

**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,<sup>1</sup> and my academic writing on the matter (see Appendix A),<sup>2</sup> 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’*).<sup>3</sup> 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 *Ghaidan*<sup>4</sup> and *re S*.<sup>5</sup> 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 name<sup>6</sup> and lifting concepts from that jurisprudence in explaining the effect of the inserted phrase.<sup>7</sup>

<sup>1</sup> Julie Debeljak, ‘Inquiry into the *Charter of Human Rights and Responsibilities*’, submitted to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament for the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), 10 June 2011, 1-30 (‘Four-Year Review Submission’).

<sup>2</sup> See in particular, Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33 *Monash University Law Review* 9-71 (‘Parliamentary Sovereignty and Dialogue’); Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have’ (2011) 22(1) *Public Law Review* 15-51 (‘Who is Sovereign Now?’); Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond’ (2014) 40(2) *Monash University Law Review* 340-388 (‘Proportionality, Interpretation and Declarations’).

<sup>3</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

<sup>4</sup> Id.

<sup>5</sup> *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*).

<sup>6</sup> Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, 82-83.

<sup>7</sup> 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*).<sup>8</sup> 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.'<sup>9</sup>

Given that the *UKHRA*<sup>10</sup> and the *NZBORA*<sup>11</sup> 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 *Ghaidan* 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",<sup>12</sup> 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".

<sup>8</sup> *Bill of Rights Act 1990* (NZ) ("*NZBORA*").

<sup>9</sup> Whether or not s 6 of the *NZBORA* and s 3(1) of the *UKHRA* achieve the same outcome is highly contested: see Claudia Geiringer, '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.

<sup>10</sup> *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]; *Ghaidan* [2004] UKHL 30 [24].

<sup>11</sup> 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 "*Moonen No 1*").

<sup>12</sup> 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<sup>13</sup> 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.<sup>14</sup> Similarly, in *Das*, Warren CJ in essence followed the UK/NZ Method<sup>15</sup> 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

<sup>13</sup> See Nettle JA in *RJE v Secretary to the Department of Justice & Others* [2008] VSCA 265 [114] – [116] (*‘RJE’*).

<sup>14</sup> *RJE* [2008] VSCA 265 [118] – [119].

<sup>15</sup> *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.

of the case.<sup>16</sup> In *Kracke*, Bell J adopted the UK/NZ Method<sup>17</sup> and held that s 32(1) codified s 3(1) as interpreted in *Ghaidan*.<sup>18</sup> I have more fully explored this issue of methodology in my academic writing.<sup>19</sup>

### 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.’

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 ‘deem[ing] 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.’<sup>20</sup>

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,<sup>21</sup> *Wilkinson* has failed to materialise as the leading case on s 3(1); rather, *Ghaidan* remains the case relied upon.<sup>22</sup> Finally, the reach of *Ghaidan* has been grossly overstated, and its approach is not appropriately described as ‘radical’.<sup>23</sup>

<sup>16</sup> *Das* [2009] VSC 381 [172] – [175].

<sup>17</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646, [52] – [65] (*‘Kracke’*).

<sup>18</sup> *Kracke* [2009] VCAT 646 [214].

<sup>19</sup> Debeljak, ‘Who Is Sovereign Now?’, above n 2; Debeljak, ‘Proportionality, Interpretation and Declarations’, above n 2.

<sup>20</sup> Debeljak, ‘Who Is Sovereign Now?’, above n 2, 18-21 (citations omitted). See also Debeljak, ‘Parliamentary Sovereignty and Dialogue’, above n 2.

<sup>21</sup> *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’*).

<sup>22</sup> See, for example, Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh, and Stephanie Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 2008) [5-64] – [5-127]; Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press, 2009), 28: ‘In what is now the leading case on s 3(1), *Ghaidan*, ...’

