak, the s 32 interpretation provision becomes an extremely important remedial provision. Before we explore this further with some examples, let us consider what we mean by “rights-compatibility”. A law may be rights-compatible for a number of reasons. First, the law may not engage or violate or limit a right. Secondly, if a law does engage/violate/limit a right, the limitation may be found to be justified under s7(2), or a qualification or limitation internal to the right. Thirdly, if a law does engage/violate/limit a right and it is not a justifiable limitation, s 32 interpretation may save the law – that is, through s 32 interpretation, the law is re-interpreted so that it is not an unjustifiable limitation on a right.

Let us now consider a few scenarios. First, if a law is rights-compatible, there is no need for a remedy under ss 38 and 39. A person’s rights are protected (read, not violated) because the law is compatible, and the public authority cannot rely on a rights-incompatible law to justify a violation of the person’s rights. In other words, the public authority has its obligations under s 38(1) and the exceptions in s 38(2) will not apply.

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56 Simpson v Attorney-General [1994] 3 NZLR 667 ("Bagient’s Case").

57 Victoria Government, Statement of Intent, May 2005; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28; Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1294 (Mr Hulls, Attorney-General), respectively.
Secondly, if the law is rights-incompatible, s 38(2) allows a public authority to act incompatibly with human rights. However, through s 32 interpretation, the judiciary may alter the statutory obligation/power to make it rights-compatible. Once the law is given a rights-compatible interpretation, the potential violation of human rights will be avoided. The rights-compatible interpretation, in effect, becomes your remedy – the law is re-interpreted to be rights-compatible, the public authority has obligations under s 38(1), and the s 38(2) exceptions to unlawfulness do not apply.

An example of this scenario can be constructed from British jurisprudence. Let us assume that, under mental health law, a patient that is involuntarily hospitalised bares the burden to prove that they are well enough to be released. This reversed onus of proof is an unjustified limitation on a patient’s rights to the freedom of movement (s 12) and to liberty (s 21), because the hospital and treating medical practitioners ought to have to prove that the conditions justifying involuntary detention still exist. Under s 38, there is no free-standing remedy for the patient against the hospital, and the hospital can justify its decision under the s 38(2) exception. In this scenario, the involuntary patient should seek a s 32 rights-consistent interpretation of the law, asking the court to interpret the law to place the onus of proof on the hospital to prove that the conditions justifying involuntary detention still exist. The s 32 rights-compatible interpretation is a complete remedy – if the hospital cannot prove the continued existence of the conditions justifying involuntary detention, the patient must be released.

Another example is the Australian Capital Territory case of R v Upton. Upton had allegedly assaulted two people and damaged a motor vehicle in 2002. For no fault of his own, Upton’s case did not come to trial until 2006. The ACT Supreme Court stayed proceedings because of the delay in bringing the accused to trial. This was done by a rights-compatible interpretation of the legislative provisions relating to stays of proceedings. The Supreme Court held that the discretion to stay proceedings had to be read in light of the right of persons charged with criminal offences to be tried without reasonable delay. The remedy here did not come from the application of ss 38 and 39 – indeed, the Human Rights Act 2004 (ACT) does not contained equivalent provisions. Rather, the remedy came about through interpreting legislation in a rights-compatible manner.

Thirdly, if the law is rights-incompatible, and it is not possible to find a rights-compatible interpretation that is also consistent with statutory purpose under s 32, the only option for the Supreme Court and Court of Appeal is to issue a declaration of inconsistent interpretation under s 36. On this occasion, there will be no recourse against a public authority that acts in accordance with the law, with the public

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58 R (II) v Mental Health Review Tribunal North & East London Region (Secretary of State for Health intervening) [2001] EWCA Civ 415.

authority being able to rely on the s 38(2) exception to unlawfulness. The only solution a person has is political.

The final point to note about the strength of the s 32 interpretation power as a remedial provision is that its influence goes beyond holding “public authorities” to account and reaches deep into the private sphere. This must be kept in mind when considering human rights solutions to what appear to be purely private disputes.

Consider the British case of *Ghaidan v Godin-Mendoza.* This case involved a dispute between a landlord and tenant concerning the amount of rent payable under a “statutory tenancy by succession” under rent protection legislation. The landlord does not fall within the core/wholly or hybrid/functional categories of “public authority”, such that the British equivalent provisions of ss 38 and 39 were not in play. Indeed, this is an action between two private parties – a horizontal application of the *HRA UK*, if you will.

The House of Lords used its s 32 equivalent interpretation power to give the relevant legislation a rights-consistent interpretation. The legislation was read to include same-sex co-habitees in the definition of “spouse” (in addition to opposite sex married and unmarried co-habitees), thereby ensuring that a surviving same-sex co-habitee received the benefits of a “statutory tenancy by succession”. This interpretation ensured that the surviving same-sex tenant’s right to a home under art 8 was not violated on the basis of unlawful discrimination based on sexuality under art 14 of the *ECHR*. Consequently, the s 32 equivalent interpretation power provided a rights-based solution to a dispute deep in the private sphere of landlord tenant relations.

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Rights and Democracy: A Reconciliation of the Institutional Debate

JULIE DEBELJAK

INTRODUCTION

The interdependence of democracy and human rights is accepted within the international law sphere. Human rights guarantee the conditions necessary for the proper functioning of a democracy. Human rights buttress the search for self-rule tempered by political equality. Conversely, democratic institutions and systems of governance allow for the protection and promotion of human rights. Just as many argue that when peace and democracy occur, they tend to occur together; so too, when respect for human rights and democracy occur, they tend to occur together.¹

However, something is lost in the translation from international law to domestic law. Indeed, within a domestic setting, human rights may be regarded as counter-majoritarian and, in particular, judicially enforceable human rights can be viewed as the antithesis of democracy. Much of the counter-majoritarian view of human rights is attributable to two factors. First, the attitude that democracy can only mean majority rule places different, diverse, unpopular, and minority interests in a precarious position. The majority is free to pay regard to, or to disregard, these interests as it pleases. Human rights, on the other hand, tend to protect and promote these interests. In this chapter concepts and practices of democracy that accommodate rights protection and promotion will be explored.

Secondly, the impact on the power relations between the institutions of government when human rights protection is formally introduced into democratic systems causes tension. Because of the corrupting nature of absolute power, the separation of powers doctrine dictates the dispersal of power between the different arms of government. Separation of powers is tempered by the need

for checks and balances, which requires mixed government. The conferral of
some aspects of the power of one arm of government upon another arm of
government provides vital oversight of the operations of each arm of govern-
ment. However acceptable the idea of mixed government is in general, the
sharing of human rights responsibility between the arms of government is most
controversial. Giving an unelected (and thus electorally unaccountable) arm of
government the power to review the decisions of the elected (and thus electorally
accountable) arms of government for vague human rights purposes is viewed as
anti-democratic. An exploration of the actual sharing of power under modern
human rights instruments is instructive in allaying this anti-democratic critique.
International human rights instruments, as well as the British Human Rights Act
and the Canadian Charter of Rights and Freedoms, will be used to ground the
theoretical discussion.

Reconciling Human Rights within a Democratic Framework

'Democracy'

The fashionable concentration on democracy as the main value threatened is not
without danger. It is largely responsible for the misleading and unfounded belief
that so long as the ultimate source of power is the will of the majority, the power
cannot be arbitrary.2

There is a multitude of competing models of democracy. The models range
from pure majoritarian, statistical market-based democracy, to procedural dem-
ocracy, to substantive democracy. The basic differences between each model
centre on whether or not the rights of the individual and the minority temper
the will of the majority; and if so, whether the rights are intended to protect
procedural or substantive notions of democracy.3 Inseparable from the demo-
cratic legitimacy of rights issue is the institutional question: Which arm of
government should interpret and enforce human rights guarantees? Just as it is
argued that human rights guarantees have the capacity to pervert some concep-
tions of democracy, so too do the institutional arrangements for enforcement.

What is the relationship between human rights and democracy?

Traditionally, democracy has been considered to favour majoritarian decision-
making. Thomas Aquinas defined democracy as popular power, through which
the ordinary people, by force of numbers, governed the rich. Human rights,
in contrast, are traditionally conceived of as recognizing and protecting the

1 F. Hayek, *The Road to Serfdom* (Sydney: Dymock's Book Arcade, 1945), quoted in C. Kakatos,
'Democracy, Parliament and Responsible Government', *Papers on Parliament*, no. 8, June 1990,
issued by the Senate Publishing Unit, Department of the Senate, Parliament House, Canberra, 1.
2 This can often be reflected in whether the protected rights are considered procedural or substan-
tive in nature.
unpopular or a minority from the power of the majority. Human rights, by
declaring minimum standards of behaviour, preclude majorities from acting in
certain ways and pursuing certain goals. Civil and political rights, in particular,
attempt to guarantee a voice for the unpopular within the popular; a voice for
the minority within the majority. Civil and political rights also protect certain
human dignities from majority incursion. Thus arises the supposed tension
between a particular expression of popular opinion, known as majoritarian
democracy, and the conditions necessary to guarantee the continuing expression
of that opinion, known as civil and political rights.

However, the interrelationship between democracy and human rights need not
be viewed as a tension. As Cappelletti suggests:

far from being inherently antidemocratic and anti-majoritarian, [rights emerge] as a pivotal
instrument for shielding the democratic and majoritarian principles from the risk of
corruption. Our democratic ideal... is not one in which majoritarian will is omnipotent.4

Indeed, democracy is dependent on human rights. Democracy could not
function without the adoption of some rules regulating political participation
and civil freedoms. Moreover, human rights limit democracy. Democracy could
not function without some rules limiting the power of those elected to govern.

... rights underpin the institutional structure of constitutional democracy. Basic rights...
become constitutive of democratic will-formation. Rights provide the basic building
blocks of the political structure and give expression to the idea of democracy. Properly
understood, rights and democracy do not... conflict. Rights and democracy are twin sides
of the same coin.5

Thus, democracy is an important value, but not the only important value.6
Other values include those embodied in human rights instruments that, aside
from promoting and protecting democratic governance, perform other useful tasks. The Preamble to the European Convention on Human Rights (the

4 In the Hon. Justice R. D. Nicholson, 'Judicial Independence and Accountability: Can They Co-
exist?', (1993) 67 Australian Law Journal 404, 410-11, quoting Cappelletti. See also D. Davis,
M. Chaskalson, and J. de Waal, 'Democracy and Constitutionalism: The Role of Constitutional
Interpretation', in D. van Wyk, J. Dugard, B. de Villiers, and D. Davis (eds.), Rights and Constitution-
people” have formulated a constitutional choice, it binds the more limited authority of the govern-
ment—the courts have a custodial function of preserving the decisions of “we the people” against the
potential undermining thereof by the government. Thus, majoritarianism has no exclusive claim on
democracy—there are certain characteristics of democratic enterprise that even the majority cannot
deny.’

5 M. Loughlin, 'Rights, Democracy and the Nature of the Legal Order', in T. Campbell,
Press, 2001), 44. Both Loughlin and Neuborne insist that rights are the necessary linchpin of our
institutional structure. See B. Neuborne, 'The Origin of Rights: Constitutionalism, the Stork and the
Democratic Dilemma', in S. Shettle (ed.), The Role of Courts in Society (Dordrecht: Martinus
Nijhoff, 1988).

6 '... democracy is not a unique fundamental value but rather one that must be understood in the
light of a very limited list of other such values', as per M. Darrow and P. Alston, 'Bills of Rights in
Comparative Perspective', in P. Alston (ed.), Promoting Human Rights Through Bills of Rights:
Comparative Perspectives (Oxford: Oxford University Press, 1999), 496.
Democratic Foundations

'European Convention') expressly links the value of human rights protection and the value of democracy:

those Fundamental Freedoms which are the foundation of justice and peace in the world...are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.

The Preamble emphasizes that both an effective political democracy and human rights observance are required for justice and peace. There is no explicit indication as to how the two interact. Yet, there is implicit recognition that an effective political democracy and the observance of human rights are complementary, and together they maintain the fundamental freedoms necessary for justice and peace. This suggests that, far from the existence of an irresolvable tension, the two ideals can be reconciled. On the basis of the Preamble, it is fair to assume that an effective political democracy protects and promotes human rights, and that human rights reinforce an effective political democracy. As Bobbio suggests:

The liberal state and the democratic state are doubly interdependent: if liberalism provides those liberties necessary for the proper exercise of democratic power, democracy guarantees the existence and persistence of fundamental liberties...

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By exploring the notion of an 'effective political democracy', our understanding of the interrelationship between human rights and democracy will be furthered. What are the features of effective political democracy, and which institutions have a role in enforcing human rights as part of it?

An 'effective political democracy'

Difficulties of definition

There are many difficulties associated with attempting to define 'democracy', the first being the diversity of views as to its core. This tends to suggest that there is no 'transparent view of the essential meaning of democracy'. Each meaning of democracy is borne of a particular context or a particular historical struggle. If the 'true' definition of democracy is indeterminate (at least without a given context and history), we should limit our enquiry. We should ask what promotes an effective political democracy and, in particular, whether a judicially enforceable instrument for the protection of fundamental rights can be considered part of a true democracy, or at least, not antithetical to democracy.

7 Bobbio, n. 1 above, 25-6.
9 Marks, n. 8 above.
Another difficulty associated with the definition of democracy is that we lose sight of its application. Democracy should not be considered as an end in itself, a final destination or a place we reach.\textsuperscript{10} Democracy should be used as a benchmark: a yardstick for criticism and a catalyst for change. It is an ideal political structure that a society aspires to, not a description of existing political institutions and practices.\textsuperscript{11} Democracy is not simply a way of legitimizing the institutions and procedures that have served existing democracies to date.\textsuperscript{12} Democracy has and will continue to evolve. Grand notions, such as democracy, must be approached in a distinct manner. Society must take a "provisional approach to their significance, to conceive them "as ongoing accomplishments. They are never finished, but have to be constructed, deconstructed and reconstructed in ever-changing circumstances."\textsuperscript{13} In this sense, democracy is an evolving concept.

So too is the notion of human rights an evolving concept. Human rights were first articulated as such during the Enlightenment period in the 1700s, were developed after the Second World War, and continued to expand at the end of the twentieth century. The concept of human rights has been expanded and refined from the libertarian Enlightenment period, to the community-reinforcing ideal after the Second World War, to the mutuality ideals underlying more modern-day documents.\textsuperscript{14} That human rights standards are the subject of a continuing and evolving debate bears witness in this expansion and refinement process.

\textit{Defining an 'effective political democracy'}

What political structure would qualify as an 'effective political democracy'? Democracy must involve notions of self-rule within a community of equals. As Dworkin suggests, democracy is about participation by all as equals and decisions that treat all with equal concern and respect. Statistical conceptions of democracy,

\textsuperscript{10} If it were considered an end in itself, Marks argues that this would be a disappointingly undemanding view of democracy. Current democratic theory accepts high levels of citizen passivity. It utilizes existing liberal institutions without addressing the limitations of those institutions. In particular, she queries whether our institutions can function without civil and political rights, and questions the role that should be played by the separation of powers. Further, democratic theory is yet to address the enormous amounts of unaccountable power being exercised over the lives of citizens of the modern state. These shortfalls in current standards of democracy manifest themselves in the contemporary melancholy about democracy and its inability to ensure self-rule and political participation. See Marks, n. 8 above, esp. 146–51.

\textsuperscript{11} Rather than pursuing questions of whether democracy has a normative component, democracy is often assumed to be the sum of current practices of representative government', as per J. L. Hiebert, \textit{Limiting Rights: The Dilemma of Judicial Review} (Montreal: McGill–Queen's University Press, 1996), 116.

\textsuperscript{12} See generally Marks, n. 8 above; Hiebert, n. 11 above.

\textsuperscript{13} Marks, n. 8 above, 149.

which legitimize what an electoral majority favours, are insufficient. Statistical conceptions of democracy do not guarantee participation by all as equals, nor do they necessarily produce decisions that treat all (popular and unpopular, majority and minority) with equal concern and respect. Communal conceptions of democracy, which legitimize the decisions of a majority within a community of equals, should be preferred over statistical conceptions of democracy.15

Marks' 'principle of democratic inclusion' best captures this communal conception of democracy. The principle of democratic inclusion is concerned with 'relationships and processes'; it is an 'agenda of enhancing control by citizens of decision-making which affects them and overcoming disparities in the distribution of citizenship rights and opportunities'.16 The essence of enhanced control by citizens over decisions that affect them is self-rule. The essence of overcoming disparities in rights and opportunities is political equality. Accordingly, the principle of democratic inclusion can be described as identifying and securing those processes and relationships that advance self-rule and political equality. It is much more demanding than merely securing episodic elections (with the concomitant episodic accountability), formalities, and securing certain institutional arrangements. This view is supported by a report of the Secretary-General of the United Nations:

Elections themselves do not constitute democracy. They are not an end but a step, albeit an important and often essential one, on the path towards the democratization of societies and the realisation of the right to take part in the government of one's own country... democracy implies far more than the mere act of periodically casting a vote, but covers the entire process of participation by citizens in the political life of their country.17

The principle of democratic inclusion addresses the two difficulties identified earlier. First, the recognition of democracy as a matter of processes and relations confirms that there is no absolute core meaning of democracy. Our task is not about absolute meanings, but about symbiotic relationships: it is to decide whether judicial review based on human rights standards is antithetical to a definition of democracy. Secondly, the principle of democratic inclusion appreciates that democratic theory is incomplete; it is still under construction. Democracy is 'an open-ended and continually recontextualized'18 discussion about the aims of governing structures, their roles, their limits, and the most appropriate dispersal or mixing of power between the structures.

Theories expounding on the principle of democratic inclusion

Two additional theories operationalize the principle of democratic inclusion. The 'deliberative theory of democracy' embraces the ongoing nature of democratic definition, the need for self-rule via continual dialogue within a polity, and the

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16 Marks, n. 8 above, 116.
18 Marks, n. 8 above, 110.
necessity of political equality. According to the deliberative theory of democracy, democracy is a process of developing preferences through dialogue which, in the absence of unanimity, will be interrupted by a majority decision.\textsuperscript{19} This majority decision is provisional; it is the practical compromise citizens live with until further agreement can be reached. Although the aim is to reach a rational consensus in order for the polity to move forward, it by no means considers this to be, or expects there ever to be, an ideal consensus. The interpretative theory of 'incompletely theorized agreements' is also useful, in terms of encouraging the exchange of ideas and keeping the channels of debate and change open.\textsuperscript{20}

Let us begin with the dialogue aspects. The deliberative theory of democracy is concerned with 'open and uncoerced deliberation aimed at reaching a rational consensus concerning the common good or the public interest'.\textsuperscript{21} The deliberative theory recognizes the capacity for impersonal reflection and the ability of each individual to engage in reasoned deliberations. The deliberative theory is civic and communitarian in nature. It is concerned with the rights and responsibilities of its electorate. It requires choice between rival concepts of the common good, not the making of individual demands or mutually beneficial agreements.\textsuperscript{22} Real alternatives must be presented and choice between these alternatives must be uncoerced.

