



MONASH University
Castan Centre for Human Rights Law



**Submission to the 2015 Review of the
*Charter of
Human Rights and Responsibilities Act 2006***

**Prepared by Professor Sarah Joseph
and Marius Smith**

The Castan Centre for Human Rights Law refers the Committee to **its submission of 1 July 2011 to the Scrutiny of Acts and Regulations Committee** regarding the 2011 review of the Charter (SARC Submission). As none of our recommendations were adopted by SARC, we reiterate those recommendations. The full SARC Submission is attached as Annexure A.

In addition to the recommendations contained in the SARC Submission, we make the following submissions:

The Relationship between sections 7, 32 and 36 of the Charter

Section 7 of the Charter outlines the circumstances under which the human rights protected by the Charter may be limited, while s. 32 provides for statutory provisions to be interpreted “in a way that is compatible with human rights”. Section 36 requires the Supreme Court or Court of Appeal to make a “declaration of inconsistent interpretation” where a statutory provision cannot be interpreted compatibly with human rights in accordance with s. 32.

In our SARC Submission, we made the following recommendations relating to these sections:

- Remove the “internal limits” from s 15(3), which protects freedom of expression, because s. 7 already provides for all of the human rights protected by the Charter to be limited (otherwise there are effectively two limitations on freedom of expression – one in s. 7 and one in s 15(3)).
- Amend s. 7 to state that human rights that are deemed “absolute” (that is, they cannot be limited) by the *International Covenant on Civil and Political Rights* (ICCPR) are exempted from s. 7.
- Amend s. 32 so that it is consistent with the interpretation provision in the United Kingdom’s *Human Rights Act* 1998.

In addition to those recommendations, the Centre recommends that the relationship between ss 7, 32 and 36 be clarified. We disagree with the methodology adopted by the Court of Appeal in the *Momcilovic* case, which was upheld by the High Court (at the time of our SARC Submission, the appeal of *Momcilovic* was pending in the High Court and was therefore not substantively addressed by the submission).

The Centre’s preferred methodology is as follows:

- The section 7 limitations of the rights contained in Part II are to be taken into account in the process of interpretation undertaken under s32

The reasons are as follows:

- s. 7 limits are an inherent part of the scope of the right. It makes no sense to try and interpret statutes only in accordance with the “pure” or “absolute” version of a right, when that is not a true representation of the actual scope of the right.

Many rights in the Charter are in fact drafted so that they reflect the limits that are found in the *International Covenant on Civil and Political Rights* (ICCPR), on which the substantive rights contained in the Charter are based. For example, as outlined

above, s 15(3) contains “internal limits” (ie they are found within s 15 itself) on freedom of expression. The freedoms from arrest and detention in s 21(2) are limited only to those instances of arrest and detention that are “arbitrary”.

But there are important exceptions: ss. 12 (freedom of movement), 14 (freedom of religion), and 16 (peaceful assembly and association). The bare words of these rights indicate that they are absolute if one disregards s. 7.

In that case, the *Momcilovic* interpretation dictates that the utility of s. 32 is exhausted once a law cannot be interpreted in accordance with the absolute version of those rights. This would surely be the case in most instances where those rights were at issue, as they are unlikely to be at issue where they are merely engaged rather than limited. This interpretation of the relationship between ss 7 and 32 undermines the extensive potential remedial value of s. 32.

Let us explore this issue with a hypothetical. Let us assume that there is a statute authorizing the quarantining, by decision of Government Department X, of an area on health grounds. Clearly, such a measure cannot be interpreted so that it is compatible with absolute freedom of movement (s 12). Section 32 is then exhausted without any consideration of whether the quarantine decision is reasonable and proportionate in relation to freedom of movement. And yet, the law might have been capable of a good or at least better human rights interpretation if s.7 could have been taken into account at the s.32 interpretation stage.

If it is impossible to interpret a law compatibly with the Charter under s32, s 36 then comes into play. Hence, the Castan Centre recommends that s 7 play a role with regard to the interpretation of statutes under s32 and with regard to the issuance of Declarations of Inconsistency under s 36. The analyses under ss 32 and 36 vis-a-vis s. 7 should not be different.

For example, a stipulation could be inserted in s 7, confirming that its principles apply to all of the processes outlined in Part 3 of the Charter.

Please note that nothing in this submission affects the related recommendations from our SARC Submission, outlined above.

Education

We note that the Terms of Reference for the current review include a requirement that it cover ways to enhance the effectiveness of the charter by developing a human rights culture in Victoria, particularly within the Victorian public sector.

We recommend that the Government institute a review of the level of understanding of the Charter across the whole of Government with the goal of identifying the level of need for better education of the public sector. The outcome of the review should be a strategy to provide suitable training and resources, and implement suitable processes, across government to ensure that all departments, agencies and officials are capable of fulfilling their obligations under the Charter. This strategy should be seen as a long-term, ongoing solution, which is the only way to ensure that the Charter is embedded into the culture of government.

Finally, we recommend that the Government require that private organisations falling under the definition of “public authority” under the Charter provide appropriate training and education to their staff engaged in providing functions of a public nature. We similarly recommend that the Government liaise with local governments to

ensure that their human rights education and training programs are sufficient to ensure that they are able to comply with all of their obligations under the Charter.

Resources

We also recommend a substantial increase of resources for the Human Rights Unit within the Department of Justice. The HRU should have the capacity to lead the implementation of the Charter across the whole of government.

Annexure A



MONASH University
Castan Centre for Human Rights Law



**Submission to the
Scrutiny of Acts and Regulations Committee of the
Victorian Parliament**

**Inquiry into the *Charter of
Human Rights and Responsibilities Act 2006***

**Prepared by Professor Sarah Joseph, Erica Contini
and Marius Smith**

EXECUTIVE SUMMARY

The Castan Centre for Human Rights Law welcomes the review of the Victorian Charter of Human Rights and Responsibilities. The Charter has been utilised successfully to assist vulnerable Victorians, both through the courts and via alternative avenues.

The Centre's submission relates most strongly to the following terms of reference:

- Whether additional rights should be included in the Charter;
- Litigation and the roles and functioning of courts and tribunals;
- The availability to Victorians of accessible, just and timely remedies for infringements of rights; and
- The overall benefits and costs of the Charter.

The first section covers additional rights. The Centre submits that the Charter must cover *all* rights in the *International Covenant on Civil and Political Rights* (ICCPR), except for those for which the Commonwealth Government has exclusive responsibility.

The recommended additional rights to be included are:

- Self determination in article 1 of both ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- Remedy for unlawful arrest or detention under article 9(5) ICCPR;
- Prohibition on war propaganda and religious hatred under article 20 ICCPR;
- Right to have one's birth registered under article 24(2) ICCPR;
- The right to marry under article 23 ICCPR.