<sup>23</sup> See Aileen Kavanagh, ‘Unlocking the *Human Rights Act*: The “Radical” Approach to Section 3(1) Revisited’ (2005) 3 *European Human Rights Law Review* 259; Aileen Kavanagh, ‘Choosing Between Sections 3 and 4 of the *Human Rights Act 1998*: Judicial Reasoning after *Ghaidan v Mendoza*’ in Helen

## **Victorian Court of Appeal in *R v Momcilovic* 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 Momcilovic* ('VCA *Momcilovic*')<sup>24</sup> aligned its judgment most closely with the *Wilkinson* decision.<sup>25</sup> The VCA *Momcilovic* 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.'<sup>26</sup>

### **The VCA Method**

The VCA *Momcilovic* 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.<sup>27</sup>

Tentatively,<sup>28</sup> the VCA *Momcilovic* Court held that s 32(1) 'is a statutory directive, obliging courts ... to carry out their task of statutory interpretation in a particular way.'<sup>29</sup> Section 32(1) is part of the 'framework of interpretive rules',<sup>30</sup> 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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Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning Under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2007) 114, 142, fn 131; Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 51-57 ('Submission to National Consultation'); Debeljak, 'Who Is Sovereign Now?', above n 2, 19-20.

<sup>24</sup> *R v Momcilovic* [2010] VSCA 50 ('VCA *Momcilovic*').

<sup>25</sup> VCA *Momcilovic* [2010] VSCA 50 [56]. For a critique of the VCA's reliance on *Wilkinson*, see Debeljak, 'Who Is Sovereign Now?', above n 2, 24-25.

<sup>26</sup> VCA *Momcilovic* [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.

<sup>27</sup> VCA *Momcilovic* [2010] VSCA 50 [35].

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

<sup>29</sup> VCA *Momcilovic* [2010] VSCA 50 [102].

<sup>30</sup> Ibid [103]. It is merely 'part of the body of rules governing the interpretative task': at [102].

presumption against interference with rights (or, the principle of legality).<sup>31</sup> 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’,<sup>32</sup> with the concept of “possible” being bounded by the ‘framework of interpretative rules’.

For the *VCA Momcilovic* Court, the significance of s 32(1) ‘is that Parliament has embraced and affirmed [the presumption against interference with rights] in emphatic terms’, codifying it such that the presumption ‘is no longer merely a creature of the common law but is now an expression of the “collective will” of the legislature.’<sup>33</sup> The guaranteed rights are also codified in the *Charter*.<sup>34</sup>

### 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.<sup>35</sup>

### Problems with *VCA Momcilovic*

There are many difficulties with the reasoning in *VCA Momcilovic* and the VCA Method proposed by that court. I have covered these in my academic writings,<sup>36</sup> 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 Momcilovic* is correct, with the reasoning of the *VCA Momcilovic* Court being open to criticism.<sup>37</sup>

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.<sup>38</sup> An exploration of s 3(1) of the *UKHRA* will highlight that the s 32(1) additional words

<sup>31</sup> 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 Momcilovic* Court, see Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, Australia, 2008) [3.11] – [3.17].

<sup>32</sup> *VCA Momcilovic* [2010] VSCA 50 [103].

<sup>33</sup> *Ibid* [104].

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

<sup>35</sup> Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2, 348-49 (footnotes omitted).

<sup>36</sup> See especially Debeljak, ‘Who Is Sovereign Now?’, above n 2; Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2.

<sup>37</sup> See Debeljak, ‘Who Is Sovereign Now?’, above n 2.

<sup>38</sup> Debeljak, ‘Who Is Sovereign Now?’, above n 2; Debeljak, ‘Parliamentary Sovereignty and Dialogue’, above n 2, 40-49; Julie Debeljak, ‘Submission to the National Consultation’, above n 23, 51-60.

‘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 jurisprudence 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.<sup>39</sup> This discussion is important as a contrast to the reasoning of the *VCA Momcilovic* 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 Momcilovic* is problematic. The VCA Method undermines both (a) the operation of the s 7(2) limitations provision,<sup>40</sup> and (b) the remedial reach of the rights-compatible statutory interpretation provision.<sup>41</sup> Both of these issues will be more fully explored below.