The deliberative theory of democracy is especially important in a plural society where diversity, disagreement, and uncertainty abound. Pluralism demonstrates that the basic trait of modern democracy is dissent: 'the fundamental feature of modern democracy is based on the principle that dissent...does not undermine a society but underpins it'.\textsuperscript{23} People will disagree about the common settlement of an issue, say, the enactment of a certain law. Although there may be disagreement about the common settlement of the content of the law, people will agree that there should be a common settlement, in preference to each group trying to implement its own view. Free and vigorous debate under fair procedures that allow all to participate equally in determining the specifics of the particular law is a necessary precursor to the enactment of that law. Indeed,

\textsuperscript{19} Campbell, n. 8 above, 45.


\textsuperscript{21} David Couzens Hay and Thomas McCarthy, Critical Theory (1994) 7, quoted in Campbell, n. 8 above, 44.

\textsuperscript{22} As per Bobbio, n. 1 above, 48: 'In most representative democracies the answer to "who" the representative is, is that he is a fiduciary and not a delegate, and "what" he represents are general rather than particular interests. (Moreover it is precisely because general and not particular interests are represented that there is a principle in force in democracies forbidding the use of binding mandates.)...a representative means a person with two very specific attributes: someone who (a) enjoys the trust of the electorate by virtue of election, and (b) who is not directly answerable to the electorate precisely because he is called upon to safeguard the general interests of civil society and not the particular interests of anyone group.'

\textsuperscript{23} See Bobbio, n. 1 above, 60. Also see ibid. 58-9: 'That our societies, in contrast to the classical polis, have several centres of power is an undeniable fact...There is pluralism at an economic level...There is political pluralism...Ideological pluralism obtains from the moment there is not just one doctrine of the state but various currents of thought...which have free rein and are reflected in a public opinion which is far from homogenous or uniform.'
Waldron argues that disagreement is the normal background to law-formation: do 'not be fooled into thinking that calmness and solemnity are necessarily the mark of a good polity, and noise and conflict a symptom of political pathology'. In other words, noise and conflict are signs of a healthy polity.

Similarly, noise and conflict resulting from a diversity of views about democracy, its institutions of governance, and the powers and limits of its institutions are signs of a system of healthy democracy. Given that the definition of democracy is indeterminate, noise and conflict over democracy is the natural state of affairs. It is through noisy and discordant deliberation that the search for improved meanings of democracy is advanced, thereby advancing the conditions for self-rule. This is particularly vital when the debate is about the functioning of democracy and the direction of society.

Noise and conflict also promote the notion of political equality. Political equality is aimed at a more inclusionary political community that treats all with equal concern and respect. Deliberative democracy promotes such indecision through the expression, discussion, and exploration of differing perspectives. The broader the range of perspectives that are included in the deliberation, the less likely exclusionary decisions will be made—at the very least, any exclusionary decisions that are made will not be monopolized by the dominant group. Furthermore, the exploration of differing perspectives also promotes a critical analysis of the current provisional consensus about the best form of governance and the current provisional consensus about the direction of society. The ongoing debate ensures that nothing is permanent. Given that democracy is not a status to be reached or a given set of institutions and procedures to adopt, the ongoing nature of the debate allows existing democratic standards to act as a benchmark for critical analysis and as a catalyst for change.

The constitution of a society embodies the provisional agreement reached about democracy via the deliberative process and embeds the political structure which best reflects the provisional agreement. Constitutional arrangements are equally provisional and should be viewed as incompletely theorized agreements that reflect the provisional agreement reached about democracy, but which are open to review and revision. Accordingly, constitutional interpretation should focus on the incompleteness of the standards so adopted.

Sunstein developed this notion of incompletely theorized agreements. It is suited to a society that contains a plurality of views. If there is dissension on a large-scale issue, people may converge on particular outcomes and low-level principles without having to agree on the general principle. Conversely, there may be agreement on the general principle, which allows us to leave open the range of outcomes in particular cases. Indeed, society may disagree on the general principle and the particular application, but find agreement on mid-level principles.

25 As per Linklater, as quoted by Marks, n. 8 above, 110.
26 Sunstein, n. 20 above.
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At whichever level the consensus is reached, the point is that a consensus is reached. There is a common settlement of the disagreement, which promotes stability, mutual respect, and reciprocity. By reaching an incompletely theorized agreement, the deepest and most defining beliefs and commitments of some people are not rejected by or subordinated to another's. Moreover, by not once and for all committing society to overarching general principles or particular outcomes, the morals and values of society can evolve and respond to changing circumstances. Finally, society can move ahead on the basis of the provisional settlement. In the words of Bobbio: 'Political life proceeds through a series of conflicts which are never definitely resolved, and whose temporary resolution comes about through provisional agreements, truces, and those more durable peace treaties called constitutions.'

Incompletely theorized agreements are part of Sunstein's theory of just institutions. In particular, incompletely theorized agreements are part of the theory of deliberative democracy. Power can only be legitimately exerted by just institutions, and just institutions must be founded on democratic considerations. However, Sunstein insists that some interests are immune from democratic intrusions (as does the principle of democratic inclusion). Constitutions are used to define what is and is not immune from democratic intrusion. Constitutions establish democracy, its just institutions, and the limits of the powers of its just institutions.

Constitutions tend to contain a particular type of incompletely theorized agreement: that is, agreement at a high level of abstraction, because people can agree at the abstract level about how to live, but cannot agree about its specification. For instance, we can agree to live by the rule of law, but we cannot agree what this means. In the context of rights, most people would agree that cruel, unusual, and inhuman treatment is inappropriate, but will disagree about what constitutes cruel, unusual, and inhuman treatment.

Overall, the principle of democratic inclusion will secure an effective political democracy. The principle of democratic inclusion emphasizes the need for self-rule and political equality. The deliberative theory of democracy, coupled with the incompletely theorized agreement theory, is best suited to improving self-rule and political equality. The principle of democratic inclusion does have human rights implications. In particular, both the deliberative theory of democracy and incompletely theorized constitutional agreements envisage human rights guarantees enforced by (at least) the judiciary. Before turning to the human rights and institutional implications of the principle of democratic inclusion, a consideration of the ramifications of substantive theories of democracy is necessary.

Substantive or procedural democracy?
There is an ongoing debate over whether democracy is concerned solely with procedures and has no (or little) quality control over the outcomes of the process,

27 Bobbio, n. 1 above, 120.
28 Sunstein, n. 19 above, 53–61.
or is concerned also with substantive outcomes without respect for which the procedures are considered illegitimate. There are many reasons to favour a substantive theory of democracy over a purely procedural (or electoral) theory. Substantive notions of democracy are better able to meet the demands of internationally recognized human rights obligations than are procedural notions. Procedural democracy has no greater commitment to human rights guarantees than the majority allows. Procedural notions can easily degenerate into non-democratic, or even anti-democratic, formalism. The core values of democracy can be subordinated to majority pressure. Moreover, procedural mechanisms designed to implement democracy are themselves based on substantive values, and their application involves the evaluation of substantive questions of political morality. A theory that acknowledges these questions of substantive political morality is to be preferred.

The ascendency of substantive over procedural theories is demonstrated by Dworkin’s theory of communal democracy, which is concerned with legitimizing what a majority, within a community of equals, prefers. This type of self-rule requires a community with moral membership. Moral membership of a community contains two relational conditions: every person must be able to take part in collective decisions, and participation must be under conditions that do not make assumptions about the individual’s worth, talent, or the credibility of their convictions. Also, equal concern and respect must be extended to all members of the community. ‘...political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all.’ The procedural and substantive elements of communal democracy require the guarantee of fundamental civil and political rights.

The principle of democratic inclusion is consistent with communal democracy. The principle of democratic inclusion is a substantive theory. First, citizens need better control over the decisions that affect them. There is a qualitative aspect to self-rule. It is not just minimum participation, such as casting a vote in a periodic election. Better self-rule requires a fully informed citizenry, an open public space for debate, and scope for participation for all in the decision-making processes of the community. For rule to be truly self-rule, it must be exercised in a community with moral membership. Without moral membership, different weight can be given to different individuals (and their ideas) within a community, undermining

31 In addition to the relational conditions, a community with moral membership also requires: (a) structural conditions, such as membership of a genuine political community which shares culture, territorial boundaries, a political history, common language, and values; and (b) the condition of moral independence, which means that people in a community must consider themselves partners in a joint venture, and they must freely accept the types of decision the joint venture is considered competent to make. See Dworkin, n. 15 above, esp. 24–6.
32 Dworkin, n. 15 above, 25.
self-rule. Secondly, greater parity in the distribution of the rights and opportunities of citizens is required. Substantive notions of political equality are to be preferred to formal notions of political equality. To treat all citizens formally in the same manner does not address existing imbalances in rights and opportunities. The extension of equal concern and respect for all members of a community is vital. Improved self-rule is illegitimate without political equality.

Self-rule and political equality cannot be furthered without guaranteeing human rights. Let us focus on civil and political rights. Civil and political rights not only ensure the freedom to stand for public office and establish the procedural voting mechanisms that are a necessary precursor to self-rule and formal political equality. Civil and political rights are also concerned with the quality of the self-rule and improving substantive political equality.

More particularly, freedoms of thought, conscience, and religion, freedom of expression, and freedoms of assembly and association improve the quality of self-rule. They also promote political equality. Guaranteeing rights to the holding of, and expression of, diverse thoughts and religious beliefs, and the freedom to live by personal sensibilities of conscience, promote substantive political equality. The state must remain neutral among these diverse views, convictions, and talents. Moreover, without rights to liberty, physical integrity, security of the person, due process, and privacy, self-rule and political equality would be threatened. Such civil rights ensure individuals control over their personal lives, and allow individuals the luxury to participate in public life without fear, thereby furthering self-rule. These civil rights also promote equality of opportunity between citizens. Furthermore, non-discrimination rights and minority rights promote political equality. Voting rights are explicitly guaranteed to be without distinction. Non-discrimination rights and minority rights also encourage tolerance, broad-mindedness and understanding within a diverse population. All views, aspirations, and perspectives are protected and thus legitimized. Decisions produced from a plurality of perspectives are more likely to dissipate disparities in the availability of opportunities.

The ramifications of a substantive theory of democracy

What are the ramifications of a substantive theory of democracy, such as the principle of democratic inclusion? Many critics argue that a substantive theory erroneously insists that democracy must produce 'right answers'. Distinctions are drawn between human rights safeguards that are necessary to produce a form of self-rule, such as the right to vote, and human rights safeguards that are designed to ensure that democracy produces the 'right' outcomes. The former are said to be acceptable constraints on democracy, but the latter are not.55

55 A. Hutchinson and P. Monahan, 'Democracy and the Rule of Law', in A. Hutchinson and P. Monahan (eds.), The Rule of Law: Ideal or Ideology (Toronto: Carswell, 1987), 122: 'A commitment to democracy does not mean that constraints on popular decision-making must always and everywhere be condemned…But there is a distinction between constitutional safeguards which constrain democratic activity in the name of democracy [i.e. rights to vote, non-discrimination] and
Waldron details such difficulties associated with substantive theories of democracy. According to Waldron, substantive theories wrongly focus on the outcomes of democratic procedures, rather than on the democratic procedures alone. Waldron rejects theories that focus on decisions about democracy (right answers), rather than theories that focus on decisions made by democratic means (democratic procedures): 'There is something lost, from a democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires... Process may not be all that there is to democratic decision making; but we should not say that, since the decision is about democracy, process is therefore irrelevant.'

These concerns are misplaced. The principle of democratic inclusion does not focus on 'right answers'. The principle of democratic inclusion recognizes that democracy is an indeterminate concept. It recognizes that democracy may be incapable of producing a single right answer or outcome. Indeed, in a pluralistic society right answers are unlikely and indeed undesirable. Even Dworkin admits that reasonable citizens may disagree about what democracy requires and what rights it presupposes. The principle of democratic inclusion is premised on the fact that democratic deliberation is an ongoing process of trial and error, aimed at securing and enhancing self-rule and political equality.

At best, we may have to settle for provisional truces that enable us to get on with life, leaving the portals open for debate and change. The elected arms of government will strike provisional truces after public debate and participation. The unelected arm will be empowered to assess the truce and alter it where the deliberative democratic process breaks down or is unreliable. This occurs where self-rule is vulnerable and where majority interests are liable to threaten minority interests, thereby undermining political equality. Thus, civil and political rights will protect against such violations of self-rule and political equality. The capacity for judicial intervention improves the quality of self-rule within the context of political equality.

34 J. Waldron, 'Judicial Review and the Conditions of Democracy', (1999) 7 Journal of Political Philosophy 346. Compare with M. S. Moore, 'Natural Rights, Judicial Review, and Constitutional Interpretation', in J. Goldsworthy and T. Campbell (eds.), Legal Interpretation in Democratic States (Dartmouth: Ashgate, 2002), 221: 'Those who value participatory democracy highly, such as Waldron, can still retort that court-enforced constitutional rights cost us something we should value, namely, the right to determine by majority vote what rights there are. We thus must balance this loss in democratic determinations of foundational issues against the gain in the protection of rights promised by judicial review. For what it is worth, I find the balance easy [in favour of judicial review].'

35 Dworkin, n. 15 above.
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Moreover, if we accept that democracy and rights reflect incompletely theorized agreements based on incompletely theorized standards, all provisional truces are open to challenge, debate, and change. No majority preference, no arm of government, no single voice has a monopoly on power. Such decisions cannot be characterized as providing the ‘right answer’.

In response to Waldron, process is not irrelevant to the principle of democratic inclusion. Admittedly, the principle does focus on decisions about democracy. It insists that democracy be concerned about improving self-rule and promoting political equality. Some decisions about democracy will be illegitimate because of their tendency to undermine self-rule and their political inequality. However, it does not follow that process is therefore irrelevant. All provisional decisions that are made about democracy are made after deliberation and debate. The deliberation occurs between the citizens, the executive, the legislature, and the judiciary. No one participant can trump the outcome of the deliberations, and any decisions made about democracy are open to change. The process of consultation and debate is very much a cornerstone of the provisional decisions made about democracy.

What are the outcomes of substantive democratic theory?
The outcomes of the substantive democratic theory based on debate and dialogue are more appropriately described as producing better answers. In the elected arms of government, rights-based debate ‘will generate a better, and more principled, answer to complex and contested issues than a policy process where rights-based assessments are absent’. If rights-based considerations are not mandatory, policy choices need only be defended in terms of reconciling conflicting interests within society. If democracy means nothing more than statistical democracy, such conflicts will more often than not be resolved in favour of the majority.

In contrast, if rights-based considerations play a role during the drafting, debate, and adoption of legislative schemes, the impact of policies on protected rights would be better exposed. To be forced to defend a policy that infringes or limits protected rights ‘would better expose the discriminating effects of policies or possible unintended consequences that impair or undermine protected rights’. At the end of the day, ‘It is more difficult to justify the reasons for pursuing policies that require limiting protected rights than it is to pursue competing interests.’ Placing burdens of justification on the legislature does protect significant values, without wholly depriving our democratic institutions the power to act. There is a democratic difference between telling the

36 Hiebert, n. 11 above, 119; my emphasis. 37 Ibid. 120. 38 Ibid.
39 See Neuborne, n. 5 above. He argues that rights are a product of democratic governmental institutions. The institutional view of the origins of rights generates less tension with democracy. Rights are the real-life consequences of the interplay of our institutions and have no independent existence from our institutions. When protecting rights, judges do not enforce a tangible phenomenon with some substantive meaning, but rather [the judge] applies error-deflection rules to assure a given
legislature that it cannot do something and requiring it to be sure of its premisses before acting.

Further, it mischaracterizes the role of the judiciary to say that, when it joins the debate and dialogue within the principle of democratic inclusion, it seeks the 'right answers'. When enforcing protected rights within the principle of democratic inclusion, the judiciary is neither producing (nor precluding for that matter) the discovery of the 'right answer'. There may be no single right answer. Rather, in enforcing protected rights, the judiciary precludes provisional truces that were not reached in compliance with the goals of self-rule and political equality. In other words, the judiciary precludes provisional truces that violate protected rights in an unjustified manner. Stated in the positive, only provisional truces that are the product of self-rule and political equality, as guaranteed by rights, are justified.40 A debate that produced policies or legislation that does not respect self-rule and substantive political equality is precluded. 'The decision to uphold the legislative response to a complex policy problem, which does not compromise a core right and which has been the product of rigorous and sincere debate about its justification and the merits of alternative means, would be consistent with the democratic ideal of governing through discussion and debate.'41

Thus, the principle of democratic inclusion is substantive in nature. It precludes some provisional truces that are unjustifiably made in violation of the principles of self-rule and political equality. It is the preclusion of majority outcomes that violate self-rule and political equality, as opposed to the search for a right answer, that is the essence of the principle of democratic inclusion. The principle of democratic inclusion 'does not accept that these exceptions [to majority decision-making] are a cause of moral regret'42 or democratic illegitimacy.

level of certainty about the choices made by the legislature concerning its textual authority and factual justification' (p. 200). The permissive error-deflection standard is the reasonable decision-maker: could a reasonable decision-maker have believed this choice was correct in terms of constitutional authority and factual justification? Thus, rights are the result of error-deflection rules imposed by the judiciary on the legislature. Error-deflection may not be totally democratic; who chooses the 'values in favor of which error should be deflected'; who chooses the 'precise degree of error deflection' (p. 201)? If the answer is the judiciary, the problem of democratic illegitimacy arises. Yet, there is a democratic 'difference between telling the legislature that they cannot do something at all and telling the legislature that it must be sure of its...premises before it acts in derogation of certain values, rather than requiring. Placing...burdens of justification on legislatures...has the effect of shielding significant values from unnecessary derogation without wholly depriving the popular institutions of the power to act' (p. 201).

40 'The Court's contribution is not to scrutinize the merits of the particular legislative scheme but to evaluate the quality of how that legislative decision was made and to ensure that the core rights have not been unduly compromised', as per Hiebert, n. 11 above, 105.
41 Ibid. 129.
42 Dworkin, n. 15 above, 17. I have used Dworkin's words and sentiment here because I agree with most of his principles. However, the conclusions that Dworkin draws are not always relevant as his analysis proceeds in the context of a fully enforceable bill of rights in the United States; whereas my analysis proceeds in the context of the Canadian Charter and the British Human Rights Act, both of which do not give the judiciary the final word.
The human rights implications of the principle of democratic inclusion

The protection of civil and political rights

The principle of democratic inclusion, with its aim to improve self-rule and political equality, has human rights implications: 'securing respect for all categories of human rights must assume priority'.43 Human rights norms recognize, protect, and promote many values including, but not limited to, democracy.