The Centre submits that ICESCR should be incorporated into the Charter. Economic, social and cultural rights have broad support in Australia, and evidence from a number of jurisdictions, particularly South Africa, shows that they are justiciable, and can be judicially reviewed without unduly interfering with government policy and budgetary autonomy. The Centre also recommends an amendment to s 10 of the Charter, relating to torture, inhuman and degrading treatment, or medical experimentation.

The second section addresses how the Charter limits human rights, and the judicial obligation to interpret laws consistently with human rights. The limitation clause should be amended to ensure compatibility with international human rights law, particularly by ensuring that absolute rights, such as freedom from torture, cannot be limited. The "override provision" should be removed as it is only necessary for constitutional bills of rights, or amended to replicate the override/derogation provision in s 37 of the South African *Bill of Rights*. The interpretation power should be amended to replicate the approach taken by the United Kingdom's courts.

The third section recommends that the definition of "public authority" continue to exclude private organisations, but that it be expanded to include courts and tribunals. The fourth section recommends that an independent course of action be included in the Charter.

The fifth section addresses some of the arguments made by opponents of human rights legislation prior to the enactment of the Charter and shows, with recent examples where appropriate, why these arguments are unfounded.

SUBMISSION

During its first four years, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the ‘Charter’) has had a positive impact on Victorian society. It has thus far played a key role in increasing awareness of human rights in Victoria among the government and public alike, and creating a culture of human rights within the State. The Castan Centre for Human Rights Law strongly recommends strengthening the Charter to address key weaknesses and improve human rights and social justice outcomes for all Victorians. We make the following recommendations for improving the Charter and human rights in Victoria.

Section 1: Additional rights to be included in the Charter

A number of rights contained in the *International Covenant on Civil and Political Rights* (1966) (ICCPR) were omitted from inclusion in the Charter for various reasons. Although we agree that it is not necessary to include some rights in the Charter, for instance Article 13 regarding deportation (as this is exclusively a federal issue), there are a number of these rights that have been inappropriately omitted. We recommend the Charter therefore be amended to include the following provisions:

1. Self-determination

We recommend inclusion of the right of self-determination, which is recognised in Article 1 of both the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR). The Explanatory Memorandum to the Charter notes that this human right was omitted because it “is a collective right of peoples,”¹ however it is also a right belonging to each individual. The importance of the right of self-determination is illustrated by its inclusion in both the ICCPR and ICESCR.

The right of self-determination is often mistakenly viewed as a threat to the territorial integrity of a State. However, the United Nations General Assembly’s 1970 *Declaration on Principles of International Law* addressed this concern, stating that the right should not be construed as:

*as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of self-determination and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or color.*²

The right of self-determination is better viewed as a right which facilitates relations between peoples and their government. Self-determination is the right of peoples to

¹ Explanatory memorandum, p8.

² GA Res 2625 “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970)

a system that respects and facilitates their political, social and economic participation.³

Recognition of the right of self-determination would affect most profoundly (but not exclusively) the rights of Indigenous peoples in Victoria. Historically, Indigenous peoples in Australia were not treated as legitimate political and economic entities.⁴ This historical 'wilful blindness' generated fundamental flaws in the foundations of the Australian legal and political system concerning Indigenous peoples and their place in our political and social structure. Indigenous Australia's history is one of policies being imposed without consent or even consultation, ranging from *terra nullius* (which denied their existence), to the infamous policy of removing Indigenous children from their families, to more recent examples of the abolition of ATSIC⁵ and the Northern Territory intervention. Other groups have not been treated with such disrespect for their autonomy, dignity and rights.⁶

This historically entrenched exclusion is exacerbated by continuing disadvantage, some of which is a legacy of explicit and egregious discriminatory laws and policies. Indigenous peoples are the most disadvantaged in Australia in terms of health, education, economic participation, political participation, property rights and representation in the criminal justice system. Their disadvantage is extreme in comparison to non-Indigenous people in Australia, and in comparison to Indigenous peoples in comparable countries such as Canada, New Zealand, and the United States.

Recognition of a right of self-determination would provide evidence that Victoria is committed to political, civil and social structures that embrace the equal participation of a historically excluded group. A practical example of self-determination in Victoria is the use of Koorie courts, whereby Koorie elders are involved in decisions regarding Indigenous peoples in the criminal process. The Koorie court example demonstrates that self-determination is not only a national issue but also a state issue, and it is a concept that does not threaten the rights of non-Indigenous Australians.

Recognition of a right to self-determination would constitute a significant stepping stone towards true reconciliation in Australia. It would signal that the Charter was meant to embrace rights for Indigenous peoples along with all others in Victoria.

³ See Julie Debeljak, 'Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations' (2000) 26 *Monash University Law Review* 159

⁴ In contrast, note how treaties were concluded in other settler States, such as New Zealand and the US.

⁵ ATSIC was seen by many as suffering from transparency and governance problems. However, it also consisted of 17 regional councils and a central body which provided Indigenous peoples with representational strength.

⁶ Contrast the abolition of local councils, such as that in the Kennett era in Victoria. Those local council were quickly restored, unlike ATSIC.

2. Remedy for unlawful arrest or detention

Article 9(5) of the ICCPR provides that “anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.” This provision was omitted from the Charter. The Explanatory Memorandum notes that clause 21 states that Parliament did not intend to create a right to compensation for people who claim to have been unlawfully arrested or detained.⁷ We argue that the language in Article 9(5) should be included in the provision to ensure false imprisonment is adequately addressed and that an appropriate remedy is available for a breach of this right. There is no reason to limit the ability of those who have been unlawfully arrested or detained from seeking compensation for the unlawful treatment. Indeed, it is likely that those detained unlawfully will have an enforceable right under s 39, including damages, such that explicit inclusion of Article 9(5) may simply provide clearer recognition of this.

3. War Propaganda and racial and religious hatred

Article 20 of the ICCPR provides:

- 1. Any propaganda for war shall be prohibited by law.*
- 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

These provisions have been omitted from the Charter. The explanatory memorandum does not make it clear why Article 20(1) and 20(2) were omitted from the Charter and we recommend they be included. Presumably Article 20(1) was omitted because issues surrounding war tend to be federal issues; however, this fails to recognise that people in states can engage in war propaganda and such conduct should be equally discouraged.