### **High Court of Australia’s decision in *Momcilovic v The Queen***

The decision in *VCA Momcilovic* went on appeal to the High Court of Australia in *Momcilovic v Queen* (*HCA Momcilovic*).<sup>42</sup> 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 Momcilovic*.<sup>43</sup>

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 Momcilovic* can be divided between those judgments that more closely align with the *VCA Momcilovic* decision, and those that more closely align with the UK/NZ Method.

<sup>39</sup> 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.

<sup>40</sup> Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2; Debeljak, ‘Who Is Sovereign Now?’, above n 2, 21, 44.

<sup>41</sup> See especially, Debeljak, ‘Who Is Sovereign Now?’, above n 2, 21, 40-41, 44-46.

<sup>42</sup> *Momcilovic v The Queen* [2011] HCA 34 (*HCA Momcilovic*).

<sup>43</sup> Debeljak, ‘Proportionality, Interpretation and Declaration’, above n 2.



### Closer to VCA Momcilovic: 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 Momcilovic*, but did not necessarily support the *Momcilovic* Method. As per my academic writing:

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.<sup>44</sup>

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 Momcilovic* and its reliance on *Wilkinson*, is open to critique.<sup>45</sup> 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'<sup>46</sup> – that is, that s 32(1) embodies a test of ordinary statutory construction.<sup>47</sup>

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.<sup>48</sup>

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.'<sup>49</sup> The reasoning and assumptions underlying the conclusions of Crennan and Kiefel JJ are open to critique.<sup>50</sup> 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

<sup>44</sup> Ibid 355.

<sup>45</sup> Ibid 357-59.

<sup>46</sup> *HCA Momcilovic* [2011] HCA 34 [565].

<sup>47</sup> Debeljak, 'Proportionality, Interpretation and Declaration', above n 2, 359-364.

<sup>48</sup> Ibid 365-68.

<sup>49</sup> *HCA Momcilovic* [2011] HCA 34 [574].

<sup>50</sup> 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 Momcilovic* 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*.<sup>51</sup>

Most importantly for our purposes, ‘[a]ll four judges held that “compatibility with rights” includes an assessment of s 7(2) limitations’<sup>52</sup> – 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 fortiori* where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1).’<sup>53</sup>

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 *Ghaidan*.<sup>54</sup> His Honour also supported the UKI/NZ method.<sup>55</sup>

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:

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

<sup>51</sup> Ibid 373.

<sup>52</sup> Ibid 373. For an exploration of the reasoning of the individual judges, see 373 to 375.

<sup>53</sup> Ibid 376 (citations omitted).

<sup>54</sup> For further discussion, see *ibid* 376-77.

<sup>55</sup> 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].<sup>56</sup>

In Justice Bell's opinion, the 7(2) criteria 'are readily capable of judicial evaluation',<sup>57</sup> 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.'<sup>58</sup> 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.'<sup>59</sup> 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*.'<sup>60</sup>

The implications of her Honour's comments about "remedial interpretation" are explored in my academic writings,<sup>61</sup> 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, *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 *VCA Momcilovic*.<sup>62</sup> 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 *Ghaidan*.<sup>63</sup> 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 *Commonwealth Constitution*.

## **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.

<sup>56</sup> *HCA Momcilovic* [2011] HCA 34 [684].

<sup>57</sup> *Ibid* [684]. In support, her Honour cites (at fn 967): *Thomas v Mowbray* (2007) 233 CLR 307 at 331-334 [20]-[28] per Gleeson CJ, 344-348 [71]-[82], 350-351 [88]-[92] per Gummow and Crennan JJ, 507 [596] per Callinan J; [2007] HCA 33; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 553-554 [14] per Gummow J, 597 [168]-[169] per Crennan and Kiefel JJ.

<sup>58</sup> *HCA Momcilovic* [2011] HCA 34 [684]. Compare with Heydon J ([429], [431], [433]).

<sup>59</sup> *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.

<sup>60</sup> *Ibid*, citing *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at 604-608 [57]-[66] (emphasis added).

<sup>61</sup> Debeljak, 'Proportionality, Interpretation and Declaration', above n 2, 379 – 381.

<sup>62</sup> *HCA Momcilovic* [2011] HCA 34 [411].