Focusing on the International Covenant on Civil and Political Rights (the International Covenant) highlights, first, the dependency of democracy on human rights.44 The right to self-determination is the essence of democracy. Among other things, self-determination is the right of a people to determine its political status collectively. This includes the right to free, fair, and open participation in the democratic processes of government.45 Additional rights are needed to provide the framework for exercising the democratic power guaranteed by the right to self-determination. These include the right to vote and the right to run for public office.46 Freedom of expression and of assembly and association create the conditions for debate that are necessary to a democratic order.47 Individuals could not participate effectively in a democracy without the right to liberty, physical integrity, and due process.48 Indeed, even economic, social, and cultural rights promote effective democracy. For instance, without education, housing, food, and shelter, individuals cannot exercise their civil and political rights effectively.49

Secondly, the International Covenant illustrates the limits human rights impose on democratic power. Democratic power is not self-limiting, yet it requires limitation. Hence, the limiting aspects of civil and political rights are internal to the democratic order. The guarantee of regular, free, and genuine

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43 Marks, n. 8 above, 116. See also Hiebert, n. 11 above, 118: 'But public debate is not the only goal of a democratic policy. Policy choices should respect fundamental rights, those contained explicitly in the Charter and others related to its core values.'

44 The regional conventions also demonstrate the dependency of democracy on human rights. See the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter of Human and Peoples' Rights (African Charter).

45 Franck, n. 1 above.

46 See Art 25 of the International Covenant on Civil and Political Rights (ICCPR), as well as Art 3 of Protocol 1 to the ECHR, Art 5 of the Charter of the Organisation of American States, and Art 13 of the African Charter.

47 For freedom of expression, see Art 19 of the ICCPR, as well as Art 19 of the Universal Declaration of Human Rights (UDHR), Art 10 of the ECHR, Art 13 of the ACHR, and Art 9 of the African Charter. For freedom of assembly and association, see Art 22 of the ICCPR, as well as Art 20 of the UDHR, Art 11 of the ECHR, Arts 15 and 16 of the ACHR, and Arts 10 to 12 of the African Charter.

48 See Arts 6 to 10 and 14 of the ICCPR, as well as Arts 5 to 7 of the ECHR, Arts 4 to 9 of the ACHR, and Arts 6 and 7 of the African Charter.

49 See, generally, the International Covenant on Economic, Social and Cultural Rights. Given the length of this chapter, in-depth consideration of economic, social, and cultural rights cannot be undertaken. See Ewing, Ch. 16 below, and Otto, Ch. 14 below, for more complete coverage of these issues.
elections ensures the periodic accountability of the representative arms of government. Freedom of expression and freedom of assembly and association create the conditions for debate and accountability that are essential to controlling and limiting power within a democracy.\textsuperscript{50} Freedom of conscience, religious belief, and thought, rights of non-discrimination, and rights of minorities ensure that all views can be aired and debated without fear, which serves to increase the accountability of the majority.\textsuperscript{51}

Thirdly, the improvement of the conditions of self-rule by enhancing control by citizens of decisions that affect them requires human rights protection. Not only do human rights guarantee the participation in the public decision-making process through voting rights and representation rights. They also, particularly in the form of constitutional rights, require the ‘state authority…to justify itself to the citizenry on a continuing basis’.\textsuperscript{52} Constitutional rights ensure a continuing justification to the citizenry that political power has been exercised in a rational and reasonable manner.\textsuperscript{53} Judicial review of legislative action would not ‘scrutinize the merits of the particular legislative scheme but…evaluate the quality of how the legislative decisions was made and…ensure that core rights have not been unduly compromised’.\textsuperscript{54} The more transparent and open the processes and reasoning of the elected arms of government, the more fully informed is the citizenry about the direction the government is taking society. This augments genuine self-rule.

Moreover, self-rule requires an authentic opportunity for all to participate in the decision-making process. The deliberative theory of democracy has participation at its core. The quality of participation improves with the protection of human rights. According to Campbell, the exemplary model of democracy includes a pre-enacted instrument protecting human rights and fundamental freedoms to be used by the judiciary to review legislation.\textsuperscript{55} Any conflicts between the guaranteed rights and the legislation found by the judiciary should be referred back to the legislature. Thus, the deliberative theory not only insists on a genuine dialogue between the represented and those representing them. It also insists on the establishment of a dialogue between the unelected and the

\textsuperscript{50} See Arts 20 to 22 of the ICCPR, as well as Arts 10 and 11 of the ECHR, Arts 13, 15, and 16 of the ACHR, and Arts 9 to 12 of the African Charter.

\textsuperscript{51} See Arts 2, 3, 18, 26, and 27 of the ICCPR, as well as Arts 9 and 14 of the ECHR, Arts 12 and 24 of the ACHR, and Arts 2, 3, 8, 19, and 28 of the African Charter.

\textsuperscript{52} Marks, n. 8 above, 59.

\textsuperscript{53} If governments are required to justify laws as per constitutional rights, ‘Any law that burdened or withheld a benefit from an individual or group’ would need to ‘meet the standards of justice which the principles of rationality and proportionality imply’, as per D. Beatty, ‘Human Rights and the Rule of Law’, in Beatty (ed.), Human Rights and Judicial Review: A Comparative Perspective (Dordrecht: Martinus Nijhoff, 1994), 23.

\textsuperscript{54} As per Eibert, n. 11 above, 155.

\textsuperscript{55} Campbell insists that the conditions for free and open debate should be determined by parliament, with the courts upholding these. Judges may be given the task of protecting fundamental rights, but they should not be given the additional task of defining fundamental rights. The definition of rights is preferable to be the product of consensus. See Campbell, n. 8 above.
elect the arm of government, over which neither has the final word. This form of dialogue is precisely what the British and Canadian human rights instruments attempt to achieve.  

Finally, human rights have an imperative role to play in attaining political equality. Political equality seeks to overcome disparities in rights and opportunities. Human rights inhere in all human beings in a non-discriminatory manner. Guarantees of non-discrimination contained in human rights instruments have the potential to break down existing disparities. The protection of minority rights, interests, and views also promotes political equality. The balance of civil and political rights ensure that minority voices are heard and accounted for in decisions concerning the direction of society. All views are protected and thus legitimized, such that decisions should treat all individuals with equal concern and respect. Such decisions should lead to the elimination of disparities in the availability of opportunities and the protection of rights.

The judicial review task

Focusing briefly on the role of the judiciary under a rights instrument, we should recall the interpretation theory of incompletely theorized agreements. Within this theory, there is a general presumption against high-level judicial theorizing. There is also a presumption in favour of judges reaching incompletely theorized agreements when adjudicating disputes. Such agreements ensure concrete outcomes to disputes in the short term, promote stability in the midst of pluralism, and allow for the civic evolution of shared values and morals. This does not mean that judgments should not incorporate abstractions or have moral or legal foundations, but it does mean that society’s commitments are not finally defined within the courtroom. Rather, judicial opinion is one voice among many in the ongoing discussion and debate.

In the context of human rights instruments, judicial interpretation of the human rights instrument should focus on the incompleteness of the specified standards, and judges, thereby, should be reluctant to completely theorize a decision. More importantly, the presumption against judicial decisions based on high-level theories does not apply, inter alia, where human rights instruments permit the judiciary to use relatively large-scale principles. Thus, the judiciary


57 Sunstein gives many reasons for settling on incompletely theorized agreements; judges may not be able to think of a good theory, or agree upon a theory; to pursue unnecessary contentions about rights diverts a lack of respect for the deepest and most defining commitments of others; it avoids the democratic pedigree of the judiciary debate; and the judiciary cannot achieve the large-scale reform that may be needed in certain circumstances. See Sunstein, n. 20 above.

58 In the sense that a judgment that is not reliant on a general theory does not undermine one’s deepest ideals and commitments in favour of another’s.
should resolve disputes under human rights instruments according to incompletely theorized agreements, which may need to be specified at a high level of theory, although lesser levels are preferable, especially when multiple theories can justify the agreement.\textsuperscript{59}

**Modern bills of rights and the 'effective political democracy'**

Modern bills of rights (whether constitutional or not) incorporate the provisional nature of democracy and human rights, and have the capacity to accommodate the diverse views, disagreements, and uncertainties that exist within pluralistic societies.\textsuperscript{60} The potential for dissension about the direction of society and the need for evolution are recognized within modern bills of rights, both explicitly and implicitly. Both notions are evident in the amending provisions of rights instruments, the breadth of the articulation of human rights guarantees, the non-absoluteness of rights, and the ability for legislatures and executives to react to judicial assessments of their actions. Each will be considered in turn.

**Amendment of protected rights**

Most rights-protective instruments, whether constitutional or not, allow for change. Obviously if rights are protected only by ordinary statute, any later inconsistent legislation can override the rights, subject to manner and form provisions. A capacity to accommodate diverse views, future disagreements, and uncertainties is retained.\textsuperscript{61} In constitutional rights instruments, the inclusion of provisions allowing for constitutional amendment to bills of rights explicitly

\textsuperscript{59} Sunstein reviews the interpretative methods under the United States Constitution. His preferred interpretative method, based partly on the need to constrain judges when interpreting constitutions for democratic reasons, has three components. First, there is a strong preference for soft originalism. Secondly, case-by-case judgments and analogical reasoning should be used to limit judicial discretion. Thirdly, judges may need to engage in a certain level of theoretical decision-making when the democratic process breaks down or is less reliable (p. 179). Deliberative democracy means more than majority rule. Deliberative democratic norms include the protection of political rights and the protection of minorities. Where the majoritarian process ignores or threatens deliberative democratic norms, 'the case for judicial control becomes stronger' (p. 180). Judges should adopt a 'presumption in favor of democratic outcomes', but the presumption weakens 'when democratic rights are at stake or when politically vulnerable groups are at risk' (p. 180). Sunstein's view of constitutional interpretation is very close to that of J. H. Ely, *Democracy and Distrust*, n. 33 above. See generally Sunstein, n. 20 above, 167–90. The United States example serves to highlight the application of the interpretative theory in the constitutional law context. However, this precise constitutional interpretative method will not apply to modern human rights instruments because of the differing context and role of the interpreters. In particular, modern human rights instruments contain much greater ambiguity than the more traditional United States Constitution, the rights are subject to various qualifications and limitations, the adjudicative powers of the judiciary are curtailed, and the elected arms of government can respond to judicial assessments of constitutional rights.

\textsuperscript{60} For example, although Prime Minister Trudeau fought for the adoption of the Charter to unity Canada, the Charter essentially protects everyone's right to stay diverse.

\textsuperscript{61} This is the case under the Human Rights Act; see s 3.
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acknowledges that disagreements may arise and unforeseen circumstances may require change. Express constitutional amending provisions may contain extraordinary requirements for amendments to be carried, but this does not detract from the capacity of such instruments to accommodate unforeseen disagreements or changed circumstances.62

Constitutional ambiguity

The provisional and flexible nature of rights is further illustrated in their vagueness. Constitutional ambiguity is deliberately used in situations of diversity, disagreement, and uncertainty. Things that cannot be known and agreed upon in a verifiable manner are 'left undefined and allowed to remain "sufficiently obscure to allow them to retain an approximate appearance of internal coherence and clarity, while at the same time accommodating several potentially conflicting and quite unresolved points of issue"'.63 In the words of Tushnet, 'the language of rights is so open and indeterminate that opposing parties can use the same language to express their positions'.64 Tushnet considers this to be a downfall, as 'rights talk can provide only momentary advantages in ongoing political struggles'.65 However, the principle of democratic inclusion—along with the deliberative theory of democracy and incompletely theorized agreements that expound it—views this as a strength, democracy being defined by its ongoing political struggles.

Rights are not 'trumps'

The fact that most rights are not absolute highlights the fact that diverse views and disagreement will exist. Many rights are internally qualified. For example, under the European Convention—which the Human Rights Act incorporates—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.66 Even the right to life is internally qualified.67

Rights can also be internally limited. Under the European Convention the rights contained in Articles 8 to 11 are guaranteed, subject to interference in specified circumstances, such as the protection of public health, public order, morals, the national interest, or the rights and freedoms of others.68 The precise

62 This is the case under the Charter. See the general amending provision under Part V of the Constitution Act 1982, particularly s 38.
63 Darrow and Alston, n. 6 above, 497.
65 Ibid.
66 See Art 5 of the ECHR, as well as Arts 9 and 14 of the ICCPR, and ss 7 to 14 of the Charter.
67 See Art 2 of the ECHR.
68 For example, Art 9(2) states that 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the
terms and justifications for the internal limits of each article differ, but the European Court has adopted the same test when considering the validity of the limitations. Once the prima facie right is engaged, the validity of any limitation on the right must be assessed. Limitations are only valid if they are prescribed by law, intended to achieve a legitimate objective, and are necessary in a democratic society (that is, proportionate to the end to be achieved). Moreover, the limitation must not be discriminatory, in the sense that any distinction must have an objective and reasonable justification, and must be proportional.69

In addition, rights can be externally limited. The Charter is a good example of this. Section 1 of the Charter guarantees all the rights contained in the Charter, that is, the rights in sections 2 to 23.70 However, under section 1 the rights and freedoms so guaranteed are subject to any reasonable limits prescribed by law and that can be demonstrably justified in a free and democratic society. The difference between the external and internal limits should be noted. First, the external limit applies to all of the rights guaranteed, compared to the internal limit which is more selective. Secondly, in the external limit context, the legitimate objectives that may justify interference with the right are left completely undefined. The test under section 1 is not that dissimilar to that under the European Convention.

The salient point is that the non-absoluteness of rights accommodates diversity and difference of opinion. The limiting or balancing of rights may be required as the result of the conflict of two protected rights. It may be required because of a clash of individual vis-à-vis group rights. It may also be required when a guaranteed right conflicts with other democratic values that were not guaranteed but that emerge as important in a particular situation, or when a guaranteed right conflicts with the broader common good or public interest. The point is that rights are flexible, indeterminate, and provisional, just as democracy is. Rights do not necessarily trump other values and, in fact, are designed to be able to accommodate competing democratic values where circumstance requires. Rights are capable of being ‘constructed, deconstructed and reconstructed in ever-changing circumstances’.71 Rights establish a formalized rights-based dialogue within a deliberative democratic system.

Institutionalized dialogue: legislative and executive responses

Many modern bills of rights allow for legislative reaction after judicial review. Let us consider the scope for institutional reaction under the Human Rights Act.

interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.69

69 Art 14 of the ECHR.
70 The Charter guarantees various categories of rights and freedoms: fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, official language rights, and minority language educational rights.
71 T. McCarthy, as quoted by Macks, n. 8 above, 149.
Rather than empowering the judiciary to invalidate laws that are incompatible with the now protected Convention rights, the judiciary is only empowered to make declarations of incompatibility. A declaration of incompatibility does not affect the validity, continuing operation, or enforcement of the provision to which the declaration applies, nor is the declaration binding on the parties to the proceeding in which it is made. In other words, the judge must apply the incompatible law in the case at hand.

The elected arms of government have a number of responses to a declaration of incompatibility. The legislature may decide to do nothing. This would indicate that the legislature has not altered its view of the legislation in light of the institutional perspective of the judiciary. In this situation, the particular individual can still seek redress in the European Court of Human Rights, and the public in general can express their (dis)satisfaction with the legislature's response at the next general election. Alternatively, the legislature may decide to pass ordinary legislation in response to the judicial reaction to the impugned legislation. In addition, the relevant minister is empowered to take remedial action, empowering the minister to rectify an incompatibility by executive action.

Both the declaration of incompatibility and the response mechanisms are consistent with the principle of democratic inclusion. The declaration of incompatibility ensures self-rule subject to an institutional debate based on rational and reasoned judicial input. Judicial review of legislative and executive action demonstrates a commitment to human rights that promote political equality. However, the Human Rights Act keeps the channels of change open, such that society's deepest commitments are not set in stone.

The Convention rights themselves are likened to a 'living tree', evolving and flexible. Moreover, the declaration of incompatibility structure ensures a continuing debate between the elected and unelected arms of government. The government and legislature can expect there to be intense public interest in response to a declaration of incompatibility and strong public pressure to change the law. A declaration of incompatibility will prompt debate between the represented and the elected and unelected arms of government. If the elected arms of government disregard the judicial view of human rights as expressed in a declaration of incompatibility, the citizenry will express their views at election time. Further, the remedial action procedure gives the executive a defined and important role in demarcating the requirements of self-rule and political equality. This further justifies the notion that it is only with the input of all perspectives that democracy can be truly inclusive. Overall, the elements of self-rule and political equality imperative to the principle of democratic inclusion are open to change as differing perspectives are brought to bear.

72 S 4(6) of the Human Rights Act.
73 See s 10 and Sch 2. If the minister considers that there are 'compelling reasons' for proceeding, the minister may by order make such amendments to the legislation as are considered necessary to remove the incompatibility. All remedial orders must be by statutory instrument. Remedial orders must ultimately receive the approval by resolution of both Houses of Parliament.
Under the Charter there are many responses available to the elected arms of government in the face of a judicial decision invalidating legislation for Charter violation. First, the legislature may not respond at all; the legislature may be happy to hand over certain issues to the judiciary because of an absence of political will or an absence of clear political preference. Secondly, the legislature may re-enact similar legislation which takes account of the reasons for the initial invalidation. Thirdly, the legislature may re-enact the impugned legislation notwithstanding the Charter under section 33. With section 33 there is no foreclosure on what the fundamental commitments of society should be. However, before acting under section 33, the legislature will have to assess the rational and reasoned judicial decision on its own merits, gauge the public mood, and decide whether it truly believes the judges misunderstood a core value.

The essence of the principle of democratic inclusion is that no arm of government should have exclusive power to interpret the limits of liberal constitutional rights. The protection of fundamental rights and freedoms enhance self-rule and political equality by distributing power between the various arms of government. Both the legislature and the judiciary have a legitimate role to play. There are brakes on both the excessive or unreasonable exercise of power of the judiciary (s 33) and the legislature (s 1). While the guarantees in the Charter act as a check on the legislature, section 1 gives the legislature a chance to justify its rights limiting choices, and section 33 acts as a check on judicial power. Section 33 provides 'a structural check on judicial power that better balances “the principle of constitutionalism with active popular sovereignty”'.

Conclusion

Hence, if we accept that the principle of democratic inclusion provides an ‘effective political democracy’, we have a theory that reconciles the basics of democracy and human rights. The principle stresses that democracy is about self-rule, but not self-rule alone. It requires self-rule within a community of political equals. Deliberative democracy and the notion of incompletely theorized constitutional agreements best implement the principle of democratic inclusion. Deliberative democracy, aimed at achieving rational consensus on the common good after open and uncoerced deliberation, achieves self-rule under the condition of political equality via human rights guarantees. Deliberative democracy itself, combined with the notion of incompletely theorized human rights standards, allows the debate about deep beliefs and commitments to continue and evolve. Thus, human rights and democracy can coexist, and the limitations

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human rights guarantees place on the scope of majoritarian decision-making are not necessarily anti-democratic. 75

There is great scope within democracy to respect the value of all human beings and to listen to the voice of all human beings. It is only when all voices are heard, and given equal respect, that society can begin to grapple with our defining commitments and human rights.