Article 20(2) is in a different category. Presumably, 20(2) was omitted because there is specific legislation addressing racial and religious tolerance, being the *Racial and Religious Tolerance Act 2001* (Vic). The existence of specific legislation is no excuse for omitting such an important right from the Charter. Inclusion of Article 20(2) in the Charter indicates the special significance attached to the suppression of national, racial or religious hatred and, for that reason alone, it should be incorporated into the Charter. Moreover, by parity of reasoning, the existence of Victorian anti-discrimination laws did not prevent the inclusion of the non-discrimination and equality provision in s 8 of the Charter. Therefore a consistent approach to the Charter requires recognition of Article 20(2). For these reasons we recommend that Article 20(2) be included in the Charter.

4. Birth registration

Article 24(2) of the ICCPR, which provides that ‘every child shall be registered immediately after birth and shall have a name’ was also omitted from the Charter.

⁷ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 16.

The Consultation Committee which drafted the Charter acknowledged the omission, stating that:

[T]he Committee has not included the article 24 provisions concerning the right to birth registration and to a name. While these rights were more relevant in the post-World War II context in which the ICCPR was drafted, they are less relevant for inclusion in a modern Victorian Charter.

This conclusion demonstrates a lack of awareness of the problems that Indigenous people in Victoria are currently facing when it comes to birth registration and obtaining a copy of their birth certificate. These problems have been well documented and analysed.⁸

The failure to include the right set out in article 24(2) of the ICCPR into the Charter in the belief that there are no issues surrounding birth registration in Victoria is an error of judgment, to the detriment of the Indigenous population in this state. Castan Centre research has revealed that some difficulties faced by Indigenous Victorians without birth certificates include difficulties in obtaining a driver's licence, registering to vote, opening a bank account and enrolling their children at school. This mistake should be remedied by adding a new section to Part 2 that provides that:

Every child born in Victoria shall:

- 1) have a name;*
- 2) be registered immediately after birth; and*
- 3) be provided with a birth certificate immediately after their birth is registered.*

5. Protection of the family

Article 23 of the ICCPR provides that

- 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
- 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.*
- 3. No marriage shall be entered into without the free and full consent of the intending spouses.*
- 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage,*

⁸ See, eg Castan, Melissa, Gerber, Paula and Gargett, Andy 'Indigenous Australians' Access to Birth Registration Systems: A Breach of International Human Rights Law?' (2011) 17(1) *Australian Journal of Human Rights*; Gargett, Andy, Gerber, Paula and Castan, Melissa 'A Right to Birth Registration in the Victorian Charter? Seek and you shall NOT Find!' (2010) 36(3) *Monash University Law Review*; Gerber, Paula 'Making Visible the Problem of Invisibility' (2009) 83(10) *Law Institute Journal* 52; Gerber, Paula 'Making Indigenous Australians 'Disappear': Problems arising from our Birth Registration Systems' (2009) 34(3) *Alternative Law Journal* 158; Jewel Topsfield, 'The Unbearable Heaviness of Being No One', *The Age* (Melbourne), 23 January 2009; Orenstein, Joel 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (2008) 7(8) *Indigenous Law Bulletin* 14.

during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 23(1) has been incorporated into the Charter (s17(1)). The other sections of article 23, however, have not been incorporated into the Charter. The explanatory memorandum states that 23(2) and 23(4) were omitted as both sections concern marriage, which is controlled at the Federal level, and was silent on the decision to exclude 23(3). The legal assumptions regarding exclusive federal control over Articles 23(2) and (4) are unproven, and these provisions should be included in the Charter. Moreover, there seems to be no reason whatsoever for the exclusion of Article 23(3).

6. Economic, Social and Cultural Rights

We recommend amending the Charter to include the economic, social and cultural rights set out in the ICESCR. The majority of economic, social and cultural rights come within the purview of state legislative power and are often impacted by state public authorities. They should therefore be guaranteed under the Charter.

The two sets of rights (civil and political, and economic, social and cultural) are indivisible, interdependent, and equally important.⁹ One is not fully integrated into society if one suffers, for example, from malnutrition, a lack of access to shelter, or a lack of access to health facilities. Civil and political rights and economic, social and cultural rights are also closely related in many respects. The social right to an adequate standard of health, for example, is crucial to enjoyment of the civil right to life. The civil right to free expression is immeasurably enhanced by the social right to education. The inclusion of civil and political rights without economic, social and cultural rights has resulted in the elevation of the former rights at the expense of the latter when such rights clash.

Under the ICCPR, States' obligations are immediate, whereas obligations under the ICESCR are softer. States are obliged under Article 2(1) of ICESCR to *progressively* guarantee the rights therein, subject to resource availability. The softness of the obligation has led some to question whether economic, social and cultural rights are concrete enough to enable findings of violation by a court.

The Maastricht Guidelines, adopted by a group of economic, social and cultural rights experts in 1997, identified a number of violations of the ICESCR. These are:

Violations through acts of commission

Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

⁹ *Universal Declaration of Human Rights* 1948; *International Covenant on Civil and Political Rights*, preamble; *International Covenant on Economic, Social and Cultural Rights*, preamble; *Vienna Declaration and Programme of Action* 1993 (World Conference on Human Rights, Vienna, 14-25 June 1993) para 5, UN Doc A/Conf.157/23.

- (a) *The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;*
- (b) *The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;*
- (c) *The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;*
- (d) *The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;*
- (e) *The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;*
- (f) *The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;*
- (g) *The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.*

Violations through acts of omission

Violations of economic, social and cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include the failure to:

- (a) *take appropriate steps as required under the Covenant;*
- (b) *reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;*
- (c) *enforce legislation or put into effect policies designed to implement provisions of the Covenant;*
- (d) *regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;*
- (e) *utilize the maximum of available resources towards the full realization of the Covenant;*
- (f) *monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;*

- (g) *remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;*
- (h) *implement without delay a right which it is required by the Covenant to provide immediately;*
- (i) *meet a generally accepted international minimum standard of achievement, which is within its powers to meet;*
- (j) *take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.*

Indeed, economic, social and cultural rights are justiciable: there is simply too much evidence to argue to the contrary.¹⁰ Courts across the world, largely in States that are poorer than Australia, have rendered numerous decisions on economic, social and cultural rights.¹¹ Furthermore, the UN Committee on Economic Social and Cultural Rights has issued numerous General Comments which add flesh to the obligations as stated in the ICESCR. Moreover, the UN by consensus adopted the Optional Protocol to ICESCR in December 2008, which will allow individuals to submit complaints to the Committee regarding breaches of their ICESCR rights by States that have ratified the Protocol when it comes into force. The process will help to further clarify the limits of ICESCR rights.