<sup>63</sup> *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 issue a s 36(2) declaration.

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

The VCA refers to Elias CJ's dissent in *Hansen*, where her Honour relies on the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11 ('*Canadian Charter*') to highlight that the limitations question is a '*distinct and later enquiry*' to interpretation: *VCA Momcilovic* [2010] VSCA 50 [109] (emphasis added). Referring to the *Canadian Charter*, Elias CJ states (*Hansen* [2007] 3 NZLR 1, 15, as cited in *VCA Momcilovic* [2010] VSCA 50 [109] (emphasis added)):

[t]he 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.<sup>64</sup>

Moreover, the conclusion in *VCA Momcilovic* 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.<sup>65</sup>

Secondly, the *VCA Momcilovic* 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

<sup>64</sup> Debeljak, 'Proportionality, Interpretation and Declaration', above n 2, footnote 46.

<sup>65</sup> Ibid footnote 47 (citations omitted).

the context of critiquing judgment of French CJ in *HCA Momcilovic*.<sup>66</sup> One element of this critique, which relates to both *VCA Momcilovic* 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 Momcilovic* [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 Momcilovic* [2010] VSCA 50 [108].

Elias CJ’s view was dependant 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 *Australian 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* an unjustified limitation has been identified.<sup>67</sup>

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

[T]he 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 Momcilovic* [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.<sup>68</sup>

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.

<sup>66</sup> Ibid 365-66.

<sup>67</sup> Ibid footnote 157.

<sup>68</sup> Ibid footnote 181. For a similar analysis in the context of the *NZBORA*, see Paul Rishworth, ‘Human Rights’ [2012] *New Zealand Law Review* 321, 333.

### **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.<sup>69</sup>

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.

<sup>69</sup> 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.<sup>70</sup>

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 Momcilovic*, 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 *Momcilovic* 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 *Momcilovic* Court. This has now been confirmed by the Deputy-President of VCAT

<sup>70</sup>

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 *UK HRA*.<sup>71</sup>

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.<sup>72</sup> 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*.

<sup>71</sup> Debeljak, ‘Four-Year Review Submission’, above n 1, 22 (citations omitted).

<sup>72</sup> 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 Momcilovic* and *HCA Momcilovic* – that is: adoption of the wording of s 3(1) of the *UKHRA* 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 *Momcilovic* 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 Momcilovic* 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,<sup>73</sup> 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.

<sup>73</sup>

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 it 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 I 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.<sup>74</sup>

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,<sup>75</sup> and elsewhere.<sup>76</sup> 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:

- Jem Stevens, ‘Changing Changing Cultures in Closed Environments: What Works’ in Bronwyn Naylor, Julie Debeljak and Anita Mackay, (eds), *Human Rights in Closed Environment* (Federation Press, 2014) 228

<sup>74</sup> Ibid 354, 371-2, 381-82.

<sup>75</sup> Debeljak, ‘Four-Year Review Submission’, above n 1, 11-17.

<sup>76</sup> Debeljak, ‘Parliamentary Sovereignty and Dialogue’, above n 2, 31-35.

- Anita Mackay, 'Operationalising Human Rights Law in Australia: Establishing a Human Rights Culture in the New Canberra Prison and Transforming the Culture of Victoria Police' in Bronwyn Naylor, Julie Debeljak and Anita Mackay, (eds), *Human Rights in Closed Environment* (Federation Press, 2014) 261
- Bronwyn Naylor, Julie Debeljak and Anita Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments: A Human Rights Regulatory Framework and its Implementation', (2015) 41(1) *Monash University Law Review* forthcoming

### **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:

- Bronwyn Naylor, Julie Debeljak and Anita Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments: A Human Rights Regulatory Framework and its Implementation', accepted for publication in (2015) 41(1) *Monash University Law Review*, forthcoming
- Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340-388
- Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.
- Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009 (extracts).
- 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.
- 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.
- 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).
- Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.), *Human Rights Protection: Boundaries and Challenges* (Oxford University Press, Oxford, 2003) 135-57.
- Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights', (2002) 26 *Melbourne University Law Review* 285-324.