75 T. R. S. Allan, 'The Politics of the British Constitution: A Response to Professor Ewing’s Paper’, Autumn [2000] Public Law 374, 374: ‘It is not “undemocratic”, except in the most superficial understanding of that term, to insist that politics should be constrained by legal safeguards for individuals and minorities.’
RIGHTS PROTECTION WITHOUT JUDICIAL
SUPREMACY: A REVIEW OF THE CANADIAN AND
BRITISH MODELS OF BILLS OF RIGHTS

JULIE DEBEJIAK*

[Since the enactment of the Human Rights Act 1998 (UK) c 42, Australia is the only common law
jurisdiction without a comprehensive system of legislative or constitutional protection of human
rights and fundamental freedoms. As a result, Australia is at risk of legal and philosophical
isolation. A reassessment of Australia's stance on human rights protection is necessary. This
reassessment must include a new examination of the link between democracy and human rights.
This article focuses on institutional models of human rights promotion and protection that are
consistent with Australia's democratic tradition. It explores modern notions of democracy, and the
balance of power between the institutions of government under modern bills of rights. Particular
features of modern bills of rights, which institutionalise the debate about human rights between the
three arms of government, are discussed. The discussion proceeds in the context of two modern
rights protective instruments: the Canadian Charter of Rights and Freedoms and the British Human
Rights Act 1998 (UK) c 42. This comparative study aims to be instructive for Australia, particularly
as the question of the means of enforcement of a bill of rights has historically been an impediment
to the adoption of an Australian Bill of Rights.]

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  earlier drafts of this article.
I INTRODUCTION

Australia does not have a comprehensive system of legislative or constitutional protection of human rights or fundamental freedoms. As Charlesworth has noted, the 'Australian discussion about rights seems locked into a repetitive debate about the legitimacy of judicial scrutiny of governmental action.' It is often asserted that democracy requires parliamentary sovereignty. If the judiciary were empowered to review legislative and executive actions under a comprehensive rights protection instrument, as the argument goes, we would have a system of judicial sovereignty. The judiciary is not elected and so judicial sovereignty is undemocratic. Thus, to preserve this democracy, our elected arms of government retain a monopoly over the scope of the protection of human rights.

This simplistic view of democracy as requiring unfettered parliamentary sovereignty cannot be sustained. Modern models of rights protection give the judiciary some capacity to review the decisions of the elected arms of government against minimum human rights standards. Breaking the parliamentary monopoly on rights protection has not undermined democracy. Rather, self-rule and political equality are enhanced by an inter-institutional debate about democracy and its limits. The essence of enhanced control by citizens over decisions that affect them is self-rule. The crux of overcoming disparities in rights and opportunities is concerned with political equality. This is a debate in which the perspectives of each institution are recognised as valid and constructive.

2 Even without a rights protection instrument, such allegations may be made. The recent exchange between the Minister for Immigration and Multicultural and Indigenous Affairs and the Chief Justice of the Federal Court of Australia is an example. The Minister's accusation that, by reviewing the legality (scope of operation) of a privative clause within the meaning of the Migration Act 1958 (Cth) the Federal Court was attempting to deal itself back into the game, suggests a concern about judicial (rather than parliamentary) supremacy. See Benjamin Haslem, 'Ruddock to Face Federal Court Revolt', The Australian (Sydney), 3 June 2002, 1; Benjamin Haslem and Amanda Keenan, 'Butt Out, Ruddock Tells Judges', The Australian (Sydney), 4 June 2002, 1; Editorial, 'Ruddock Cops a Judicial Press Release', The Australian (Sydney), 4 June 2002, 10; Darrin Farrant, 'Judges Hit Back at Ruddock', The Age (Melbourne), 4 June 2002, 1.
This article briefly describes the current parliamentary monopoly over rights in Australia. It then explores the potential congruence between democracy and human rights, adopting the principle of 'democratic inclusion' as its foundation. The principle of democratic inclusion promotes improved notions of self-rule conditioned by political equality. The judiciary has a legitimate role to play in securing self-rule and political equality, but this should not be to the exclusion of the representative arms of government. The modern rights protection instruments in Canada and Britain, which recognise the need for an inter-institutional debate about democracy and rights, are then assessed against the elements of the principle of democratic inclusion. The article concludes by criticising all governmental monopolies over the democracy and rights debate (whether they be representative or unrepresentative). In a dynamic, pluralistic society, a continuing debate about the directions of society, informed by legislative, executive and judicial perspectives, is the way forward.

II The Monopoly over Human Rights Protection in Australia

Human rights are increasingly part of the common parlance in Australia today — one need look no further than the daily newspaper to find debate and discussion about the state of human rights promotion and protection in Australia. Human rights debates have been sparked by a wide and varied array of issues: the mandatory sentencing laws in the Northern Territory and Western Australia; the continued denial of self-determination for indigenous Australians in a non-discriminatory manner; the diversion of asylum seekers to neighbouring countries following the 'Tampa crisis'; the mandatory detention of asylum seekers; the debate over the post-September 11 laws designed to deal with modern forms of terrorism and the widening of the powers of the Australian Security Intelligence Organisation; the provision of welfare to the less able; and even the appointment of a religious leader as Governor-General.


4 Neil Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (Paper presented at the Fifth Annual Colloquium of the Judicial Conference of Australia, Uluru, 7–9 April 2001); Neil Morgan, 'Easy Scapegoats and Simplistic Reactions: The Continuing Saga of Mandatory Sentencing' (Paper presented at the Sixth Annual Colloquium of the Judicial Conference of Australia, Launceston, 26–8 April, 2002).


Currently in Australia, the elected representatives have a monopoly on deciding the breadth of our human rights. This is due to the lack of constitutionally protected human rights guarantees, the fragile nature of statutory human rights protection, and the domestic impact (or lack thereof) of our international human rights obligations. The elected arms of government are, consequently, subject to very few human rights constraints when enacting and executing laws and implementing policy.

A Domestic Protection of Human Rights

The domestic protection of human rights is a mixture of constitutional and statutory protection.

1 Protection of Rights in the Australian Constitution

There are only a handful of expressly guaranteed rights in the Australian Constitution. These express rights have most often been interpreted narrowly by the courts, giving greater freedom to the elected arms of government in their creation and enforcement of Commonwealth law.

The Constitution also contains a handful of implied limits restricting the legislature and executive. The trend of the High Court of Australia to imply 'rights proper' into the Constitution appears to have stalled, as evidenced by the denunciation of the implied right to legal equality and curial rejection of the implied right to equality in voting power. Whether or not one is in favour of a restricted reading of our express rights or the practice of implying rights into the Constitution, the fact remains that the Constitution does not provide comprehensive protection of our human rights and fundamental freedoms.


7 The acquisition of property on just terms (s 51(xxxi)), the right to trial by jury on indictment (s 80), the freedom of religion (s 116), and the right to be free from discrimination on the basis of interstate residence (s 117).

8 Eg Cheng v The Queen (2000) 203 CLR 248; King v Jones (1972) 128 CLR 221.


11 I have two concerns about the implication of a bill of rights into the Constitution. My first concern is based on the public perception of the proper role of the judiciary. Judicial introduction of human rights standards, for instance, via administrative law, will cause (and has caused) controversy and may be considered an improper judicial function. Moreover, I am concerned that judicial introduction of human rights standards will be piecemeal and not comprehensive,
2 Statutory Protection of Rights

The Commonwealth and States also protect human rights by statute.\(^{13}\) Although the scope of the rights protected under statute is much greater than that protected under the Constitution, the statutory regimes are subject to limitations. First, the scope of the rights currently protected by statute is much narrower than that protected by international human rights law. Second, there are exemptions from the statutory regimes. Third, the interpretation of human rights legislation by courts and tribunals has been restrictive.\(^{14}\) Finally, the commissions established under the statutes to promote, protect and implement the human rights are only as efficacious as the elected arms of government allow them to be. Cases in point include: the ongoing and prolonged failure to appoint a permanent Aboriginal and Torres Strait Islander Social Justice Commissioner;\(^{15}\) the proposed changes to the overall structure of the Human Rights and Equal Opportunity Commission (\textquoteleft HREOC\textquoteright), particularly changes to the role of the Aboriginal and Torres Strait Islander Social Justice Commissioner;\(^{16}\) and the general reduction in

with some rights being readily compatible with our existing legal regime and others not being so.


\(^{14}\) Charlesworth, above n 1, 40.

\(^{15}\) At the expiration of Mick Dodson's term as Social Justice Commissioner in January 1998, Zita Antonios was appointed as acting Social Justice Commissioner, followed by the appointment of William Jonas as Social Justice Commissioner in April 1999.

\(^{16}\) In August 1998, the Committee on the Elimination of Racial Discrimination (\textquoteleft CERD\textquoteright) issued a \textquoteleft please explain\textquoteright request to Australia in relation to, inter alia, its changes to the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner: Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 53\textsuperscript{rd} sess, Supp No 18, [22], UN Doc A/53/18 (1998). Australia submitted an extensive report: CERD, \textit{Additional Information Pursuant to Committee Decision: Australia}, UN Doc CERD/C/347 (1999). After considering Australia's response, CERD expressed concern about Australia's proposed changes to the overall structure of the Human Rights and Equal Opportunity Commission (\textquoteleft HREOC\textquoteright), particularly the abolition of the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner and the assignment of those functions to a generalist Deputy President: CERD, \textit{Decision 2(54) on Australia: Concluding Observations/Comments}, [6]–[8], UN Doc CERD/C/54/ Misc.40/Rev.2 (1999). The Australian government rejected the views of CERD. In consequence, CERD decided to continue to consider the matters whilst considering Australia's 10\textsuperscript{th}, 11\textsuperscript{th} and 12\textsuperscript{th} periodic reports during CERD's 56\textsuperscript{th} session in March 2000 \textit{(Report of the Committee on the Elimination of Racial Discrimination}, UN GAOR, 54\textsuperscript{th} sess, Supp No 18, [23], UN Doc
resources and staffing to HREOC. The statutory human rights regime is particularly vulnerable to legislative and policy changes. In short, the vulnerability of statutory protection enhances the existing representative monopoly over human rights delimitation and enforcement.

B The International Regime

In addition to the domestic human rights regime, Australia has international legal obligations that it must protect and promote. Australia has ratified numerous human rights treaties. Because of our constitutional arrangements, ratification gives rise to international legal obligations only. An international human rights convention does not form part of domestic law until it is incorporated into domestic law by the Parliament. Even under the international human rights system, the elected arms of government retain a monopoly over our human rights obligations.

All of the international human rights treaties create treaty bodies that receive and comment on periodic reports submitted by states parties, and some allow individual complaints to be made. The expert personnel on these treaty bodies

A/54/18 (1999)). In its concluding observations, CERD expressed concern over the changes to the role and function of the Aboriginal and Torres Strait Islander Social Justice Commissioner which may limit the capacity of the Commissioner to address the full range of issues relating to indigenous peoples: CERD, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, [II], UN Doc CERD/C/304/Add.101 (2000).

17 HREOC is semi-independent; see generally Human Rights and Equal Opportunity Commission Act 1986 (Cth) and HREOC, 'Australian Human Rights and Equal Opportunity Commission: About the Commission' (2002) <http://www.hreoc.gov.au/about_the_commission/index.html> at 20 July 2002. HREOC is funded by the executive arm of government, but it is free to criticise the executive. The amount of funding impacts on the quantity and quality of the work HREOC can undertake. A funding cut to HREOC in the late 1990s resulted in fewer commissioners, staff and resources to undertake its work. For example, although HREOC has five main areas of interest (sex discrimination, disability discrimination, race discrimination, social justice for Aboriginal and Torres Strait Islanders, and human rights) there are only three Commissioners, two of whom have responsibility for two portfolios. The position of President of the Commission was retained.


19 The Constitution empowers the executive to enter into treaties under s 61; but it is the Commonwealth Parliament that is empowered to incorporate these treaties into domestic law under s 51(xxxi), a provision which reflects the broader notion that it is Parliament (not the executive) which is the primary law-maker in Australia: see generally Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273. For examples of international obligations that have been incorporated into domestic law, see above n 13.

20 The First Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) ('First Optional Protocol') allows individual complaints to be made under the ICCPR. Australia
may, and often do, have different opinions on the human rights record of a state. It is the manner in which a state responds to the 'constructive dialogue' of these bodies that warrants examination. For example, in relation to an urgent reporting request, the Committee on the Elimination of Racial Discrimination ('CERD') not only criticised the Australian government for its proposed amendments to the functions of HREOC,21 but also for its amendments to the Native Title Act 1993 (Cth) and the consultation process preceding the amendments.22 The Australian government rejected the views formed by the expert treaty body in no uncertain terms:

[CERD] is not a court, and does not give binding decisions or judgments. It provides views and opinions, and it is up to countries to decide whether they agree with those views and how they will respond to them.23

The Australian government has shown similar contempt toward communications and decisions made as a result of individual complaints processes. There are numerous outstanding complaints against Australia awaiting determination by the UN Human Rights Committee.24 16 complaints are awaiting determination, while the Australian government is preparing its initial response to five other complaints.25 If the Human Rights Committee finds that Australia has violated its human rights obligations, Australia is nevertheless entitled to ignore the findings of this expert international tribunal. Australia has the sovereign right to disagree with the Human Rights Committee, and continue with whatever law or practice that is found wanting. Indeed, Australia has done so on numerous occasions.26

ratified the First Optional Protocol in September 1991. Article 22 of the CAT also allows states to submit to its individual complaints jurisdiction; Australia has done so.

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21 See above n 16.
22 CERD, Decision 2(54) on Australia: Concluding Observations/Comments, [6]–[8], UN Doc CERD/C/54/Misc.40/Rev.2 (1999). As mentioned in above n 16, this view of the Committee was formed after a 'please explain' was issued to the Australian government between reporting times: CERD, Decision 1(53) on Australia, [22], UN Doc CERD/A/53/18 (1998). In fact, the government had not submitted its 10th, 11th or 12th reports, forcing the Committee to issue the request.
24 The Human Rights Committee is established under Part IV of the ICCPR. Under the First Optional Protocol, individuals are able to complain to the Human Rights Committee about violations of human rights protected under the ICCPR.
25 These figures were obtained during a meeting with the Commonwealth Attorney-General, Daryl Williams (Canberra, 27 May 2002).
26 See Human Rights Committee, Communication No 500/1993: Australia 30/04/97, UN Doc CCPR/C/59/D/560/1993 (1997) ('A v Australia') (where mandatory detention of asylum-seekers was held to be arbitrary detention) and the Australian government's response (Daryl Williams (Attorney-General) and Philip Ruddock (Minister for Immigration), 'Australian Government Responds to the United Nations Human Rights Committee' (Press Release, 17 December 1997)); Committee Against Torture, Communication No 120/1998: Australia 25/3/99, UN Doc CAT/C/22/D/120/1998 (1999) ('Elmi v Australia') (where it was held that expulsion of an asylum-seeker would violate the obligation not to expel where there are substantial grounds for believing that the asylum-seeker would be in danger of being subject to torture); Human Rights Committee, Communication No 930/2000: Australia 16/08/2001, UN Doc CCPR/C/72/D/930/2000 (2001) ('Winata v Australia') (in which it was held that the deportation of the parents of a 13 year old Australian citizen amounts to an arbitrary interference with family life).
The *Toonen Case*, concerning the right to privacy of homosexuals in Tasmania, is the only Human Rights Committee decision that has been followed by the Australian government and Parliament. The impact of the ratification of the *Rome Statute* for the International Criminal Court on Australia's attitude to human rights violations remains to be seen.

With the views of the international community being at best influential, the elected representatives in Australia retain their monopoly on deciding the extent of human rights protection. Australia's overall deficiency with respect to domestic and international human rights protection will not surprise some. Roberto Bobbio suggests that there is a link between a lack of constitutional guarantees of human rights and a lack of respect for international human rights bodies:

> In the world there are states with and without properly functioning 'constitutional guarantees'. There can be no doubt that it is the citizens in the states without properly functioning constitutional guarantees who most need international protection. Yet these states are the very ones which are least inclined to accept the changes to the international community that would open the way to the establishment of a well-functioning legal system to protect human rights fully.

C. Breaking the Monopoly

How can the majoritarian monopoly over the definition of human rights, human rights promotion and human rights protection be broken? How can the elected

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28 *Reading this case is rather surreal. It is quite clear from the Australian government's submissions to the Committee that it was not committed to saving the Tasmanian law, which it viewed as being out of step with the broader Australian community's views. It was thus no surprise when the Australian government responded to the decision by enacting the Human Rights (Sexual Conduct) Act 1994 (Cth), which led to the invalidation of the Tasmanian law criminalising consensual adult homosexual activity under s 109 of the Constitution.*

29 The Howard Government's ratification of the *Rome Statute* was subject to various declarations, some procedural in nature (such as the declaration that Australia will not surrender any suspect until it has had the opportunity to investigate and decide whether or not it will prosecute) and some substantive in nature (such as the declaration that Australia will interpret genocide, crimes against humanity, war crimes and crimes of aggression according to its domestic law). The permissibility of such declarations remains in doubt. It is for the International Criminal Court to assess whether these declarations are, in fact, reservations and thus impermissible under art 124 of the *Rome Statute* (see also Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, art 19 (entered into force 27 January 1980)). In terms of its impact on Australian attitudes to human rights, the picture is unclear. The concern that international human rights obligations undermine Australia's sovereignty was sympathetically argued by close to half of Howard's government during Cabinet and party debate on the ratification of the *Rome Statute*, signalling a resistance to international interference. Moreover, the *Rome Statute* deals with egregious breaches of human rights (genocide, war crimes and crimes against humanity, with crimes of aggression soon to be defined and made applicable), such that it may have little impact on the government's attitude to the multitude of its other human right obligations. See also Joint Standing Committee on Treaties, Parliament of Australia, *Report 45: The Statute of the International Criminal Court* (2002).

arms of government be drawn out of the vicissitudes of majoritarian number-crunching, and into a rational dialogue on human rights? How can we ensure that the majority respects the rights of individuals and minorities? One answer to this dilemma is the introduction of a domestic bill of rights enforceable by the judiciary. The introduction of another domestic institutional voice pertaining to human rights issues may be beneficial.

This article will explore the legitimacy of judicial input into the human rights debate. This assessment will occur within the contexts of the comprehensive models of rights protection adopted by Canada and the United Kingdom. Canada has a constitutionally entrenched Canadian Charter of Rights and Freedoms ("Charter") and the United Kingdom has recently incorporated, via the Human Rights Act 1998 (UK) c 42 ("Human Rights Act"), the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

The respective constitutional and statutory models both empower the judiciary to review legislative and executive action taken against minimum standards of human rights. Yet in doing so, neither model transfers to the judiciary a monopoly over the human rights project. Both models allow for a representative response to judicial decisions. Undoubtedly, the Charter and the Human Rights Act challenge traditional conceptions of democracy, the separation of powers and the role of the judiciary. Thus, analysis must begin with a brief discussion of the reconciliation of democracy with rights protection, and the separation of powers. Discussion will then focus on the operation of the Charter and the Human Rights Act, in particular on issues such as the amendment of human rights protections, rights ambiguity, the scope of rights, the remedies available to the rights enforcers, and the responses available to the elected law-makers.