States have obligations to respect, protect, and fulfil all of their human rights obligations, whether they concern civil and political rights, or economic, social and cultural rights. We endorse the comments of Julie Debeljak, Deputy Director of the Castan Centre, who has put forward a separate submission to the Committee, in her explanation of these tripartite duties.¹²

Some of the most advanced jurisprudence on economic, social and cultural rights has emerged from South Africa. As explained by Dr Debeljak, South African courts have essentially inquired into whether a particular act or omission by the government is rational or reasonable.¹³ This type of decision-making is not foreign in Victoria; it arises in the context of administrative law.

It has been argued that economic, social and cultural rights considerations will inappropriately involve the judiciary in decisions regarding resource allocation. However, our judiciary commonly considers complex matters relating to government

¹⁰ See Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008) 3, 4; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, (Hart Publishing, Oxford, 2009) 149-202.

¹¹ See generally, Malcolm Langford (ed), above n 155.

¹² See submission of Dr Julie Debeljak.

¹³ See submission of Dr Julie Debeljak.

policy, many of which have significant resource implications (e.g. cases concerning public housing and evictions, education, and health care). Courts already have significant jurisdiction over economic, social and cultural rights in the context of anti-discrimination law at state level, for instance with regard to employment rights, rights to education and the right to housing.

Finally, under amendments to the Charter, a court may be empowered to only decide that a certain situation is a violation of economic, social and cultural rights of a particular individual; it could then be up to the government to decide how to fix that situation.¹⁴ For example, a court could find that a person living in squalor without access to housing has had his rights breached, but order the government to remedy the breach in whatever way it sees fit. This system is in place in Europe. Under Article 46 of the European Convention on Human Rights, States parties have agreed to “abide by” decisions of the European Court. Essentially, the European Court will identify the deficiencies in the domestic legislation but will not direct a State how to remedy it. The State party is free to implement the decision in a manner determined by their own government and parliament. Thus, any deficiency in the domestic law of a State party *must* be rectified so as to meet the requirements of the *ECHR*; but it is the domestic government and parliament, not the European Court, which determines the precise *manner* of rectification.¹⁵

The inclusion of economic, social and cultural rights in the Charter will provide a basis upon which embedded human rights problems can be addressed. Such an approach is consistent with the recent expression of human rights found in the *Charter of Fundamental Rights of the European Union* (2000) and the *Declaration of the Rights of Persons with Disabilities* (2007), as well as the *Convention on the Elimination of All Forms of Racial Discrimination*, *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, and *Declaration on the Rights of Indigenous Peoples*. All of these documents provide a template for an inclusive iteration of civil and political, and economic, social, and cultural rights. As it stands, the Victorian Charter, absent of economic, social and cultural rights, falls short of contemporary human rights standards.

7. Improvement to Section 10

Section 10 should be amended so that the words “or treatment” are removed from s 10(c). Medical treatment without consent is a breach of the right to privacy and would fall, therefore, within s 13. It is not, however, to be equated with the other subject matter in s. 10, namely torture, inhuman and degrading treatment, or medical experimentation.

¹⁴ Ibid 157.

¹⁵ *ECHR*, opened for signature 4 November 1950, 213 UNTS 222, Article 46 (entered into force 3 September 1953).

Section 2 – Judicial powers under the Charter

1. The limitations power

The Charter provides both internal and general limitations to human rights and fails to recognise absolute rights within the broader general limitations provision. We recommend the following changes be made to bring the Charter limitations clauses in line with international human rights law.

Section 7(2) – general limitation

Section 7(2) provides a general limitation that applies to all rights within the Charter. It states:

A human right 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 all relevant factors including-

- (a) the nature of the right; and*
- (b) the importance of the purpose of the limitation; and*
- (c) the nature and extent of the limitation; and*
- (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.*

Section 15 (3) contains an additional internal limitation in sub-paragraph (3), which 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.*

This additional limitation means courts or other decision-makers may mistakenly apply two tests of limitation to that provision. It would be nonsensical for a decision-maker to work out the limits to s 15 rights by reference to s 15(3), and then go through the whole process again with reference to s 7. Additionally, internal limitations exist with regard to other rights under the ICCPR (e.g. with respect to freedom of thought, conscience and religion (ICCPR Article 18)), yet these limitations have not been incorporated into the Charter (s 14). Moreover, there is no adequate explanation as to why the internal limitation was retained in relation to s 15 and not other rights, and despite the existence of the general limitation provision in s 7(2).

Therefore we propose to remove the internal limit found in s 15 (freedom of expression) of the Charter, and utilise only the general limitation set out in s 7(2) when balancing limitations on human rights.

If economic, social and cultural rights are added to the Charter (see discussion and our recommendation above), it is recommended that a limitations clause be included that reflects Article 2(1) of ICESCR for these rights. Article 2(1) provides:

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

Inclusion of this provision will give judges guidance on how to effectively adjudicate these rights and remove concerns regarding the justiciability of economic, social and cultural rights.¹⁶

Absolute rights

Those rights which are absolute at the international level should be recognized as absolute in the Charter and excluded from the operation of the general limitations clause in s 7. These include the right to be free from torture and cruel, inhuman and degrading treatment or punishment, and the right to be free from slavery and servitude. No civilized society should ever be required to qualify such rights.¹⁷

Accordingly, the general limitations clause in s 7 of the Charter should not apply to the following rights, meaning that the following rights are *absolute*:

- (a) Section 10 – torture;
- (b) Section 11 – freedom from forced work;
- (c) Section 21(8) – freedom from imprisonment for failure to perform contractual obligation;
- (d) Section 22(1) – humane treatment for detainees;
- (e) Section 25(1) – right to be presumed innocent;
- (f) Section 25(4) – right to appeal in criminal proceedings; and
- (g) Section 27 – retrospective criminal laws.

Override Provision

¹⁶ See Julie Debeljak's submission.

¹⁷ See further, Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 433-35.

The override provision in the Charter (s 31) permits the government to explicitly remove legislation from the rubric of the Charter. We do not agree with the inclusion of an override provision in the Charter and recommend it be removed. We note that such a provision was not thought to be necessary in the *Human Rights Act 2004 (ACT)* ('ACTHRA').

An override provision is included in Canada's constitutional model in order to preserve parliamentary sovereignty, as the Canadian courts have power to invalidate rights-incompatible legislation. This is not the case with the Victorian Charter. Parliamentary sovereignty is preserved in the non-constitutional model in Victoria. Accordingly, there is no need to additionally provide for an override provision in the Charter.¹⁸

If an override clause is felt to be necessary, we support the recommendation of Dr Julie Debeljak, as outlined in her submission, that s 31 of the Charter be amended to replicate the override/derogation provision in s 37 of the *South African Bill of Rights*.¹⁹

It may be noted that the ICESCR contains no specific derogation clause, so it is probable that derogation is not permissible under that treaty. Therefore, we would recommend that a derogation clause not extend to rights in the ICESCR if these rights are included in the Charter. In any case, derogation should never be necessary, given that a State's ICESCR obligations are constrained by its available resources.²⁰ Therefore, any fluctuation in resources necessitated by an emergency would justify a fluctuation in Australia's ability to provide for economic, social and cultural rights.