## **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**

**By Dr Julie Debeljak\***  
**Senior Lecturer, Faculty of Law**  
**Deputy Director, Castan Centre for Human Rights Law**  
**Monash University**

**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 inter-dependent, 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.<sup>77</sup> 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.'<sup>78</sup> Any

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<sup>77</sup> See the *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993) amongst others.

<sup>78</sup> See *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, 22-26 January 1997, [4] (see <[http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html)>). More than thirty experts met in Maastricht from 22-26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights

domestic human rights framework must comprehensively protect and promote all categories of human rights for it to be effective.<sup>79</sup>

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.<sup>80</sup>

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.<sup>81</sup> 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.<sup>82</sup> Traditionally, civil and political rights are considered to fall within the former category, whilst economic, social and cultural rights fall within the latter category.<sup>83</sup>

These are artificial distinctions. All rights have positive and negative aspects, have cost-free and costly components, are certain of meaning with vagueness around the edges, and so on.<sup>84</sup> 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,<sup>85</sup> first, States have the duty to *respect* the right to life, which is largely comprised of negative, relatively cost-free duties, such as, the duty not to take life. Secondly, States

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(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.'

<sup>79</sup> Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000), especially ch 3, ch 4, 110, 116; K D Ewing, 'The Charter and Labour: The Limits of Constitutional Rights', in Gavin W Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press Ltd, Great Britain, 1999) 75; K D Ewing, 'Human Rights, Social Democracy and Constitutional Reform', in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights*, (Mansell Publishing Ltd, London, 1996) 40; Dianne Otto, 'Addressing Homelessness: Does Australia's Indirect Implementation of Human Rights Comply with its International Obligations?' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) 281; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, Toronto, 1997).

<sup>80</sup> 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.

<sup>81</sup> See generally D. Warner, 'An Ethics of Human Rights', (1996) 24 *Denver Journal of International Law and Policy* 395. See further P. Hunt, 'Reclaiming Economic, Social and Cultural Rights', (1993) *Waikato Law Review* 141.

<sup>82</sup> See generally D. Warner, 'An Ethics of Human Rights', (1996) 24 *Denver Journal of International Law and Policy* 395. See further P. Hunt, 'Reclaiming Economic, Social and Cultural Rights', (1993) *Waikato Law Review* 141.

<sup>83</sup> See generally D. Warner, 'An Ethics of Human Rights', (1996) 24 *Denver Journal of International Law and Policy* 395. See further P. Hunt, 'Reclaiming Economic, Social and Cultural Rights', (1993) *Waikato Law Review* 141.

<sup>84</sup> See generally D. Warner, 'An Ethics of Human Rights', (1996) 24 *Denver Journal of International Law and Policy* 395. See further P. Hunt, 'Reclaiming Economic, Social and Cultural Rights', (1993) *Waikato Law Review* 141.

<sup>85</sup> *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,<sup>86</sup> first, States have a duty to *respect* the right to adequate housing, which is a largely negative, cost-free duty, such as, the duty not to forcibly evict people. Secondly, States have a duty to *protect* the right to adequate housing, which comprises of partly negative and partly positive duties, and partly cost-free and partly costly duties, such as, the duty to regulate evictions by third parties (such as, landlords and developers). Thirdly, States have a duty to *fulfil* the right to adequate housing, which is a positive and costly duty, such as, the duty to house the homeless and ensure a sufficient supply of affordable housing.

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

Indeed the experience of South Africa highlights that economic, social and cultural rights are readily justiciable. The South African Constitutional Court has and is enforcing economic, social and cultural rights. The Constitutional Court has confirmed that, at a minimum, socio-economic rights must be negatively protected from improper invasion. Moreover, it has confirmed that the positive obligations on the State are quite limited: being to take 'reasonable legislative and other measures, within its available resources, to achieve progressive realisation' of those rights. The Constitutional Court's decisions highlight that enforcement of economic, social and cultural rights is about the *rationality* and *reasonableness* of decision making; that is, the State is to act rationally and reasonably in the provision of social and economic rights. So, for example, the government need not go beyond its available resources in supplying adequate housing and shelter; rather, the court will ask whether the measures taken by the government to protect the right to adequate housing were reasonable.<sup>87</sup> 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),<sup>88</sup> 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

<sup>86</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, above n 78.