III RECONCILING HUMAN RIGHTS WITHIN A DEMOCRATIC FRAMEWORK

A 'Human Rights'

There are many competing ideas about the existence, source and definition of human rights. The least controversial source of human rights is said to be our common humanity. Human rights are human constructs designed to promote and preserve the conditions required for human dignity. '[T]he idea of human rights stems from the lessons human beings have learnt to make life livable. This constructed concept of human rights is acceptable to many schools of thought, including utilitarianism. Utilitarian thought is of particular significance in this debate, as utility is often thought to be the prime motivator in democratic decision-making. Utilitarianism disputes the existence of natural rights, but not

31 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), commonly known as the European Convention on Human Rights ("ECHR").
positively stated rights: rights can be protected, not because of a belief in some higher-order being or in nature, but simply because they serve a useful, legitimate end in our society.\textsuperscript{34}

In the 21\textsuperscript{st} century, it is safe to assert that rights are much more than a whim. As Lord Bingham stated, extra-curially:

\begin{quote}
I cannot, however, for my part accept that these [ECH\textsuperscript{R}] Articles represent some transient sociological mood, some flavour of the month, the decade, or the half-century. They encapsulate legal, ethical, social, and democratic principles, painfully developed over 2,000 years. The risk that they may come to be regarded as modish or passé is one that may safely be taken.\textsuperscript{35}
\end{quote}

Human rights were first articulated as such during the Enlightenment period in the 1700s, were further developed after World War II, and continued to expand at the end of the 20\textsuperscript{th} century.\textsuperscript{36} The concept of human rights has been extended and refined from the libertarian Enlightenment period, to the community-reinforcing ideals post-World War II, to the mutuality ideals underlying more modern-day documents.\textsuperscript{37} That human rights standards are a continuing and evolving debate is indicated by this process of expansion and refinement.

Whichever philosophical justification for human rights is accepted, in pragmatic terms human rights are an accepted notion. Virtually all nation states, in fact, recognise the existence of human rights.\textsuperscript{38} Australia, along with most other states, has indicated its view of the worth of human rights by voluntarily entering into international human rights treaties.\textsuperscript{39} It is the translation of the international human rights commitments to the domestic polity that is disputed within Australia. It is the political choice of the mode by which human rights are guaranteed\textsuperscript{40} that causes controversy.

\textsuperscript{34} This is a consequentialist view of rights (that is, we deny government some choices because the outcomes of such denial are worth it) rather than a deontological view (we pursue the protection of rights because of the intrinsic worth of rights). Moore considers that the utilitarian nature of the legislature requires a rights-based approach to democracy. Michael S Moore, 'Natural Rights, Judicial Review, and Constitutional Interpretation' in Jeffrey Goldsworthy and Tom Campbell (eds), Legal Interpretation in Democratic States (2002) 207. He argues that human rights are better justified on rights-based theories (i.e. that judicial enforcement of bills of rights is justified because judges are likely to give greater protection to certain rights than a utilitarian legislature would). This is still a consequentialist argument.


\textsuperscript{36} Any number of human rights instruments, including the ICCPR and the Canadian Charter, could be substituted for the reference to the ECHR.


\textsuperscript{38} See generally, for example, Francesca Klug, Human Rights, Rights and Freedoms in the United Kingdom (1996) 9: ‘as the continuing interpretation of the European Convention has shown, human rights evolve as society evolves — in the same way as the common law itself adapts over time’.


\textsuperscript{40} See above n 18 and accompanying text.
The Supposed Tension/Link between Human Rights and Democracy

Traditionally, democracy has been considered to favour majoritarian decision-making: it is understood as popular power — ordinary people govern by the force of numbers. Human rights, in contrast, are traditionally conceived of as recognizing and protecting the individual or a minority from the power of the majority. Civil and political rights attempt to guarantee a voice for the unpopular within the popular; a voice for the minority within the majority. Civil and political rights also protect individual human dignity from majority incursion. Human rights, by declaring minimum standards of behaviour, preclude majorities acting in certain ways and pursuing certain objectives. Thus arises the supposed tension between democracy and human rights.

However, there is no necessary tension between democracy and human rights. As Cappelletti suggests:

far from being inherently antidemocratic and antimajoritarian, [rights emerge] as a pivotal instrument for shielding the democratic and majoritarian principles from the risk of corruption. Our democratic ideal ... is not one in which majoritarian will is omnipotent.

Thus, democracy is an important value, but it is not the only important value.

Indeed, other values are often included in, and embodied by, human rights

41 Civil, political, economic, social, cultural, developmental, environmental and other collective rights are indivisible and interdependent. Any human rights package must comprehensively protect and promote all categories of human rights for it to be effective. Particularly in Australia, a bill of rights should contain some recognition of the rights of indigenous peoples, which must include the right to self-determination and the economic, social and cultural rights that flow from this. The linguistic rights of the Canadian Charter are an example of 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, being Schedule B to the Canada Act 1982 (UK) c 11. The symbolism of the delegation of the bulk of the rights of indigenous peoples from the Charter to the broader Constitution has caused much controversy in Canada, largely due to the similarly controversial limiting of the terms of s 35. In Australia, indigenous peoples' rights should be protected within a bill of rights proper, and the rights protected must be broad enough to counter the dispossession, discrimination and inequalities suffered. This article will focus primarily on civil and political rights for three pragmatic reasons: firstly, the length of the article requires it; secondly, the Canadian and British models being studied focus on civil and political rights (with some exceptions, which will be highlighted where relevant throughout the article); and thirdly, in the current Australian political climate, it is very unlikely that a bill of rights that included second and third generation rights would be adopted.


[The courts have a] custodial function of preserving the decisions of 'we the people' against the potential undermining thereof by the government. When 'we the people' have formulated a constitutional choice, it binds the more limited authority of the government ... majoritarianism has no exclusive claim on democracy. ... [T]here are certain characteristics to the democratic enterprise which cannot be amended or destroyed even by a majority government.

43 '[D]emocracy is not a unique fundamental value but rather one that must be understood in the light of a very limited list of other such values': Mac Darrow and Philip Alston, 'Bills of Rights
instruments. The preamble of the ECHR, for example, expressly links the value of human rights protection and the value of democracy:

those fundamental freedoms which are the foundation of justice and peace in the world ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.44

According to this preambulatory statement, both an effective political democracy and human rights observance are required for justice and peace. Although there is no specific elucidation as to their interaction, there is implicit recognition that an effective political democracy and the observance of human rights are complementary, and together they can maintain the fundamental freedoms necessary for justice and peace. This suggests, in turn, that the two ideals can be reconciled. As the preamble illustrates, it is fair to assume that an effective political democracy protects and promotes human rights, and that human rights reinforce an effective political democracy. As Bobbio suggests:

The liberal state and the democratic state are doubly interdependent: if liberalism provides those liberties necessary for the proper exercise of democratic power, democracy guarantees the existence and persistence of fundamental liberties. .... The historical proof of this interdependence is provided by the fact that when both liberal and democratic states fall they fall together.45

An exploration of the concept of an ‘effective political democracy’ will be crucial to our understanding of the inter-relationship between human rights and democracy. The European Court of Human Rights, in interpreting the ECHR, has stated that ‘democracy does not simply mean that the views of a majority must always prevail; a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.’46 Features of a democratic society include ‘pluralism, tolerance and broadmindedness’,47 and adherence to the rule of law.48

The interaction between democracy and human rights as established under the Canadian Charter is also instructive. All rights in the Charter are guaranteed subject to ‘reasonable limits’ that are both ‘prescribed by law’ and ‘justified in a free and democratic society’.49 Violations of, or limits to, Charter rights can be defended in those terms. In assessing limitations, the Supreme Court of Canada must ‘be guided by the values and principles essential to a free and democratic society’.50 These values and principles inspired the creation of the guaranteed

44 ECHR, opened for signature 4 November 1950, 213 UNTS 222, preamble (entered into force 3 September 1953).
46 Case of Young, James and Webster (1981) 44 Eur Court HR (ser A) 25.
47 Handside Case (1976) 24 Eur Court HR (ser A) 23; Dudgeon Case (1981) 45 Eur Court HR (ser A) 21–2.
48 Goldar Case (1975) 18 Eur Court HR (ser A) 16–17; Case of Klüs and Others (1978) 28 Eur Court HR (ser A) 22.

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rights and freedoms. It is thus according to these values and principles that a limitation must be proved to be reasonable and demonstrably justified in a free and democratic society. This is another acknowledgment of the interdependency of, and mutuality between, human rights and democracy. Dickson CJ describes the values and principles associated with a ‘free and democratic’ society to include

respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.51

C A Reconciliation of the Supposed Tension: An 'Effective Political Democracy'

The Charter and the Human Rights Act (taking up the language of the ECHR) clearly recognise the link between democracy and human rights. What are the features of an ‘effective political democracy’52 which emphasise the congruity between democracy and human rights? Which institution(s) should have a role in enforcing human rights under this effective political democracy? Does the current representative monopoly over human rights protection in Australia withstand scrutiny?

1 Impermanence of Definitions

Just as human rights are indeterminate and evolving, so too is democracy: there is no ‘transparent view of the essential meaning of democracy’.53 Given this indeterminacy, our inquiry should be limited to whether a judicially enforceable instrument for the protection of human rights can be considered part of a true democracy or, at least, not antithetical to democracy.54 Moreover, the evolutionary nature of democracy warns us against using it to justify the institutions and procedures that have served existing democracies to date.55 Democracy is not a destination;56 it is a benchmark from which we aspire to improve. Society must take a provisional approach to democracy.

51 Ibid.
52 In the words of the ECHR, opened for signature 4 November 1950, 213 UNTS 222, preamble (entered into force 3 September 1953).
54 Marks, above n 53, 106–7.
56 If it were considered an end in itself, Marks argues that this would be a disappointingly low-demanding view of democracy. Current democratic theory accepts high levels of citizen passivity. It utilises the existing liberal institutions without addressing the limitations of those institutions. In particular, she queries whether our institutions can function without civil and political rights, and what role the separation of powers should play. Further, democratic theory is
2 Effective Political Democracy

The ‘principle of democratic inclusion’ best captures the provisional and evolving nature of democracy.\textsuperscript{57} The principle of democratic inclusion is concerned with ‘relationships and processes’; it is an ‘agenda of enhancing control by citizens of decision-making which affects them’ and of ‘overcoming disparities in the distribution of citizenship rights and opportunities.’\textsuperscript{58} The essence of enhanced control by citizens over decisions that affect them is self-rule. The essence of overcoming disparities in rights and opportunities is concerned with political equality. The principle of democratic inclusion is about processes and relationships (not destinations) that allow for the construction, deconstruction and reconstruction of democracy ‘in ever-changing circumstances.’\textsuperscript{59}

This principle of democratic inclusion is best effectuated by a deliberative theory of democracy. The deliberative theory of democracy is concerned with ‘open and uncoerced deliberation aimed at reaching a rational consensus concerning the common good or the public interest’.\textsuperscript{60} Deliberative democracy is a process of developing preferences through dialogue which, in the absence of unanimity, will be precluded by a majority decision. It acknowledges the individual’s capacity for impersonal reflection and reasoned deliberation. The process of deliberation improves people’s control over decisions that affect them and thus improves self-rule. Deliberative democracy also promotes political equality through the expression, discussion and consideration of differing perspectives. Acknowledgment of the differing views not only promotes tolerance and understanding, but also encourages a critical analysis of the current provisional consensus of society. Finally, deliberative democracy recognises the evolutionary nature of democracy. Any majority decision made, amidst the noise and conflict about democracy and the direction of society, is provisional only.\textsuperscript{61}

The interpretative theory of incompletely theorised agreements is also important to operationalise the principle of democratic inclusion.\textsuperscript{62} Constitutions embed the provisional truce about democracy reached via a deliberative process. Legislation similarly reflects the provisional truce about a particular matter reached via the deliberative process. Constitutional arrangements and legislative outcomes should be viewed as ‘incompletely theorised agreements’ that reflect yet to address the enormous amounts of unaccountable power being exercised over the lives of citizens by the modern state. These shortfalls in current standards of democracy manifest in the contemporary melancholy about democracy and its ability to ensure self-rule and political participation. See Marks, above n 53, 147–51.

\textsuperscript{57} Ibid 109–10.
\textsuperscript{58} Ibid 116.
\textsuperscript{59} Ibid 149.
\textsuperscript{60} Campbell, above n 53, [44].
\textsuperscript{61} See Jeremy Waldron, ‘Legislation by Assembly’ in Tom Campbell and Jeffrey Goldsworthy (eds), Judicial Power, Democracy, and Legal Positivism (2000) 251. Waldron suggests that we should ‘not be fooled into thinking that calmness and solemnity are necessarily the mark of a good polity, and noise and conflict a symptom of political pathology’: at 267. In other words, he argues that noise and conflict are signs of a healthy polity and that disagreement is the normal background to law formation.
and implement the provisional agreement, but which are open to review and revision.\textsuperscript{63}

The theory of incompletely theorised agreements manages the indeterminacy of human rights and democracy. In a pluralist society, such as Australia, people will disagree about issues. However, people will agree that a common settlement should be reached. People may disagree about a large-scale principle, but the issue may be resolved by agreement on low-level principles and particular outcomes without having to agree on the general principle (and vice versa). Whether consensus is reached at the level of high-level principle, low-level principle or particular outcome, the point is that a consensus is reached. Common settlement of the issue, based on an incompletely theorised agreement, promotes mutual respect, reciprocity and stability. In this situation, the deepest and most defining beliefs and commitments of some people are not rejected by or subordinated to others. Moreover, by not once and for all committing society to overarching general principles or particular outcomes, the morals and values of society can evolve and respond to changing circumstances. Finally, society can move ahead on the basis of the provisional settlement.

Incompletely theorised agreements are part of a theory of just institutions. According to Sunstein, power can only be legitimately exerted by just institutions, and just institutions must be founded on democratic considerations.\textsuperscript{64} Democratic considerations require some interests to be removed from the agenda of just institutions. Constitutions (and to a less effective extent, statutes) define what is and is not immune from democratic intrusion by just institutions. Constitutions are, in fact, incompletely theorised agreements containing incompletely theorised standards. They tend to reflect agreement at a high-level of abstraction, because people can agree at the abstract level about how to live, but cannot agree about its specification.\textsuperscript{65} The incompleteness of the standards and underlying theory reflect the indeterminacy of democracy and human rights. This opens the way for change — for improved conditions of self-rule, conditioned by political equality.

Thus, the deliberative theory of democracy and the interpretation theory of incompletely theorised agreements best implement the principle of democratic inclusion, which seeks better self-rule and political equality.

3 \textit{The Human Rights Implications of an Effective Political Democracy}

An effective political democracy, as encapsulated by the principle of democratic inclusion, does have human rights implications: 'securing respect for all categories of human rights must assume priority'.\textsuperscript{66} Democracy is both dependent

\textsuperscript{63} Sunstein developed this notion of incompletely theorised agreements: ibid 44–6.
\textsuperscript{64} Ibid.
\textsuperscript{65} For instance, we can agree to live by the rule of law, but we cannot agree what this means. In the context of rights, most people would agree that cruel, unusual and inhuman treatment is inappropriate, for example, but will disagree about what constitutes cruel, unusual and inhuman treatment.
\textsuperscript{66} Marks, above n 53, 116. See also Hiebert, \textit{Limiting Rights}, above n 55, 118: 'But public debate is not the only goal of a democratic polity. Policy choices should respect fundamental rights, those contained explicitly in the Charter and others related to its core values.'
on, and limited by, human rights. The notions of self-rule and political equality inherent in the principle of democratic inclusion are attainable only through respect for human rights.

Focusing on the civil and political rights guaranteed under the ICCPR demonstrates the dependency of democracy on human rights. The principal human right is the right to self-determination, which includes the right of a people to collectively determine its political status. A core component of this is the right to free, fair and open participation in the democratic processes of government. The right to vote and the right to run for public office are also aspects of self-determination. Freedom of expression and of assembly and association create the conditions for debate which are essential to a democratic order. Nor could individuals participate effectively in a democracy without rights to liberty, physical integrity and due process.


The right to self-determination is protected under the common art 1 in the ICCPR and ICESCR. As mentioned, self-determination includes an external element: the right of a people to freely determine its political status and place in the international community. Self-determination also includes an internal element: the right of all peoples to freely pursue their economic, social and cultural development without outside interference. The right to self-determination is thus relevant to civil, political, economic, social, and cultural rights. In other words, these rights, as well as other collective rights, are interdependent and indivisible. Comprehensive protection and promotion of human rights requires the protection and promotion of all categories of human rights. Human rights and democracy cannot function in any society in which economic, social and cultural rights are denied. Hence, although this article focuses primarily on civil and political rights, any Australian bill of rights should consider and include protection of economic, social and cultural rights. This is particularly important for Australian indigenous peoples, whose right to self-determination has been, and continues to be, denied.


See ICCPR, opened for signature 19 December 1966, 999 UNTS 171, arts 6–10, 14 (entered into force 23 March 1976), as well as ECHR, opened for signature 4 November 1950, 213
The ICCPR also provides essential limits to democratic power. Democracy is not self-limiting, yet it requires limitation. The guarantee of regular elections ensures the periodic accountability of the representative arms of government. Freedom of expression, assembly and association foster the deliberation and accountability that are essential to controlling and limiting power within a democracy.73 Freedom of conscience, religious belief and thought, rights of non-discrimination, and rights of minorities, ensure that all views can be aired and debated without fear.74 Rights to personal liberty, physical integrity and due process limit the influence of democracy.

Human rights protections improve self-rule by enhancing the control of citizens over decisions that affect them. Human rights, particularly constitutionally-entrenched rights, require the 'state authority ... to justify itself to the citizenry on a continuing basis.'75 Exercises of political power must be justified as rational and reasonable.76 The more transparent and open the processes and reasoning of the elected arms of government, the more fully informed the citizenry is about the direction in which the government is taking society. This augments genuine self-rule. Civil and political rights aid the transparency of government.

Political equality is aimed at the diminution of the disparities in rights and opportunities. Human rights thus promote political equality. Human rights are guaranteed to all in a non-discriminatory manner.77 The protection of minority rights promotes the coexistence of minority culture within the majority culture. Non-discrimination rights and minority rights also encourage tolerance, broad-mindedness and understanding within a diverse population. The various public participation and personal integrity rights ensure that minority voices are heard and accounted for in decisions concerning the direction of society. All views are protected and thus legitimised. Decisions produced from a plurality of perspec-


75 Marks, above n 53, 59.

76 If governments are required to justify laws as per constitutional rights, "[a]ny law that hardened or withheld a benefit from an individual or group [would need to] meet the standards of justice which the principles of rationality and proportionality imply": David Beatty, 'Human Rights and the Rules of Law' in David Beatty (ed), Human Rights and Judicial Review: A Comparative Perspective (1994) 1, 23.