2. The interpretation power

The Charter is a dialogue model bill of rights and as such requires an ongoing dialogue between the courts, the government, and parliament. The s 32 interpretive provision is an essential element of the structure of the dialogue model and provides the courts with a means to engage the government and parliament over the human rights compatibility of Victorian legislation. The Centre notes that s 32 is currently before the High Court of Australia.

We recommend the words "consistently with their purpose" be removed from s 32 to ensure that the section is interpreted in line with the approach taken by the UK

¹⁸ See further, Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422.

¹⁹ *Constitution of the Republic of South Africa 1996* (RSA), s 37. See further Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, especially 440, 458-461.

²⁰ Manisuli Ssenyonjo, 'Economic Social and Cultural Rights: An Examination of State Obligations', in Sarah Joseph and Adam McBeth (eds), *Human Rights: A Research Handbook* (Edward Elgar, UK, 2010).

House of Lords in *Ghaidan v Godin-Mendoza*²¹ in interpreting s 3(1) of the United Kingdom's *Human Rights Act 1998* (UKHRA), being the provision that s 32 of the Charter was modeled on. This will resolve the current issues surrounding s 32(1) including its effect as a remedial clause and questions concerning the methodology adopted by the Victoria Court of Appeal in the *Momcilovic* case. We refer the committee to the submission of Dr Julie Debeljak for further detail on s 32.

Section 3 – The application of the Charter to public authorities

As is the case under s 38, when read with ss 3 and 4 of the Charter, public authorities at the state level should be bound to abide by human rights, as well as private bodies exercising functions of a public nature. While there are strong arguments that private bodies, especially powerful bodies such as corporations and/or the media, should also have duties to respect human rights, we believe that such issues should be dealt with in separate legislation.²² However, we endorse the ACT approach of allowing such bodies to opt in and undertake the same human rights duties as public bodies, as in s 40D of the ACTHRA and recommend incorporating a similar provision into the Charter. Private bodies may wish to do so, for example, to demonstrate their bona fides in the arena of corporate social responsibility.

A question arises as to whether courts should be required to abide by human rights when making decisions. If so, this can lead to human rights influencing the development of the common law, as has occurred in the UK.²³ This is a desirable outcome in our view. The High Court has stated that there is a common law of Australia, not a common law of each state.²⁴ This argument, however, is illusory as common law obligations in areas other than human rights have been codified and altered by State legislation without creating problems. For further discussion of this point, please see the submission of Dr Julie Debeljak.

Section 4(1)(j) of the Charter explicitly excludes a court or tribunal (except when it is acting in an administrative capacity) from the definition of a public authority. There is no reason to bar the application of the Charter to judges while acting in their judicial capacity. The UKHRA explicitly includes a court and tribunal within the definition of public authority (s (3)(a)). The Charter should be amended to remove s 4(1)(j), and include courts and tribunals in the category of public authority within s 4.

This amendment will also clarify confusion regarding s 6(2)(b) which declares that the Charter applies to “courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3”. Section 6(2)(b) when read with s 4(1)(j)

²¹ [2004] UKHL 10.

²² The Castan Centre would support separate legislation in that regard.

²³ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

²⁴ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, para 135.

create a tension. Section 4(1)(j) firstly omits courts and tribunals from the definition of public authorities (making them not bound to abide by human rights), and then s 6(2)(b) suggests that the Charter does in fact apply to courts to the extent that they have functions under the Charter. This ambiguity could be removed by simply including courts and tribunals within the definition of public authorities, with a consequential amendment to s 6(2)(b) to reflect this.

Section 4 – The need for an Independent Cause of Action

The Charter should be amended to provide for independent causes of action modeled on the UKHRA²⁵, including access to damages. The UKHRA model is to be preferred over the recently enacted ACT version because the UK version provides judges with the full range of remedies available, including damages. The Victorian approach of limiting causes of action to those which can be “piggybacked” on another claim generates unwieldy, and as yet unresolved, issues, such as how strong the other claim has to be, or whether an administrative law action based solely on a public body’s failure to comply with the Charter is allowed. An independent cause of action is necessary to ensure that victims of breaches of human rights are able to access effective local remedies to redress human rights abuses.

Section 5 – The importance of maintaining judicial involvement in the Charter

Commentators have continued to attack the Charter on the ground that it is undemocratic and undermines parliamentary sovereignty by giving power to an unanswerable judiciary in Victoria.²⁶ These statements are inaccurate, misleading, and demonstrate a misunderstanding of the legal structures in the Charter. Below we outline some of the common arguments against a Charter and explain why these concerns are unfounded, with reference to the Charter’s first four years of operation where appropriate.

1. “A Charter usurps Parliamentary sovereignty”

One of the most oft-repeated arguments against the Charter is that it hands too much power to an unelected judiciary from a democratically elected and accountable Parliament. This argument is illogical in so far as it applies to the Charter. First, the Charter does not give judges the authority to invalidate legislation that breaches human rights: judges simply issue a declaration of inconsistent interpretation which indicates to the Parliament that a law is inconsistent with human rights. Declarations of inconsistent interpretation do not, in and of themselves, invalidate laws. Even if

²⁵ *Human Rights Act 1998* (UK), s 8.

²⁶ See eg comments by Ted Lapkin, of the Institute of Public Affairs, cited in Peter Munro “State told human rights matter of decency”, *The Age*, 29 May 2011 < <http://www.theage.com.au/victoria/state-told-human-rights-a-matter-of-decency-20110528-1f9tx.html>>.

judges decide to give legislation a rights-compatible interpretation under s 32, Parliament maintains the ability to amend judicial interpretations under the Charter. In fact, the Charter does not repeal prior inconsistent legislation (unlike most legislation, which automatically overrides prior inconsistent legislation).

Any response, active or passive, by a Parliament to a judicial decision under the Charter, whether the decision be a declaration of inconsistent interpretation or a judicial interpretation of an Act, is a response by the democratically elected arm of government. If it is feared that Parliaments will automatically “cave in” to judicial interpretations, that fear betrays a lack of trust in Parliaments rather than judges. Executive governments and Parliaments are unlikely to respond to judicial interpretations that they believe to be utterly untenable, or so politically unpopular as to jeopardize the position of the government of the day.