<sup>87</sup> 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).

<sup>88</sup> *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),<sup>89</sup> 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),<sup>90</sup> HIV/AIDS treatment was in issue. In particular, the case concerned the provision of a drug to reduce the transmission of HIV from mother to child during birth. The World Health Organisation had recommended a drug to use in this situation, called nevirapine. The manufacturers of the drug offered it free of charge to governments for five years. The South African Government restricted access to this drug, arguing it had to consider and assess the outcomes of a pilot program testing the drug. The Government made the drug available in the public sector at only a small number of research and training sites.

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

The Constitutional Court held that in assessing reasonableness, the degree and extent of the denial of the right must be accounted for. The Government program must also be balanced and flexible, taking into account short-, medium- and long-terms needs, which must not exclude a significant section of society. The test applied was whether the measures taken by the State to realize the rights 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.<sup>91</sup>

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

<sup>89</sup> *Government of the Republic South Africa & Ors v Grootboom and Ors* 2000 (11) BCLR 1169 (CC).

<sup>90</sup> *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).

<sup>91</sup> *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 [80].



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.<sup>92</sup>

Moreover, the clarity of economic, social and cultural rights is being improved by the United Nations Committee on Economic, Social and Cultural Rights<sup>93</sup> currently through its concluding observations to the periodic reports of States' Parties<sup>94</sup> 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 International Covenant on Economic, Social and Cultural Rights* (2008),<sup>95</sup> 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 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 *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.<sup>96</sup> It essentially 'imposes an obligation to move *as expeditiously and effectively as possible* towards'<sup>97</sup> 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-a-vis a particular individual; with it then being up to the government to decide how to fix that situation.<sup>98</sup> This system is in place in the European system. Under art 46 of the *European Convention on Human Rights* (1951) ("*ECHR*"), States parties have agreed to "abide by" decisions of the European Court.<sup>99</sup> 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

<sup>92</sup> See generally Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008); Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, (Hart Publishing, Oxford, 2009, espec ch 4.

<sup>93</sup> 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)).

<sup>94</sup> *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, arts 16 and 17 (entered into force 3 January 1976).

<sup>95</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008) UN Doc No A/RES/63/117 (on 10 December 2008).

<sup>96</sup> Committee on the Elimination of Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc No E/1991/23 (14 December 1990)

<sup>97</sup> Committee on the Elimination of Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc No E/1991/23 (14 December 1990) [9]

<sup>98</sup> Paul Hunt, 'Reclaiming Economic Social and Cultural Rights' (1993) *Waikato Law Review* 141, 157.

<sup>99</sup> *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*.<sup>100</sup> 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;<sup>101</sup> and (c) the unlawful act can be relied upon in any legal proceeding.

Most importantly, under s 8 of the *UK HRA*, where a public authority acts unlawfully, a court may grant such relief or remedy, or make such order, within its power as it considers just and appropriate, which includes an award of damages in certain circumstances if the court is satisfied that the award is necessary to afford just satisfaction.<sup>102</sup> 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,<sup>103</sup> 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 s 39 of the *Charter*. This divergence of the *ACT HRA* from the *Charter* is

<sup>100</sup> Section 24 of the *Canadian Charter* empowers the courts to provide just and appropriate remedies for violations of rights, and to exclude evidence obtained in violation of rights if to admit it would bring the administration of justice into disrepute.

<sup>101</sup> 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.

<sup>102</sup> The Consultative Committee recommended adopting the UK model in this regard, but the recommendation was not adopted: see ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [4.53] – [4.78].

<sup>103</sup> It would be rare for a victim of a human rights violation to be awarded an amount in excess of GBP 20,000.

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.<sup>104</sup> 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’*)<sup>105</sup> 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).<sup>106</sup>

### **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.<sup>107</sup>

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.<sup>108</sup> 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.