77 Thus, voting rights are explicitly guaranteed to be without distinction; for example, when arts 2, 3 and 25 of the ICCPR are read together.

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tives are also more likely to dissipate disparities in the availability of opportunities and to secure the protection of rights.\textsuperscript{78}

IV MODERN BILLS OF RIGHTS AND 'EFFECTIVE POLITICAL DEMOCRACY'

In theory, we can reconcile an effective political democracy with rights protection. In practice too, modern rights protection instruments embrace the elements of an effective political democracy in which the evolving nature of human rights and democracy can be accommodated. In attempting to improve self-rule and political equality, modern rights protection instruments incorporate the diversity of views, disagreement and uncertainty about democracy and human rights. Democracy, human rights and the direction of society are designed to be ongoing debates in which the representative arms of government have an important and influential voice but do not monopolise debate. By institutionalising an interplay and dialogue between the represented, the representative arms of government, and the unrepresentative arm of government, self-rule moderated by political equality is secured.

The Charter and the Human Rights Act ensure an effective political democracy in a variety of ways. These include the amendment procedures of rights protective instruments, the ambiguity associated with rights specification, the scope of the rights specified, the remedies available to rights enforcers, and the responses available to the representative law-makers. These mechanisms highlight not only the inconclusiveness of our understanding of democracy and human rights, but also the pluralistic approach to furthering our understanding of democracy and human rights.

A brief introduction to both models is needed. The Charter guarantees a variety of rights and freedoms.\textsuperscript{79} However, the rights so guaranteed are subject to any reasonable limits that are prescribed by law and that can be demonstrably justified in a free and democratic society, under s 1. The powers of the judiciary include the ability to invalidate legislation that offends a Charter right and which cannot be defended under s 1.\textsuperscript{80} The Charter also contains an 'override clause'. Section 33(1) allows the Parliament [to] expressly declare in an Act of Parliament ... that the Act or a provision thereof shall operate notwithstanding a provision included [in] this Charter.\textsuperscript{81}

\textsuperscript{78} For a more complete discussion of the principle of democratic inclusion, in particular, its substantive nature and the ramifications thereof, see Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), Human Rights Protections: Boundaries and Challenges (forthcoming, 2002).

\textsuperscript{79} 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.

\textsuperscript{80} Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11, s 52. 'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect': s 52(1).

\textsuperscript{81} To enact legislation containing a s 33 override, a simple majority is needed. Section 33(2) states that legislation (or provisions thereof) that is subject to a 'notwithstanding' declaration operates
The *Human Rights Act* incorporates arts 2–12 and 14 of the *ECHR*. The judiciary must interpret primary and secondary legislation, *so far as it is possible to do so*, in a way that is compatible with the incorporated *ECHR* rights. The judiciary is not empowered to strike down legislation that cannot be read compatibly with *ECHR* rights. Rather, primary incompatible legislation stands and must be enforced. All the judiciary can do is make a 'declaration of incompatibility'. The legislature then has a number of options. It may ignore the declaration. Alternatively, it may choose to repeal or amend the incompatible legislation by the ordinary legislative process. Moreover, a Minister may take remedial action, in the form of subordinate legislation, to remedy the incompatibility.

**A Amendment of Protected Rights**

Recognition of the evolving nature of human rights and democracy is evident in the provision for amendment contained in rights protection instruments. Most rights protection instruments, whether constitutional or otherwise, allow for change, thereby anticipating circumstances where diversity, disagreement and uncertainty may arise. Both the British and Canadian regimes allow for amendment to the range and definition of the protected rights.

1 *The Human Rights Act*

If rights are contained in ordinary legislation, later inconsistent legislation can override the rights, subject to 'manper and form' provisions. A capacity to accommodate diverse views, future disagreements and uncertainties is retained. This is the case under the *Human Rights Act*, which is an ordinary enactment of the British Parliament and as such its future amendment is not subject to any special manner and form requirements. Moreover, the doctrine of implied repeal has been excluded under the *Human Rights Act*. Thus, the representative arm of government can alter the provisional, incompletely theorised agreement in

"as it would have but for the provision of this Charter referred to in the declaration.' Sub-sections 33(3)–(5) provide that notwithstanding provisions are subject to a sunset clause of five years, after which date the legislature can re-enact the declaration, with all subsequent re-enactments also being subject to the five year sunset clause. Certain rights are exempted from the operation of s 33 and, thus, cannot be the subject of the override provision. These are the democratic rights (ss 3–5), mobility rights (s 6), and language rights (ss 16–23). A further limitation is that the override clause cannot be applied retrospectively: *A-G (Quebec) v La Chaussee Brown's Inc* [1988] 2 SCR 712.


85 Section 3 of the *Human Rights Act* provides that the validity, continuing operation or enforcement of any primary legislation that is incompatible with the *Convention* rights is not affected by the incompatibility. Thus, the doctrine of implied repeal is expressly excluded. In other words, legislation that predates the *Human Rights Act*, and that is incompatible with the *ECHR* rights protected under the *Human Rights Act*, is not invalid.
response to a change in circumstances, whether that change is motivated by the view of the represented or by a (dis)agreement with the unrepresentative arm of government.

2 The Charter

In constitutional rights instruments, the inclusion of provisions allowing for constitutional amendment explicitly acknowledges that disagreements or unforeseen circumstances may arise requiring change. Express constitutional amendment provisions may contain extraordinary legislative requirements, but this does not detract from the capacity of such instruments to accommodate unforeseen disagreements or changed circumstances. The Charter is contained within the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11, and can be amended via extraordinary procedures. The federal Parliament must assent to the amendment before it is put to referendum. To succeed at referendum, a majority in two-thirds of the provinces must assent to the amendments, provided that the two-thirds represents 50 per cent of the total population. In other words, it needs both two-thirds of the provinces to approve the referendum (by simple majority) and a simple majority of Canadians as a whole to approve the referendum. This provision is not a veto power, and nor does it impose a unanimity requirement; one province cannot obstruct a change that seven Provinces and 50 per cent of the population support. Again, the most important and defining commitments of society are open to reform, reflecting the capacity of the system to cope with the ongoing maturation of the Canadian polity.

B Constitutional Ambiguity

The provisional and flexible nature of rights is further illustrated by the vagueness of these instruments. Modern rights protection instruments are deliberately vague and ambiguous in circumstances of diversity, disagreement and uncertainty. Things that cannot be known and agreed upon in any verifiable manner are left undefined and allowed to remain 'sufficiently obscure to allow them to retain an approximate appearance of internal coherence and clarity, while at the

86 Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11, s 38.
87 Amendment may be initiated by the Senate or House of Commons of the federal legislative body, or by the legislative assembly of a province: Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11, s 46(1).
88 The two-thirds condition means that at least seven of the 10 provinces must agree to the amendment. The 50 per cent requirement, in effect, means that either Ontario or Quebec must agree, since the combined population of Ontario (9 million) and Quebec (6.5 million) is more than 50 per cent of the population of Canada (25 million): Peter Hogg, Constitutional Law of Canada (4th ed, 1997) 112–13.
89 If more than three provinces were to opt out, the amendment could not pass under Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11, s 38(1). A province may 'opt out' under s 38(3) if an amendment 'derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province': Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11, s 38(2).
same time accommodating several potentially conflicting and quite unresolved points of issue.90

Such incompletely theorised agreements and standards may be criticised. Tushnet describes ‘the language of rights’ as being ‘so open and indeterminate that opposing parties can use the same language to express their positions’.91 This indeterminacy is considered a weakness, as ‘rights talk can provide only momentary advantages in ongoing political struggles’.92

In contrast, an effective political democracy views indeterminacy as a strength. Democracy and human rights are defined by ongoing political struggles. There is no agreed essence to democracy and human rights, so indeterminacy is a given. Indeed, indeterminacy is positive in that it allows for the evolution of democracy and the concomitant human rights standards. At some stage in the deliberative democratic process, compromise will produce temporary definitions that can be used until deeper and further consensus can be reached. The incompletely theorised agreement will promote mutual respect, reciprocity and stability. In these conditions, citizens have participated in the processes that impact on their lives, the participation proceeded on the basis of equality of all voices, and society is not indefinitely committed to a particular compromise because of the imprecision of the guarantees.

C The Scope of Rights

It is a myth that rights are absolute ‘trumps’ over majority desires or whims. In fact, most rights are not absolute.93 Rights are balanced against and limited by many other values and communal needs. A plurality of values are accommodated and the specific balance between the values is assessed by a plurality of institutional perspectives.

1 Internal Qualification: The Human Rights Act

Many rights are expressly qualified. Under the ECHR, which is the basis for the Human Rights Act, every person has the right to liberty and security of their 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).94 The ECHR also qualifies the right to life. A deprivation of life resulting from the use of force that is not more

90 Darrow and Alston, above n 43, 497 (citations omitted).
92 Ibid.
93 According to customary international law, the only rights that are absolute are the right to be free from genocide, slavery and servitude, and systematic racial discrimination: American Law Institute, Restatement of the Law (Third): The Foreign Relations Law of the United States (1987) vol 2, 161.
than absolutely necessary in defence of unlawful violence, in order to effect an arrest, or for the purpose of quelling a riot or insurrection, is not a violation.\textsuperscript{95}

2 \textit{Internal Limitation: The Human Rights Act}

Rights can also be internally limited. Under the \textit{ECHRI}, the rights contained in arts 8–11 are guaranteed, subject to interference in specified circumstances. Interference is allowed in such circumstances to protect public safety, public health, public order, morals, the rational interest, or the rights and freedom of others.\textsuperscript{96} The precise terms and justifications for the internal limits of each article differ, but the European Court has adopted the same technique when considering the validity of the limitations.\textsuperscript{97} This technique bears consideration as it supports the principle of democratic inclusion and is directly relevant under the \textit{Human Rights Act}. Section 2 of the \textit{Human Rights Act} requires British courts, in determining whether a law or action is incompatible with a \textit{ECHRI} right, to take into account the jurisprudence of the Strasbourg organs.\textsuperscript{98} The words emphasised above demonstrate that "[t]he judgments are relevant, not compelling, aids to interpretation."\textsuperscript{99}

The European Court of Human Rights interprets the \textit{ECHRI} purposively. The \textit{ECHRI} is a "living instrument which ... must be interpreted in the light of present-day conditions."\textsuperscript{100} As discussed above, the fundamental purposes of the \textit{ECHRI} include the establishment and maintenance of an effective political democracy and the understanding and observance of human rights.\textsuperscript{101} Features of a democratic society include "pluralism, tolerance and broadmindedness"\textsuperscript{102} and adherence to the rule of law.\textsuperscript{103} The European Court of Human Rights does not equate

\textsuperscript{95} \textit{ECHRI}, opened for signature 4 November 1950, 213 UNTS 222, art 2 (entered into force 3 September 1953).

\textsuperscript{96} For example, art 9(2) states that: Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

\textsuperscript{97} See generally \textit{The Sunday Times Case} (1979) 30 Eur Court HR (ser A) 31; \textit{Handyside Case} (1976) 24 Eur Court HR (ser A) 23; \textit{Case of Goodwin v United Kingdom} (1996) II Eur Court HR 483, 509; \textit{Case of Silver and Others} (1983) 61 Eur Court HR (ser A) 33.

\textsuperscript{98} The relevant organs are the European Court of Human Rights, the European Commission of Human Rights (now defunct), and the Committee of Ministers of the Council of Europe. This is only a duty so far as, in the opinion of the court, the European jurisprudence is relevant to the proceedings.


\textsuperscript{100} \textit{Tymer Case} (1978) 26 Eur Court HR (ser A) 15.

\textsuperscript{101} In the preamble to the \textit{ECHRI}, the states reaffirm their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.

\textsuperscript{102} \textit{The Soering Case} (1989) 161 Eur Court HR (ser A) 34 confirmed that the objects of the \textit{ECHRI} include the protection of individual human rights.

\textsuperscript{103} \textit{Handyside Case} (1976) 24 Eur Court HR (ser A) 23; \textit{Dudgeon Case} (1981) 45 Eur Court HR (ser A) 21–2.

\textit{Goldfrab Case} (1975) 18 Eur Court HR (ser A) 16–17; \textit{Case of Klass and Others} (1978) 28 Eur Court HR (ser A) 22.
democracy with majoritarianism; it requires 'a balance ... which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.' The ECHR guarantees rights that are practical and effective, rather than those that are theoretical and illusory. Moreover, the ECHR is concerned with an individual's substantive position, not their formal position; it encourages courts to look behind formal rules and consider how practices operate in reality.

It is clear that the Court's general interpretative principles support the principle of democratic inclusion. The practical and effective protection of rights enhances control over decision-making and thus self-rule. The purposive and substantive approaches to rights interpretation will advance the goal of substantive political equality. Self-rule will be moderated by substantive political equality. The 'living tree' approach to interpretation acknowledges that effective political democracy and human rights are evolving concepts. As such, provisional (rather than final) determinations of the scope of the rights are appropriate.

The approach to ECHR rights that are subject to internal limits also supports the principle of democratic inclusion. Once a ECHR right is prima facie engaged, the validity of any limitation on the right must be assessed. Limitations are valid if three criteria are satisfied: they must be prescribed by law, intended to achieve a legitimate objective, and necessary in a democratic society.

First, to be prescribed by law, the interference with the right must be governed by an ascertainable legal regime. This will be satisfied if the law has a basis in domestic law, and the law itself is adequately accessible and sufficiently clear such that a citizen can adjust their conduct. Secondly, the legitimate objectives that can justify a limitation are outlined in the articles themselves. As mentioned above, the objectives include the protection of public safety, public health, public order, morals, the national interest, or the rights and freedoms of others. Satisfying this test is not too demanding, given the breadth of the objectives and the need to satisfy only one of the stated objectives. Finally, the question of whether interference with a right is 'necessary in a democratic society' is twofold.

104 Case of Young, James and Webster (1981) 44 Eur Court HR (ser A) 25.
105 Mareck Case (1979) 31 Eur Court HR (ser A) 14; Artico Case (1980) 37 Eur Court HR (ser A) 16; Soering Case (1989) 161 Eur Court HR (ser A) 34. Accordingly, any interference with the exercise of ECHR rights cannot negate the very existence of the right or remove its effectivness: Case of Mathieu-Mohin and Clerfayt (1987) 113 Eur Court HR (ser A) 23; Ashingdane Case (1985) 93 Eur Court HR (ser A) 24; Winterwerp Case (1979) 33 Eur Court HR (ser A) 24.
106 Adolf Case (1982) 49 Eur Court HR (ser A) 15; Case of Duinhof and Duif (1984) 79 Eur Court HR (ser A) 15–16.
107 Moreover, limitations are subject to the ECHR, opened for signature 4 November 1950, 213 UNTS 222, art 14 (entered into force 3 September 1953). Thus, a limitation must not be discriminatory, in the sense that any distinction must have an objective and reasonable justification, and must be proportional.
108 Case of Silver and Others (1983) 61 Eur Court HR (ser A) 33.
109 The Sunday Times Case (1979) 30 Eur Court HR (ser A) 31. Moreover, the common law may be of sufficient precision for this purpose (statutary law or regulation not being essential).
Firstly, the term 'necessary' requires a 'pressing social need' for the interference. The second element is proportionality. A legitimate aim will not suffice if the interference is excessive in the circumstances.

The internal limitation test secures the elements of an effective political democracy. The representative arms of government have great latitude in moulding an objective to one of the broadly stated legitimate aims, thus promoting self-rule. The achievement of this objective, however, must strike 'a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights,' thus ensuring self-rule that is subject to political equality. The representative branches of government strike their version of a fair balance, and the judiciary can reassess this balance. Only where self-rule or political equality are threatened or compromised would the judiciary interfere with the balance struck by the representative arms of government; a stance reflected in the wide margin of appreciation allowed by the judiciary to representative branches of government. This balancing, by both the elected and unelected arms of government, is a matter of fact and degree and is always evolving.

Assessment of the Human Rights Act and its compatibility with an effective political democracy must begin with an analysis of s 19. Under s 19(1)(a), the responsible Minister must make a statement that a bill is compatible with Convention rights. If a statement cannot be made, the responsible Minister must make a statement that Parliament is to proceed with the bill regardless of the inability to make a statement of compatibility under s 19(1)(b). A statement under s 19(1)(b) is expected to 'ensure that the human rights implications [of the bill] are debated at the earliest opportunity.' Section 19 squarely places human rights at the heart of the legislature's role: law-making. Parliament's formal role thus includes defining and refining the meaning of human rights, which in turn defines and refines our understanding of democracy. Parliament has a legitimate voice in the human rights project.

In assessing the judiciary's role in the human rights project, we begin with the judicial interpretative obligation outlined in s 3. This section requires that so far as it is possible to do so, primary and subordinate legislation must be read and given effect to in a way that is compatible with the Convention rights. If two

111 The Sunday Times Case (1979) 30 Eur Court HR (ser A) 35–6; Handyside Case (1976) 24 Eur Court HR (ser A) 22; Goodwin v United Kingdom (1996) II Eur Court HR 483, 500.
112 The concept of proportionality has already made its way into British jurisprudence via European Community law: R v Secretary of State for Employment; Ex parte Equal Opportunities Commission [1995] I AC 1.
113 See Soering Case (1989) 161 Eur Court HR (ser A) 35.
114 Ibid.
115 The s 19(1) statement must be made before the second reading speech. Under s 19(2), both statements must be made in writing and published in such manner as the Minister making it considers appropriate.
116 Human Rights White Paper (UK), above n 83, [3.3].
117 Ibid [2.7]. The interpretative obligation applies to primary and subordinate legislation whenever enacted. This 'will prove a strong form of incorporation': United Kingdom, Parliamentary Debates, House of Lords, 3 November 1997, col 1230 (Lord Irvine, Lord Chancellor). This
interpretations of a law are possible, one that is compatible and the other incompatible with Convention rights, the former must be chosen. The judiciary is obliged to search for compatible legislative meanings and it is only where the legislative language clearly precludes compatible interpretations that the judiciary will be required to sanction incompatible readings. In effect, s 3 creates 'a rebuttable presumption in favour of an interpretation consistent with Convention rights. Given the inherent ambiguity of language the presumption is likely to be a strong one.'\textsuperscript{118} A s 19(1)(a) statement will strongly influence the judiciary to interpret legislation compatibly with Convention rights. The converse does not necessarily follow, although s 19(1)(b) statements will weaken the interpretative presumption.

The s 3 interpretative obligations will lead to controversy. Interpreting broadly worded rights, invoked in controversial cases, may in and of itself expose the judiciary to criticism. Moreover, the approach to judicial interpretation has changed. Traditionally, judges were to identify the true meaning of the words used by Parliament. Section 3 'goes far beyond the [traditional] rule',\textsuperscript{119} by enabling the judiciary so far as it is possible to do so, to find a meaning that upholds ECHR rights, whether or not that happens to be the true meaning of the words used by Parliament. In interpreting legislation compatibly with Convention rights, the judiciary may in fact undermine the objective of the legislation, rendering it incapable of achieving its intended purpose. This clearly places the judiciary in a controversial law-making role.