Indeed, the Parliament of Victoria has already demonstrated its willingness to explicitly depart from human rights standards. In *RJE v Dept of Justice, AG and VEOHRC*,²⁷ the majority in the Victorian Court of Appeal read a statutory provision in accordance with the common law right to liberty, while Nettle J came to the same conclusion relying on provisions of the Charter, in particular the right to freedom of movement (s 12), the right to privacy (s 13) and the right to liberty (s 21). The legislation concerned Extended Supervision Orders for serious sex offenders. The Victorian Parliament acted promptly to amend the legislation, so as to undo the effect of the Court’s human rights-respecting interpretation and make the system harsher, and less human rights compliant, for serious sex offenders.²⁸

2. “A Charter transfers power from the elected Parliament to the unelected judiciary”

Much has been made of the unelected and unrepresentative nature of the Australian judiciary. The “unelected” nature of the judiciary has been used in public debate as a disparaging aspect of the judiciary. Just as one, however, can despairingly label the judiciary as “unelected”, one can commendably label it as “apolitical”, “independent”, “impartial”, or “a judiciary not beholden to any political constituency”.

Indeed, the independence of the judiciary is a vital part of the Victorian system of government. Independence is the precise reason that judges already oversee governmental actions, as the judiciary is in a position to give sober and detailed consideration to the legality of any action without fear of being “thrown out” of office by populist sentiment. Independent judicial scrutiny of governmental action is a vital pillar of the rule of law in Victoria and a key reason for the separation of powers. The Victorian Charter merely provides additional criteria (namely compliance with human rights) to the exercise of judicial scrutiny of government action. The *Momcilovic* decision is an example of how the judiciary was able to effectively provide an

²⁷ [2008] VSCA 265.

²⁸ *Serious Sex Offenders Monitoring Amendment Act (Vic) 2009*.

objective opinion that a particular law infringes human rights while ceding to our elective representatives the right to decide if and how that infringement should be addressed. In that case, the Court of Appeal declared s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* to be inconsistent with the defendant's right to be presumed innocent under s 25 of the Charter. Once the current High Court appeal of the *Momcilovic* case is completed, the Parliament will decide whether or not to amend the law (assuming that the original declaration is upheld).

A second concern with the argument that oversight of human rights should not be given to "unelected" judges is that it confuses the role of politicians and judges. Under the separation of powers doctrine, politicians have the power to pass laws, while judges have the power to determine the meaning and scope of those laws. If somebody's human rights are infringed, it is unreasonable to expect Parliament to do something to remedy that particular situation; rather, it is the role for courts. Indeed, in many instances under the Charter, judges have been tasked with considering whether the decisions or actions of "unelected" public authorities and officials breach human rights. Some examples of relevant cases are provided under the next sub-heading.

3. "Human rights only protect minorities"

It is true that human rights can often be used to protect minority groups, but in fact human rights ensure a level playing field for everyone. They are not designed to favour certain groups, but rather to ensure that those who "fall through the cracks" are helped. The most important effect of this factor is that judges are able to address human rights in individual situations, whereas legislatures use a broad-brush approach. That is, judges are able to address those situations where individuals may have, perhaps inadvertently, been unfairly affected by legislation.²⁹ Perhaps Mr Gary Kracke was such a person: it seems doubtful that the legislature had contemplated the possibility that a person might be subject to unreviewed, non-consensual, compulsory medical treatment, and the Charter enabled that anomaly to be redressed through the courts.³⁰

Furthermore, the judiciary can offer better protection to vulnerable minorities, who might lack political traction. While human rights attach to all, majorities are more able to influence parliaments to protect and respect their rights, compared to minorities. Unpopular minorities, such as criminals, alleged criminals or the homeless, are particularly vulnerable as majorities may actively wish to suppress their rights. Minority rights may also be misunderstood, such that majorities fear that recognition

²⁹ Jeremy Webber, 'A modest (but robust) defence of statutory bills of rights', in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights* (Ashgate, 2006) 275-78.

³⁰ In fact the legislation required review of the relevant treatment orders, but was silent on the result of the failure to conduct such review. *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 464.

of such rights harm their own interests. Finally, minority rights may simply not be of sufficient interest to majorities so as to motivate their vote: there are fewer votes, for example, in rights for prisoners or the mentally ill compared to economic policies. If human rights are left solely in the hands of parliaments, minorities may be required to wait patiently for majorities to be motivated enough to prompt or tolerate change. That can take a long time, and leave many human rights abuses unaddressed along the way.³¹

Since its introduction, the Charter has enabled many people to successfully seek redress in court for breaches of their human rights. In addition to the case of *Kracke v Mental Health Review Board & Ors* (see above), some examples of recent cases include:

1. *Director of Housing v Sudi* [2010] VCAT 328, in which the applicant sought an order that he be permitted to stay in his house, which was owned by the Director of Housing. The applicant, who had been unemployed for over a year and had assets totaling \$8000, was the primary carer of his three-year old son and was seeking to stay in the house after the death of his mother, whose name had been on the lease. The Tribunal held that the Director's decision to evict the applicant was a breach of his right to not have his family or home interfered with unlawfully or arbitrarily – pursuant to s 13(a) of the Charter. The decision of the Director was found to be unlawful because eviction was a serious interference with the applicant's right, and the Director had not offered any evidence to justify such interference.
2. *Secretary to the Department of Human Services v Sanding* [2011] VSC 42, in which the Supreme Court held that the decision of the Department of Human Services to remove three children from the custody of their grandmother could be overturned by the Magistrates Court without the Court hearing formal evidence from the children. The Department had planned to separate each of the children and place them in state care. In making his decision, Bell J referred to the right to a fair hearing (s 24(1)), the right to protection of the family as the fundamental group unit of society (s 17(1)), the best interests of the child (s 17(2)), cultural rights (s 19), freedom of movement (s 12) and the right not to have one's privacy, family or home arbitrarily interfered with (s 13(a)).
3. *Conroy v Yooralla Society of Victoria* [2009] VCAT 1873, in which the Victorian Civil and Administrative Tribunal found that attempting to evict a man from a residential unit for people with a disability without due cause was a breach of human rights. The Tribunal interpreted the relevant

³¹ For example, while the Castan Centre applauds Victoria's creation of domestic relationship registration which applies to opposite and same-sex couples alike. Such reform was long overdue and remains inefficient as same-sex couples are still not entitled to the same rights as opposite-sex couples, for example with regards to adoption.

section of the *Disability Act 2006* governing the issue of “notices to vacate” as requiring the issuer to give proper reasons for evicting the tenant. The Tribunal found that the defendant had failed to give proper reasons. In so finding, Lambrick SM stated: “I...consider that the interpretation I have reached is an interpretation compatible with human rights [specifically the right not have one’s home arbitrarily or unlawfully interfered with pursuant to s 13 of the Charter] and consistent with the purpose of the *Disability Act 2006* and that the contrary interpretation would not be so.”

Each of these cases has taken place in the full glare of the public, and the reasoning of the court in each case has been written and released publicly, allowing scrutiny and debate of both the legal intricacies of the decision, and the actions of the relevant public authority.

In the case of *Sudi*, discussed above, when the Victorian Civil and Administrative Tribunal found that the Director of Housing’s attempt to evict a man and his child on the basis that it was his deceased mother’s name on the lease, the Tribunal also discussed an earlier incident of relevance to the case: in 2003, the Director had rejected a joint application of the applicant and his mother to have the lease transferred into his name. The Tribunal found that the rejection was a breach of the relevant guidelines. “If the guidelines had been properly applied, this controversy may have been avoided”, wrote Bell J. This statement is, we submit, an eloquent summary of why judges must be empowered to scrutinise and remedy the decisions and actions of public authorities which infringe human rights. In many cases, there is simply no one else to investigate a wrong and order its remedy.

4. “A human rights Charter is a villains’ charter”

Some opponents of human rights legislation claim that a charter of rights can be abused by villains or criminals. In response, we say the following.

First, the use of human rights arguments by criminals or suspected criminals is most likely to arise in the context of criminal procedure laws, such as the right to fair trial, or pre-trial procedural rights concerning arrest and bail. The judiciary already deals with such issues, and has in fact increasingly uncovered such rights in the common law (for instance the right to not be tried or punished more than once). Indeed, in many criminal cases, judges have been able decide cases in a defendant’s favour by referring only to the defendant’s common law rights. One such example is the case of *RJE v Department of Justice* (see discussion, above), in which the majority of the court made its decision on common law grounds.³²

³² Common law rights have also been in preference to Charter rights in non-criminal matters. See, eg, *Antunovic v Dawson & Anor* [2010] VSC 377, in which the Supreme Court held that a woman’s common law right to freedom of movement had been breached by a requirement that she stay each night in a psychiatric facility. Bell J held that his finding meant that he did not need to consider whether the Charter right to freedom of movement had been breached (s 12).

Another example is *Castles v Secretary to the Department of Justice [2010] VSC 310*, in which the applicant requested an order that she be allowed to continue in vitro fertilisation (IVF) treatment while incarcerated on the grounds that failure to do so amounted to an infringement of the right of humane treatment while in detention pursuant to s 22 of the Charter, among others. Emerton J granted the application in part because of the unusual circumstances of the case: Ms Castles had commenced IVF before incarceration, she would become ineligible for treatment by the time of her release because of her age, and she was willing to pay for the treatment.

His Honour stated that his decision was arrived at under the applicable sections of the *Corrections Act 1986*, and that “the application of [s 22 of] the Charter served to confirm the interpretation that had been arrived at in any event.” His Honour, it should be noted, made it clear that that the applicant’s case would not have succeeded on either common law or human rights grounds if the treatment was not reasonable, for example if “the cost of the treatment and the magnitude of any disruption to the prison system entailed in its provision” were excessive.

Secondly, human rights are premised on the idea that human beings have human rights simply by virtue of being human: this is an idea long promoted by Australia at the international level. Thus, criminals have the same human rights as others, and, importantly, the same *limits* to their human rights as others.³³ There is no human right to commit crime, or to harm others: importantly, an internationally recognized basis of limiting one’s human rights include the safeguarding of the “rights of others”, “public order” and “public morals”. However, the fact that a person has committed a crime does not deprive that person of his or her rights. We doubt the “rogues’ charter” critics are seriously maintaining that criminals or suspected criminals should be subjected to arbitrary (as opposed to justified) arrest, unfair (as opposed to fair) trial, or inhumane (as opposed to humane) treatment.

It is a slippery slope to argue that the rights of criminals should be reduced, or not recognized. How does one distinguish criminals from criminal suspects, and therefore from those who are mistakenly suspected? If criminals have no rights, criminal suspects and those wrongly suspected would also be highly vulnerable to rights abuses. In this respect, we draw the Committee’s attention to instances of grave miscarriages of justice, facilitated by confessions beaten out of the protagonists, such as the wrongful convictions of the terrorism suspects known as the “Guildford 4” and “Birmingham 6” in the UK. We also remind the Committee of the farcical detention, charge, and deportation of Dr Haneef in 2007.

³³ Some might be surprised at our assertion here, noting for example that prisoners do *not* have the same rights: for example, they do not have the same rights to freedom of movement or privacy as the general population. However, this discrepancy is explained by well recognized limits to rights, which apply to everybody. *Anybody’s* freedom of movement can be limited by legitimate measures to protect public order. Clearly, public order requirements suffice to limit the freedom of movement of anybody who is lawfully and reasonably detained in prison.

Criminal procedure rights and other human rights may occasionally inconvenience the process of criminal investigation. However, the rights which protect criminals and criminal suspects, in fact, protect us all. They are also functional in that they promote good policing practices, helping to minimize the instances of the arrest or conviction of innocents, or maltreatment of persons, whether guilty or innocent.

Relatively few criminal matters before the County Court, Supreme Court or Court of Appeal in 2010 included arguments relating to the Charter. A review of the major 2010 criminal cases reveals that the courts have balanced the rights of criminals and accused against other considerations. These cases show consistently that the Charter has not become a weapon for “villains” to somehow evade punishment. Some examples of cases relating to criminals or people accused of crimes in 2010 are:

1. *In the matter of a Major Review of Derek Ernest Percy* [2010] VSC 179, in which the applicant failed in his attempt to be transferred from a prison to a forensic psychiatry facility on the grounds that his right to humane treatment when deprived of liberty under s 22 of the Charter was being infringed. Mr Percy is detained at the Governor’s pleasure, having been found not guilty of murder in 1970 by reason of insanity. The Court rejected the applicant’s argument on the basis that a forensic psychiatric facility would be no less restrictive than a prison, and would not provide superior medical treatment to the applicant.
2. *WBM v Chief Commissioner of Police* [2010] VSC 219, in which the applicant requested an order that his name be removed from the Victorian Sex Offenders Registry. The applicant argued that the listing was an arbitrary interference with his privacy in contravention of s 13 of the Charter, and a retrospective penalty in contravention of s 27 of the Charter (he was convicted prior to the advent of the registry). The court declined to order the applicant’s removal from the Registry, stating that the listing was neither arbitrary, nor a penalty.
3. *Inquest into the Death of Tyler Cassidy: Ruling on suppression application by the Chief Commissioner of Police pursuant to 73(2)(b) of the Coroners Act 2008*, in which the court ruled that certain documents relating to the internal workings and processes of Victoria Police and details of training, protocols and operational methods could be suppressed. In doing so, the Court held that the rights to freedom of expression (s 15) and life (s 9) needed to be balanced against the risk to police and community by allowing publication of the information.
4. *DPP v Ali & Anor (No 2)* [2010] VSC 503, in which the court held that the confiscation of a property under the *Confiscation Act 1977* did not constitute a breach of the human rights of the owner’s wife and children. The court therefore permitted the confiscation of the property. (However the court also ordered a cash payment to the wife out of the sale of the

property as partial relief against hardship. This order was made under the applicable section of the *Confiscation Act*, and without reference to the Charter).