However, the parliamentary debates somewhat quell this concern. According to the Lord Chancellor, the courts should 'strive to find an interpretation of legislation which is consistent with convention rights so far as the language of the legislation allows and only in the last resort to conclude that the legislation is simply incompatible with them.'\textsuperscript{120} According to the Home Secretary, s 3 is supposed to enable 'the courts ... to find an interpretation of legislation that is consistent with convention rights, so far as the plain words of the legislation allow'.\textsuperscript{121} In other words, s 3 does not condone any distortion of parliamentary


\textsuperscript{119} Human Rights White Paper (UK), above n 83, [2.7].

\textsuperscript{120} United Kingdom, Parliamentary Debates, House of Lords, 18 November 1997, col 535 (Lord Irvine, Lord Chancellor) (emphasis added). Consider also Lord Lester:

The courts will no doubt strive as far as is judicially possible to save legislation from having to be declared incompatible, ... The courts will do so by construing existing and future legislation as intended to provide the necessary safeguards to ensure fairness, proportionality and legal certainty as required by the convention.

United Kingdom, Parliamentary Debates, House of Lords, 3 November 1997, col 1240.

\textsuperscript{121} United Kingdom, Parliamentary Debates, House of Commons, 3 June 1998, col 421–2 (Jack Straw, Secretary of State for the Home Department) (emphasis added). The government did not want to create a subjective interpretative test, so it avoided the 'reasonable' standard. Rather, it chose the term 'possible': 'What is the possible interpretation? Let us look at this set of words and the possible interpretations': at col 427.
words,\textsuperscript{122} ensuring that parliamentary sovereignty is not replaced by judicial sovereignty.

Where legislation cannot be read compatibly with Convention rights, the courts are empowered to issue a declaration of incompatibility. However, such a declaration does not affect the validity, continuing operation or enforcement of the primary legislation.\textsuperscript{123} In an effort to preserve parliamentary sovereignty over judicial sovereignty, the Human Rights Act does not allow for the judicial invalidation of primary legislation. Rather, the Human Rights Act 'is like a compass, and all English law must point to magnetic north, which represents Convention rights.'\textsuperscript{124}

Thus, under the Human Rights Act, the obligations of judicial interpretation will enhance the deliberative debate. This process starts with the s 19 statement, which ensures that Convention rights become part of the political dialogue during the formulation of policy and during the parliamentary legislative process. The temporary consensus will be assessed for its reason, rationality, and adherence to minimum human rights standards if challenged in a court. Thus, a pluralistic dialogue is established, with different institutional perspectives being debated pre- and post-enactment. A challenge to legislation based on Convention rights will promote a substantive view of political equality, the requisite elements of which are free to be developed over time. However, strained interpretations of the Convention rights will not be sanctioned, nor can the judiciary invalidate incompatible legislation, both of which ensure that self-rule is maintained. This self-rule is based on parliamentary sovereignty, tempered by judicial input: although the incompatible legislation will remain in force, a judicial declaration of incompatibility will produce an institutional discussion about democracy and human rights, in which the reasoned and rational viewpoint of the judiciary is added to the multitude of voices aired during the representational deliberation.

\textsuperscript{122} The Home Secretary stated that 'it is not our intention that the courts, in applying [s 3], should contort the meaning of words to produce implausible or incredible meanings.' United Kingdom, Parliamentary Debates, House of Commons, 3 June 1998, col 422 (Jack Straw, Secretary of State for the Home Department).

\textsuperscript{123} Nor does a declaration affect the validity, continuing operation or enforcement of any subordinate legislation if (disregarding the possibility of revocation) primary legislation prevents removal of the incompatibility under s 3(2). Incompatible subordinate legislation will be held ultra vires unless the parent legislation requires the incompatibility. In other words, incompatible subordinate legislation will not stand unless Parliament, the primary legislator, has required the incompatibility in primary legislation. Incompatible laws cannot be sanctioned by a delegated law-maker, nor should incompatible laws bypass the approval of the legislature. This requirement also ensures that the courts do not indirectly undermine the will of Parliament. If the courts were empowered to strike down subordinate legislation that was supported by primary legislation, the courts would effectively be challenging the primary legislation. The Human Rights Act ensures that indirect, as well as direct, affronts to parliamentary sovereignty by the courts do not occur.

3 External Limitation: The Charter

Rights can also be externally limited. The Charter is a good example of this. Section 1 of the Charter guarantees all the rights contained in the Charter are subject to any reasonable limits that are prescribed by law and that can be demonstrably justified in a free and democratic society. The scope of the rights has been greatly influenced by the s 1 justification. Rather than restricting the breadth and reach of the rights by narrowly defining their content, the Canadian courts have been more willing to pursue broad, purposive interpretations, given that s 1 allows certain limits to be placed on the rights. Dickson J held:

The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts.

The Canadian courts follow a two-step process in Charter challenges: first, they must decide whether the legislation violates a Charter right, generously defined; second, if there is a violation, they must decide whether that legislation should nonetheless be upheld under the s 1 reasonable limitation justification. In relation to the latter, restrictions on rights are legitimate if, first, the limitation is prescribed by law and, second, if the limitation is reasonable and demonstrably justifiable in a free and democratic society. To be prescribed by law, there must be

some positive legal measure imposing a discernible standard sufficient to guide with reasonable clarity the individual whose rights are limited and the State officials responsible for enforcement. While measures that leave some room for judgment in application will be tolerated, laws that confer an open-ended or vaguely defined discretion to limit protected freedoms will not.

The test for deciding whether a limit is reasonable and demonstrably justified in a free and democratic society was outlined in R v Oakes in which Dickson CJ held that the court must 'be guided by the values and principles essential to a free and democratic society'. Dickson CJ then outlined a functional test.

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125 This was first outlined in the case of Hunter v Southam Inc [1984] 2 SCR 145, but the most often quoted case on the point is R v Big M Drug Mart Ltd [1985] 1 SCR 295 ("Big M Drug Mart Case").
126 Big M Drug Mart Case [1985] 1 SCR 295, 344. Dickson J also identified sources that were to be used in interpretation as being the character and objectives of the Charter, its historical origins, the language of the specific right or freedom, and the meaning and purpose of other Charter rights textually associated with the right or freedom in question: at 344.
The first step is to ensure reasonableness, in that the objective of the legislation which limits the Charter right must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’. At a minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

The second step addresses the demonstrably justifiable standard. Dickson CJ held that this phrase is aimed at reconciling competing interests and is best verified by a proportionality test. There are three components to the proportionality test. The first component is a rationality test. The ‘measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations.’ The second component is the ‘minimum impairment’ test. The means chosen by the legislature must ‘impair “as little as possible” the right or freedom in question’. Finally, there must be proportionality between the deleterious effects of the legislation which limits the right, and the objective identified as being of ‘sufficient importance.’ The later case of Canadian Broadcasting Corporation v Dagenais found that ‘there must [also] be a proportionality between the deleterious and the salutary effects of the measures.’

There is debate about whether, and the extent to which, the s 1 external limit promotes deliberative democracy, in the form of institutionalised dialogue about the limits of democracy between the elected and the unelected arm of government. These claims must be assessed against the identified elements of an effective political democracy. The principle of democratic inclusion is founded upon protection of human rights, as human rights underpin self-rule,

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131 R v Oates [1986] 1 SCR 103, 139. The initial assessment of the importance of the object of the legislation anchors the proportionality test that follows. Objectives that are found to be pressing and substantial ‘provide a fixed reference point against which the reasonableness of alternate means can be measured and the weight of the restrictions on constitutional guarantees can be balanced and compared’. David Beatty, Talking Heads and the Supremes: The Canadian Production of Constitutional Review (1990), 180–1.


133 Ibid.


135 Ibid 889 (emphasis omitted). The Canadian courts have differentiated between the standard of justification required under s 1 in certain classes of cases, essentially only requiring a reasonable basis upon which to satisfy the proportionality test. This has happened in: non-criminal cases (eg McKinney v University of Guelph [1990] 3 SCR 229); cases where social and economic rights are at issue (eg McKinney v University of Guelph [1990] 3 SCR 229, 304–5); situations of competing individual rights, as opposed to individuals as against the state (eg A-G of Quebec v Irwin Toy Ltd [1989] 1 SCR 927); and when there are threats to the periphery of the right or freedom, as opposed to matters at the core of the right (eg A-G of Quebec v Irwin Toy Ltd (1989) 58 DLR (4th) 577). See generally Janet L Hiebert, ‘Policy Making in a Different Venue: Judicial Discretion, Normative Preferences and Uncertainty Masquerading as Principled, Objective Criteria’ (Paper presented at the Centre for Public Policy Workshop on The Changing Role of the Judiciary, Melbourne, 7 June 1996).

political equality and deliberative democracy, and are consistent with the incomplete nature of democracy. According to the principle of democratic inclusion, judicial review under the Charter should be considered part of the ongoing debate to develop democracy and the concomitant human rights, with the view to achieving and improving self-rule and political equality. Self-rule moderated by political equality will be achieved by dialogue between the people being represented and the elected and unelected institutions of government. Judicial review should avoid once and finally committing society to overarching general principles. However, judges may engage in a certain level of theoretical decision-making when the democratic process breaks down or is less reliable. How does the Charter fare?

The study prepared by Hogg and Bushell on situations of dialogue between the legislature and the judiciary is instructive.\textsuperscript{137} Dialogue is defined as ‘those cases in which a judicial decision striking down a law on Charter grounds is followed by some action by the competent legislative body.’\textsuperscript{138} Any legislative sequel to a judicial decision is ‘dialogue’ because ‘legislative action is a conscious response from the competent legislative body to the words spoken by the courts.’\textsuperscript{139}

Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislature body as a dialogue. In that case, the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the Charter values... identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.\textsuperscript{140}

Of the 65 decisions that struck down legislation for an unjustified breach of the Charter in the period 1982–97, 52 (80 per cent) have had legislative sequels.\textsuperscript{141} Of the legislative sequels, in 43 of the 52 cases (83 per cent) the legislature amended the impugned law.\textsuperscript{142} In most cases the requisite change was minor and did not forfeit the objective of the legislation. The language contained in the legislative responses highlights the legislature’s consideration of, and interaction with, court decisions. The legislative responses tended to be prompt,\textsuperscript{143} where there was delay, this in itself may constitute a response in the form of protest.

\textsuperscript{137} Peter Hogg and Allison 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.

\textsuperscript{138} Ibid 82.

\textsuperscript{139} Ibid 98.

\textsuperscript{140} Ibid 79–80.

\textsuperscript{141} Of the 13 cases without legislative sequel, two have been the subject of proposed legislation, and three were decided only within the last two years: ibid 97.

\textsuperscript{142} Ibid.

\textsuperscript{143} Out of the 52 cases that triggered a response, in 39 cases the response came within two years of the invalidation of the law (75 per cent); in nine cases the response came within two and five years (17 per cent); and in only four cases did the response take more than five years (8 per cent) (on two occasions it took the Quebec government over two years to respond to a judicial decision, and on another occasion it took more than five years): ibid 99.
These statistics indicate that the Charter may prompt a dialogue between the courts and the legislature, but it rarely raises an absolute barrier to the wishes of the democratic institutions. Hogg and Bushell correctly conclude that judicial review under the Charter, as an exercise in dialogue, is democratically legitimate:

Judicial review is not 'a veto over the politics of the nation,' but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole.

Various features of the Charter were identified as facilitating this dialogue; of special relevance are the interpretative features and the override clause. The interpretative features help to secure an effective political democracy. The legislature will presumably intend to pass laws that do not violate Charter rights, or at least the legislature's understanding of those rights. Legislation is based, or at least should be based, on a dialogue which members of the legislature have had with their constituencies. If a law is subsequently challenged, dialogue occurs between the legislature and the judiciary about the definition and scope of the rights vis-à-vis the impugned law. If the judiciary disagrees with the legislature's assessment of the law and finds that it violates a right, the dialogue turns to defence of the violation.

The defence dialogue focuses on the reasonableness and justifiability of the law. Although the reasonableness of a limitation — whether the objectives relate to concerns that are pressing and substantial in a free and democratic society — is crucial in defining the directions of society, it has had little impact on the judiciary's assessment of the law. Of all the statutes that have violated Charter rights, 97 per cent have been held to be sufficiently justifiable by the

\[144\] Ibid 81.

\[146\] Another feature of the Charter that facilitates dialogue is s 15 dealing with rights to equality. Usually laws that violate equality rights are under-inclusive, in that the group suffering the disadvantage has been excluded from the receipt of some benefit or protection. Legislatures typically respond by extending the benefit or protection of the law to the excluded group. Occasionally, the legislature decides to reduce the benefit or protection available to all groups, both those previously included and excluded. This latter response is equally valid, as the Charter equality rights accommodate 'different legislative choices ... such that democratically elected bodies are still ultimately responsible for setting their own budgetary priorities, albeit in a way that does not discriminate against disadvantaged groups': Hogg and Bushell, 'The Charter Dialogue', above n 137, 91. Hogg and Bushell also identify some factors that constrain the democratic process, but conclude that despite the constraints, the final decision is democratic. Some constraints are, for example, that before the Charter was introduced an issue may have gone untouched by the legislature for fear of electoral backlash. However, under the Charter, a court decision will force the legislature to act. In addition, the court decision may heavily influence the precise terms of the new legislation. Also, the legislature may have to account more for Charter values than it prefers to. See Hogg and Bushell, 'The Charter Dialogue', above n 137, 80.

\[147\] It will be recalled that a limitation will also need to be prescribed by law. This element tends to be of little consequence to this debate.
Supreme Court. This confirms two things: first, that the Supreme Court is unwilling to engage in final, high-level theorising about principles and commitments which define society; second, and relatedly, the Supreme Court is unwilling to make final decisions about the direction of society, in the sense of permanently removing issues from the arena of democratic debate. By rarely undermining legislative objectives, and thus avoiding high-level philosophical conclusions, the courts do not ‘concretise’ issues that should remain open to democratic review. The underlying aim of deliberative democracy and incompletely theorised agreements — to form provisional truces — is honoured.

The Canadian Supreme Court's approach to proportionality also indicates a respect for the elements of an effective political democracy. A lesser, but nonetheless substantial, majority of limitations are also found to be rational; that is, 86 per cent of violations possess a rational connection. However, it is the 'minimum impairment test' that most s 1 Charter justifications fail. Of the 50 (out of 86) infringements of Charter rights that have failed the R v Oakes test, 86 per cent (43 infringements) failed the minimum impairment test. Moreover, all legislation that passed the minimum impairment test passed the R v Oakes test.

Thus, legislative policy is seldom overridden by constitutional norms imposed by the judiciary. According to Hogg and Bushell, by relying on the minimum impairment test, dialogue between the unelected and elected arms of government is facilitated. The executive and legislature have room to manoeuvre in response to the judicial view. If the court identifies a less restrictive alternative method, the legislature can enact that alternative method or a similarly less restrictive alternative. If the suggested alternative is not practicable, the legislature can devise another alternative that is workable. This signifies a constructive debate which ensures that legislative objectives are achieved at a minimum cost to fundamental rights and freedoms.

Beyond this statistical analysis, many commentators agree that s 1 reinforces democracy. For instance, Beatty argues that an upshot of s 1 analysis has been the courts demanding that 'the Governments involved ... pursue their political
manifestos in ways and by means that impaired the constitutional entitlements of those affected as little as possible. 155 Hiebert agrees:

The Court’s contribution is not to scrutinize the merits of the particular legislative scheme but to evaluate the quality of how the legislative decision was made and to ensure that core rights have not been unduly compromised. 156

The interpretative approach of the Supreme Court reinforces the principle of democratic inclusion. Section 1, by requiring a rational and reasoned justification for encroaching on rights and freedoms, improves the debate about how society is to live. By relying heavily on the minimum impairment test for invalidity, the Court does not finally nor permanently preclude legislative objectives. Rather, it initiates a dialogue between the courts and the legislature about the requirements of self-rule and political equality, and about the manner in which legislative objectives are pursued. This is beneficial for deliberative democracy, as ‘those who ... have been ignored by their Governments can insist that valid explanations be provided for why they have been treated as they have.’ 157

Thus, self-rule is enhanced and political equality is further entrenched. The ultimate role of policy determination and implementation remains with the representative arms of government. The essence of representative and responsible government remains untouched. However, in addition, the representative arms of government are held to account for the way in which they choose to pursue their policy objectives. Democracy is about participation, dialogue, and rational and reasonable methods of achieving social outcomes. Forcing representative arms of government to justify their behaviour in these terms strengthens the legitimacy of their decisions, and should strengthen the confidence in democracy of all, particularly those traditionally excluded from political debate.

4 Conclusion

The saient point is that the non-absoluteness of rights accommodates diversity and difference of opinion about human rights, democracy and the direction of society. Rights do not necessarily trump other values and, in fact, are designed to be able to accommodate competing human rights and competing democratic values where required. By ensuring that multiple perspectives structure our provisional truces, majoritarian concerns are tempered by improved self-rule and substantive political equality for all.

D Institutionalised Dialogue: Remedies and Responses

Many modern rights protection instruments allow for legislative and executive reaction after judicial review. The potential for such reaction ensures that democracy and human rights truces are open to change, and that the conditions of self-rule and political equality are the product of a dynamic, inter-institutional

156 Hiebert, Limiting Rights, above n 55, 155.
debate rather than the dictates of one arm of government (in this case, the judiciary). I will consider the British and Canadian models in turn.

1 The Human Rights Act

In Britain, rather than empowering the judiciary to invalidate laws that are incompatible with ECHR rights, the judiciary may only make declarations of incompatibility. As discussed above, such a declaration does not affect the validity, continuing operation or enforcement of the provision to which the declaration applies, nor is the declaration binding on the parties to the proceeding in which it is made.\textsuperscript{158} The power to make declarations of incompatibility is limited to the higher courts, namely the High Court, the Court of Appeal and the House of Lords.\textsuperscript{159}

The notion of declarations of incompatibility is congruent with the principle of democratic inclusion. The deliberative process continues via an inter-institutional dialogue, ensuring that no arm of government has a monopoly on the final resolution of the defining commitments of society. However, the ongoing dialogue promotes self-rule subject to an institutional debate based on rational and reasoned judicial input. Moreover, the dialogue includes the judicial perspective on the protection of political equality.

According to the Human Rights White Paper (UK), a judicial declaration of incompatibility is part of an inter-institutional dialogue. A declaration of incompatibility 'will almost certainly prompt the Government and parliament to change the law'\textsuperscript{160} and 'the Government would have to consider, and in most cases [it] would consider the position pretty rapidly.'\textsuperscript{161} There is likely to be intense public interest in response to a declaration of incompatibility and strong public pressure to change the law. The government and the legislature will not be able to ignore the situation because the victim of the violation retains the right of recourse to the European Court of Human Rights under the ECHR.\textsuperscript{162} A debate between the represented, the elected and the unelected arms of government is precisely what the principle of democratic inclusion promotes.