5. “Judges are unelected and unaccountable”

Of course, the judiciary is not directly accountable as our elected representatives, in the sense that they are not subjected to election. However, judges are nevertheless accountable in different ways.

Judges must issue reasoned judgments, which are almost always open to being overturned on appeal, or reversed by legislation, or, in the case of declarations of inconsistent interpretation, ignored by the Parliament. In contrast, consider decision-making processes within the executive government. Such decisions are not necessarily transparent or reasoned. In fact, Cabinet documents are sealed for 10 years.³⁴ Judicial decisions are also based on precedent, and changes to the pre-existing law are usually small and incremental. Judicial decisions are thoroughly reasoned, and based on pre-existing known laws, which is vastly different to political and policy decision making, which may be justified on the basis that the decision maker is simply doing what he or she thinks “is right”.³⁵ The process of policy formulation, or the real motivations behind a Cabinet decision, may also be concealed for some time. Judgments are crafted according to arguments presented openly in court, or in public documents (e.g. statements of claim, pleadings). In contrast, in making decisions, it is legitimate in many instances for politicians to make decisions after being influenced by behind-the-scenes lobbying.

Of course, in most cases, executive policy must be approved by Parliament. Legislation is debated, and is often subjected to scrutiny by parliamentary committees. Nevertheless, the wishes of the executive government prevail more often than not. In any case, as noted, most judicial decisions can be subjected to legislative scrutiny and may be reversed, sometimes with retrospective effect, by legislatures.³⁶ Furthermore, some legislation is enacted very quickly without proper debate or consideration.³⁷

Our point here is not to impugn decision-making in the legislature and the executive. It is to note that an important level of transparency and accountability is imposed on judges through the judicial decision-making process. Those processes compare well in terms of transparency and accountability to those of the executive. Both processes may be subjected to oversight by the legislature.

³⁴ *Freedom of Information Act 1982* (Vic) s 28(2).

³⁵ For example, former Prime Minister Howard, in the ABC Documentary series *The Howard Years* explained a number of decisions on the basis that he did what he thought was right. Tony Blair and George W. Bush have expressed similar sentiments. (We focus on ex-leaders because they tend to be more frank about their decision making bases than current leaders).

³⁶ See *Nicholas v R* (1998) 193 CLR 173, for an example of a court decision being retrospectively reversed by legislation.

³⁷ See George Williams, ‘Wisdom of politicians is frail shield for our rights’, *Sydney Morning Herald*, 2 June 2009, citing the limited legislative scrutiny of the Northern Territory intervention legislation.

6. Human rights are “too political” for judges

It has been argued that human rights are simply too “political” or “discretionary” for judges to be involved. It is true that the perimeters of most human rights are limited by vague measurements such as “reasonableness”, “necessity”, or “minimal impairment”. The argument runs that such decisions are inherently political and should therefore be left to the politically accountable arms of government.

In response, we note the following. First, judges commonly have to apply vague standards in their decision-making. The “reasonable person” test has long been a part of tort law. The “reasonably appropriate and adapted” test of proportionality peppers constitutional law.³⁸ Government decisions can also be invalidated on the ground that they were so unreasonable that no reasonable decision-maker could have come to that conclusion.³⁹

Secondly, the tests of limiting human rights are not applied in a vacuum. There is a wealth of comparative and international jurisprudence to draw from in deciding if a certain action or omission breaches human rights, particularly but not exclusively in the area of civil and political rights. Victoria is of course not bound by those precedents, but they are highly instructive for judges making human rights decisions. Furthermore the Charter explicitly directs judges to refer to international and comparative human rights jurisprudence in interpreting legislation.⁴⁰

Thirdly, not every human rights issue is as controversial as, for example, abortion, euthanasia or same sex marriage. Indeed, human rights case law often concerns procedural rights arising from the right to fair trial, rights which the judiciary is uniquely qualified to implement.⁴¹

7. “A human rights charter will be a lawyer’s picnic”

Experience thus far from Victoria indicates that the impact of charters of rights on litigation has been minimal. In 2010, only 59 cases before the Supreme Court and County Courts raised Charter issues.⁴²

A review of the UKHRA noted that, with regard to applications for judicial review, human rights claims were often simply tacked on to other pre-existing grounds and

³⁸ See Joseph and Castan, above n 7, 471-78. THIS FN IS WRONG. DO CHECK THEM

³⁹ *Associated Provisional Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

⁴⁰ See, eg, UKHRA, s 2(1); Victorian Charter, s 32(2); ACTHRA, s 31(1) (the latter notes that judges ‘may’ consider international and comparative jurisprudence in interpreting legislation).

⁴¹ Helen Irving, ‘Off the Charter’, *Australian Literary Review*, 1 April 2009. It is likely that procedural human rights prompt more litigation than other human rights in those jurisdictions with Bills of Rights.

⁴² Victorian Equal Opportunity & Human Rights Commission “Talking Rights 2010 report on the operation of the Charter of Human Rights and Responsibilities” 51. The commission received 52 notifications in 2009 and 35 in 2008 of Charter issues arising before Victorian court and tribunal proceedings.

thus the UKHRA has not resulted in an increase in litigation.⁴³ The Ministry of Justice's review of the UKHRA has shown that the UKHRA has had a far less negative impact on the development of UK law than anticipated prior to its enactment.⁴⁴ This is particularly relevant given that we recommend the inclusion of a free standing cause of action into the Charter (as discussion above) and evidence from the UK indicates that the feared flood of litigation will not occur in Victoria should such a provision be added.

CONCLUSION

Since its enactment, the Victorian Charter has ensured more equitable outcomes for many Victorians whose rights have been violated. In the process, it has debunked many of the myths supported by opponents of human rights legislation.

We strongly believe that the Charter should be strengthened by including the substantive rights of the *International Covenant on Economic, Social and Cultural Rights*, and by more fully incorporating the *International Covenant on Civil and Political Rights*. We also believe that the Charter will be strengthened by improving certain elements, most particularly how rights are limited and how they are interpreted.

⁴³ Public Law Project, *The impact of the Human Rights Act on Judicial Review* (June 2003) 31.

⁴⁴ Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act*, at p. 10.