The British Government favoured judicial declarations of incompatibility over judicial powers of invalidation primarily to preserve parliamentary sovereignty. The Government stressed that nothing is beyond the competence of a legislature,

\textsuperscript{158} Human Rights Act 1998 (UK) c 42, s 4(6). In other words, the judge must apply the incompatibility law in the case at hand.

\textsuperscript{159} Human Rights Act 1998 (UK) c 42, s 4(5). It also includes the Judicial Committee of the Privy Council, the Court-Martial Appeal Court; in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session; and, in England and Wales or Northern Ireland, the High Court or the Court of Appeal. 'The power is so confined because of the constitutional importance of such a declaration, and also because the government did not believe that [criminal] trials should be upset, or potentially upset, by declarations of incompatibility'. Letter and Pannick, above n 124, 27, quoting United Kingdom, Parliamentary Debates, House of Lords, 18 November 1997, col 551 (Lord Irvine, Lord Chancellor). A decision by the High Court or Court of Appeal making, or refusing to make, a declaration of incompatibility will itself be subject to appeal: Human Rights White Paper (UK), above n 83, [2.9].

\textsuperscript{160} Human Rights White Paper (UK), above n 83, [2.10].

\textsuperscript{161} United Kingdom, Parliamentary Debates, House of Commons, 21 October 1998, col 1306 (Jack Straw, Secretary of State for the Home Department).

\textsuperscript{162} Human Rights Act 1998 (UK) c 42, s 11.
with its democratic mandate secured via representative election.\textsuperscript{163} The emphasis on the 'democratic mandate' of the legislature is not inconsistent with the principle of democratic inclusion, which proffers an understanding of 'democratic mandate' that includes self-rule and substantive political equality. The concept of incompletely theorised agreements allows interpretation at a higher theoretical level when democracy is at risk. A law that threatens self-rule or political equality should be interpreted so as to avoid incompatibility, even if this requires high-level theorising. This should not be viewed as an undermining of the democratic mandate; rather, it becomes a necessity in situations where the democratic process has broken down or is less reliable. In essence, a legislature in power under circumstances of non-self-rule or political inequality would lack the requisite 'democratic mandate' to justify its claim to undiluted parliamentary sovereignty.

Adherence to parliamentary sovereignty, subject to rights influences, should improve self-rule moderated by political equality. The influence of rights on parliamentary exercises of sovereignty is vital. First and foremost, the judiciary has great influence over the interpretation of legislation under ss 3 of the \textit{Human Rights Act}. Where its interpretative powers cannot produce an outcome compatible with \textit{ECHCR} rights, the option of making a declaration of incompatibility gives the judiciary a role in the ongoing definition of human rights and democracy. Via a declaration of incompatibility, the judiciary can express (and has expressed)\textsuperscript{164} its dissatisfaction with legislation considered to undermine self-rule and political equality. The judiciary adds shape to the incompletely theorised standards contained in the \textit{Human Rights Act}, which mould the limits of parliamentary sovereignty.

The legislature has a number of responses available to it after a declaration of incompatibility.\textsuperscript{165} It may decide to do nothing. This would indicate that the legislature has not altered its view of the legislation in light of the institutional

\textsuperscript{163} Human Rights White Paper (UK), above n 83, [2.13].

\textsuperscript{164} Between October 2000 and March 2001, a total of 107 cases before the English and Welsh courts considered the \textit{Human Rights Act}. In only three cases was a declaration of incompatibility made. Action taken under primary or subordinate legislation was found to be incompatible on four occasions. (A right to privacy has been developed under the existing common law confidentiality principles, and the \textit{Human Rights Act} has been held to have a horizontal effect, that is, it effects the legal relationship between citizens, rather than just the vertical legal relationship between citizens and the state,) It is too early to draw conclusion from these figures, but they are interesting nonetheless. The Human Rights Act Research Unit at King’s College London is undertaking a monitoring task of all \textit{Human Rights Act} decisions in the English and Welsh courts. The results are to be published periodically in the \textit{European Human Rights Law Review}.


\textsuperscript{165} It should be noted that ‘regular’ remedies are also available under the \textit{Human Rights Act 1998} (UK) c 42. Where a court finds that a public authority has acted unlawfully, it may grant such relief or remedy, or make such order, within its power, as it considers just and appropriate under s 8(1). The remedies that may be available in any forum include damages, injunctions, declarations, and/or relief by prerogative writ after judicial review (eg certiorari, mandamus or prohibition). Courts or tribunals with limited jurisdiction will be most affected by s 8(1). They will be powerless to award a remedy considered ‘just and appropriate’ and ‘necessary to afford just satisfaction’ if it is beyond their statutory jurisdiction: s 8.
perspective of the judiciary. In this situation, the victim can seek redress in the European Court, and the general public can express its (dis)satisfaction with the legislature’s response at the next election. Alternatively, the legislature may decide to pass ordinary legislation in response to the declaration. In addition, the relevant Minister in the executive is also empowered to take remedial action, which basically empowers the Minister to rectify an incompatibility by executive action.

Under the last alternative, if the Minister considers that there are ‘compelling reasons’, he or she may, by ‘remedial order’, make such amendments to the legislation as are considered necessary to remove the incompatibility. Such remedial orders may be issued in two situations: in response to a declaration of incompatibility, or, having regard to a finding of the European Court against the United Kingdom, where a provision of domestic legislation is incompatible with an ECHR obligation. All remedial orders must be made by statutory instrument. Remedial orders must ultimately receive the approval (by resolution) of both Houses of Parliament. In the ordinary situation, a remedial order drafted by the Minister will be laid before Parliament for 120 days and will not come into effect unless it is approved by a resolution of each House of Parliament. In addition, there is an emergency or ‘fast-track’ procedure. If the Minister declares the matter urgent, parliamentary approval is not required before an order becomes operative. Under this fast-track procedure, the Minister need only present the order to each House of Parliament ‘after it is made’. The remedial order will, however, cease to have effect 120 days after it was made unless approved by a resolution of each House of Parliament. Even if the fast-track remedial action is not approved, all acts done under the remedial order remain valid.

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166 Human Rights Act 1998 (UK) c 42, s 10(2). In the case of subordinate legislation, if the Minister considers that it is necessary to amend the primary legislation under which the subordinate legislation was made in order to enable any incompatibility to be removed, and that there are compelling reasons for proceeding, the Minister may by order make such amendments to the primary legislation as are considered necessary under s 10(3).

167 Section 10(1).

168 In the situation where an appeal lies, a remedial order cannot be made until all persons who may appeal have stated in writing that they do not intend to do so, the time for bringing an appeal has expired and no appeal has been brought within that time, or an appeal brought within that time has been determined or abandoned, as per s 10(1)(a).

169 This relates only to proceedings against the United Kingdom after the date of entry into force of s 10 of the Human Rights Act 1998 (UK) c 42 (2 October 2000). Moreover, it does not apply to European Court of Human Rights decisions pertaining to other contracting states. If the Court finds that legislation of another contracting state, which is in similar terms to British legislation, violates ECHR rights, the Parliament can only amend this legislation by normal means.

170 Human Rights Act 1998 (UK) c 42, s 20(1).

171 Further detail about remedial orders is contained in s 10 and sch 2 of the Human Rights Act 1998 (UK) c 42.

172 Human Rights Act 1998 (UK) c 42, sch 2, ss 2(6) and 4(1).


174 There are democratic difficulties with remedial measures, particularly the fast-track remedial measures. For instance, the fast-track measures sanction the use of ‘Henry VIII clauses’ (that is, the change of primary legislation by subordinate legislation). A further concern is the lack of consultation with the elected representatives in developing the response to a declaration of...
The available legislative and executive responses are consistent with the principle of democratic inclusion. The responses to an adverse rights challenge keep the channels of change open. By allowing for declarations of incompatibility (rather than judicial invalidation), debate about human rights and democracy continues between the represented and the elected and unelected arms of government. The judiciary does not have a monopoly over society’s deepest commitments. If the legislature disregards the view of the judiciary, the citizenry can express their views at election time. Moreover, the provision of remedial orders ensures an institutionalised role for the executive in demarcating the requirements of self-rule and political equality. This further embraces the notion inherent in the *Human Rights Act* that inter-institutional perspectives on democracy and its limits are vital. Overall, the elements of self-rule and political equality, imperative to the principle of democratic inclusion, are open to exploration and improvement as differing perspectives are brought to bear.

2 The Charter

There are a variety of remedies available under the *Charter*, the most powerful being the judicial power to strike down legislation. The other remedies that impact on the scope of legislative provisions are: the severance of the offending provisions; the striking down or severance of the offending provisions coupled with a temporary suspension of the declaration of invalidity; the reading down of the offending provision; or the ‘reading in’ of an appropriate provision.

There are many responses available to the elected arms of government in the face of an adverse judicial decision under the *Charter*. The capacity to respond to judicial decisions is vital to the ongoing search for the meaning of human rights, democracy and the direction of society. First, the legislature may not respond at all. Indeed, the legislature may prefer to entrust certain issues to the judiciary because of an absence of political will or clear political preference. Second, the legislature may re-enact similar legislation which takes account of the reasons for the initial invalidation. Such re-enactment may follow the precise suggestion of the court, or it may employ a preferable alternative that adopts the spirit of the decision. Finally, and most importantly, the legislature has the power to re-enact the impugned legislation notwithstanding the *Charter*.

The most famous example of the first situation is the case of *R v Morgentaler* regarding the right to abortion. Hogg and Bushell correctly highlight that judges cannot be accused of stifling the democratic process where political sensitivities forestall the reaction of the representative arms to a judicial deci-

175 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 52.
176 Ibid. Section 24 also grants the judiciary remedial powers. Section 24(1) empowers the courts to give anyone whose rights or freedoms have been denied or infringed a remedy that is just and appropriate in the circumstances. Section 24(2) empowers a court to exclude evidence obtained in violation of the rights and freedoms in the *Charter* if to admit it would bring the administration of justice into disrepute. These remedies generally will not be invoked if s 52 has been engaged.
sion. Controversial issues should not be allowed to lie dormant. Laws that no longer reflect community consensus ought to be debated and, if necessary, repealed or replaced. As such, it may take a Charter challenge and subsequent judicial decision to invigorate democracy by effectively forcing the issue onto the public agenda. ‘If a new law is slow to materialize, that is just one of the consequences of a democratic system of government, not a failing of judicial review under the Charter.’

The second situation of re-enactment is pluralism in motion. The legislature will have its reasons for pursuing the legislative objective over the Charter guarantees. The judiciary will have indicated its view of the objective (which is usually supportive) and its view as to why the balance struck between the objective and the infringement of the right was not appropriately balanced. Legislation is usually rejected under the ‘minimal impairment test’. In this situation, the legislature can alter the legislative impairment to rights, whilst still achieving the legislative objective. Policy and principle, pragmatism and reason will inform this decision. If re-enactment is not an option, the legislature retains the choice to re-enact the legislation under s 33.

Section 33, in particular, helps to secure the principle of democratic inclusion and requires further exploration. Legislation (or a provision thereof) that is subject to a ‘notwithstanding declaration’ operates regardless of Charter rights. Notwithstanding provisions are subject to a sunset clause of five years, after which date the Parliament or legislature can re-enact the declaration, with every subsequent re-enactment being subject to the five year sunset clause. Certain democratic, mobility and language rights are exempt from the operation of s 33; they cannot be overridden even with a positive notwithstanding declaration. A notwithstanding provision cannot be applied retrospectively. Only a simple majority is required to enact a notwithstanding provision.

The override clause is far from uncontroversial. Support for the override clause is usually based on the preservation of parliamentary sovereignty. It has been described as an “elegant compromise” between the requirements of democratic governance and constitutionalism in deciding the outer limits of core values. Also, ‘[f]or those who see judicial review as another form of fallible policymaking, the override is a prudent fail-safe device.’ Conversely, the override clause is accused of undermining the Charter by subjecting it to the whims of the

179 Ibid.
180 See above n 151 and accompanying text.
182 Section 33(3)–(5).
183 These are the democratic rights (ss 3–5), mobility rights (s 6) and language rights (ss 16–23).
184 A-G (Quebec) v La Chaussette Brown’s Inc [1988] 2 SCR 712.
majoritarian branches of government. In reality, s 33 is of greater theoretical than practical significance, as most legislatures choose to avoid the serious political consequences of a legislative override of a Supreme Court decision regarding the Charter. The use of s 33 has gained a reluctant acceptance in Quebec and only once to date has it been used to directly overturn a judicial decision. Outside of Quebec, use of the override clause appears to be politically unacceptable.

This need not be the fate of the ‘elegant compromise’. This feature of the Charter (arguably more than any other) promotes the principle of democratic inclusion. The possibility of the legislature disagreeing with a judicial interpretation of the Charter keeps the debate about fundamental beliefs and commitments alive. Section 33 ensures there is no foreclosure on what the fundamental commitments of society should be. Before acting under s 33, the legislature will have to assess the rational and reasoned judicial decision on its merits, gauge the public mood, and decide whether it truly believes the judges misunderstood a core value. Of course this will be a last resort — the legislature will be forced to use s 33 only where the judiciary rejects its legislative objective, something that has occurred in only 3 per cent of the cases. In terms of the principle of democratic inclusion, at this point dialogue between the courts and the legislature is exhausted, but the dialogue between the electorate and the legislature continues.

If a legislative decision to utilise the s 33 power turns out to be political suicide, then so be it. The people have been presented with two versions of their defining commitments (at that point in time) and have freely chosen one version. Self-rule has been enhanced, in the sense that individuals can express their informed (dis)approval at the next election. The conditions required for political equality will have been fully explored by the elected and unelected arms of government and the citizenry. The entire episode will be one of the ongoing steps toward democratic inclusion.

So the question remains as to how to invigorate s 33. How can we instill a sense that s 33 is not ‘anti-rights’? How does one carve out a legitimate role for the elected arms of government in the process of defining human rights and the contours of democracy? How can we instill greater trust in the political process?

The concern about constitutionalising rights is that it can undermine self-rule. If political power is limited by a constitution, and the judiciary has a monopoly over constitutional interpretation, political power is constrained by the constitution but judicial power is not. What is initially considered to be constitutional supremacy, rather than legislative supremacy, is no more than a guise for judicial supremacy. ‘The paradox is that judicial enforcement of rights in the name of liberal constitutionalism may destroy the most important right that citizens in

188 This occurred in the language rights case of A-G (Quebec) v La Chaussure Brown’s Inc [1988] 2 SCR 712.
189 Trakman, Cole-Hamilton and Gatien, above n 130, 95. Two examples where this has occurred are with the Lord’s Day Act, RSC 1970, c L-13 and the Canada Elections Act, SC 2000, c 9.
liberal democracies possess, [namely] the right of self-government. ¹¹⁹ That judges should review government action and pass judgment on its constitutionality is a relatively uncontroversial proposition; that the proper functioning of liberal constitutionalism requires these judgments to be, for all practical purposes, final is debatable. ¹¹⁰

No arm of government should have exclusive power to interpret the limits of liberal constitutional rights. Both the legislature and the judiciary have a legitimate role to play, as ss 1 and 33 reveal. These sections act as a brake on the excessive or unreasonable exercise of power of the legislature (s 1) and the judiciary (s 33). Whilst Charter rights and freedoms act as a check on the legislature, s 1 gives the legislature a chance to justify its rights-limiting choices. Where judicial assessment of the legislature’s rights-limiting choices under s 1 is considered unwarranted, s 33 acts as a check on judicial power. Section 33 provides ‘a structural check on judicial power that better balances “the principle of constitutionalism with active popular sovereignty”.’ ¹¹² The dispersal of power between the arms of government provides checks and balances on all exercises of power.

The principle of democratic inclusion stresses the need for self-rule and political equality, thus enabling an open and uncoerced debate about the direction of society. Judicial review of legislative action does add a rational and reasoned perspective to the continuing debate, but s 33 makes certain that it does not stifle or conclude that debate. Section 33 helps to ensure an open and informed deliberation and discussion about the direction of society, which enhances self-rule. Self-rule is indispensable, as it necessitates that whatever (provisional or permanent) commitments do emerge from the debate, they inhere in — and are sourced from — those individuals required to live by them. Political equality, as reflected in human rights standards, is an evolving concept. Its evolution is just as enhanced by legislative actions (under s 33) as by judicial decisions (under s 1). Human rights evolve, as does democracy. Actions taken under s 33 are part of this process of evolution. Use of s 33 should be promoted and accepted as a legitimate assertion of the legislature’s representative voice, otherwise the inter-institutional dialogue may more closely resemble a judicial monologue.

V Conclusion

This article has come full circle. What began as a warning against the Australian legislative monopoly of the rights debate ends with a warning against judicial monopoly of that same debate. Neither monopoly will produce values and commitments that inhere in all, and neither alone can compel citizens to adhere to the values and commitments so produced. We must understand that ‘a political community [cannot] flourish, or its citizens develop and improve their own sense

¹¹⁹ Manfredi, above n 136, 22.
¹¹⁰ Ibid.
¹¹² Ibid 195.
of moral responsibility, unless they participate in the community’s deepest and most important decisions about justice. 193

In a dynamic and pluralistic society, noise and conflict are the norm. Yet it is common ground that provisional truces, based on incompletely theorised agreements, should allow us to ‘get on with life’. Such truces provide mutual respect, reciprocity and stability. But ‘it would be wrong to believe that constitutions can eliminate conflict by “guaranteeing” ... rights.’ 194 What constitutions can do is ensure that another voice is heard, one which has less need to be responsive to the concerns of the majority. This non-majoritarian voice should promote self-rule conditioned by political equality, but should not impose final determinations on what are essentially evolutionary concepts, such as democracy and human rights. The legislature, executive and judiciary have equally valid views on democracy and its limits, as embodied by human rights. Constitutional and legislative structures that encourage and respect an inter-institutional dialogue should be preferred to both legislative and judicial monopolies. Such structures are embodied in the Charter and the Human Rights Act.

Australian debates about democracy and human rights must progress from the simplistic notion that bills of rights illegitimately empower the unelected judiciary. A better balance between the legislature, executive and judiciary in the human rights debate would improve Australian democracy and respect for human rights. Open and uncoerced debates about the conditions required for better citizen control over decisions that affect them, and the process of overcoming the disparities in rights and opportunities available to members of the Australian community, would be improved by a rights dimension. This debate should not be monopolised by one arm of government, but should be engaged in by all three. Models requiring an inter-institutional effort in the demarcation of democracy and human rights do exist, do function without threatening the principle of democratic inclusion, and should be the starting point for the continuing debate in Australia about the best way to secure democracy and human rights.

194 Manfredi, above n 136, 199.