<sup>104</sup> ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003 [3.22] – [3.23].

<sup>105</sup> *Canadian Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 1 and 33.

<sup>106</sup> 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).

<sup>107</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

<sup>108</sup> *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.<sup>109</sup> 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 court 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).<sup>110</sup>

### **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*’).<sup>111</sup> The United States adopted the traditional model of domestic human rights protection, which relies heavily on judicial

<sup>109</sup> *Kracke v Mental Health Review Board And Ors (General)* [2009] VCAT 646 [236] – [254].

<sup>110</sup> Julie Debeljak, ‘Human Rights Responsibilities of Public Authorities Under the Charter of Rights’ (Presented at *The Law Institute of Victoria Charter of Rights Conference*, Melbourne, 18 May 2007) 2-12.

review of legislative and executive actions on the basis of human rights standards. Under the *US Constitution*,<sup>112</sup> the judiciary is empowered to invalidate legislative and executive actions that violate the rights contained therein. If the legislature or executive disagree with the judicial vision of the scope of a right or its applicability to the impugned action, their choices for reaction are limited. The representative arms can attempt to limit human rights by changing the *US Constitution*, an onerous task that requires a Congressional proposal for amendment which must be ratified by the legislatures of three-quarters of the States of the Federation.<sup>113</sup> Alternatively, the representative arms can attempt to limit human rights by controlling the judiciary. This can be attempted through court-stacking and/or court-bashing. Court-stacking and/or court-bashing are inadvisable tactics, given the potential to undermine the independence of the judiciary, the independent administration of justice, and the rule of law – all fundamental features of modern democratic nation States 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 more 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 apposite. 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

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<sup>111</sup> *United States Constitution* (1787) (‘*US Constitution*’).

<sup>112</sup> *United States Constitution* (1787) (‘*US Constitution*’).

<sup>113</sup> *US Constitution* (1787), art V. An alternative method of constitutional amendment begins with a convention; however, this method is yet to be used. See further Lawrence M Friedman, *American Law: An Introduction* (2<sup>nd</sup> edition, W W Norton & Company Ltd, New York, 1998). The Australian and Canadian Constitutions similarly employ restrictive legislative procedures for amendment: see respectively *Constitution 1900* (Imp) 63&64 Vict, c 12, s 128; *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 38.

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.<sup>114</sup> 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:<sup>115</sup> does the legislative measure impair the right more than is necessary to accomplish the legislative objective?<sup>116</sup> 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.<sup>117</sup>

<sup>114</sup> Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal and Kingston, 2002) x.

<sup>115</sup> Peter W Hogg and Alison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 100.

<sup>116</sup> 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.

<sup>117</sup> 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* 422-469, 427-432.

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.<sup>118</sup> 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.<sup>119</sup> 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,<sup>120</sup> 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*.<sup>121</sup>

Secondly, parliament may decide to pass ordinary legislation in response to the judicial perspective.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup>

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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<sup>118</sup> *Charter 2006* (Vic), s 37.

<sup>119</sup> For a discussion of examples of the first 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(a).

<sup>120</sup> Indeed, the very reason for excluding parliament from the definition of public authority was to allow incompatible legislation to stand.

<sup>121</sup> 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 ratified the *First Optional Protocol* in September 1991.

<sup>122</sup> 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).

<sup>123</sup> Dominic McGoldrick, 'The United Kingdom's *Human Rights Act 1998* in Theory and Practice' (2001) 50 *International and Comparative Law Quarterly* 901, 924.

<sup>124</sup> *First Optional Protocol*, opened for signature 16 December 1966, 999 UNTS 302, art 5(4) (entered into force 23 March 1976). For a discussion of Australia's seeming disengagement with the international human rights treaty system, see David Kinley and Penny Martin, 'International Human Rights Law at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466; Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 297



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.<sup>125</sup> 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.

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.<sup>126</sup> 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.<sup>127</sup> 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 by far most legislation will never be the subject of human rights based litigation;<sup>128</sup> 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:

<sup>125</sup> Janet L Hiebert, ‘A Relational Approach to Constitutional Interpretation: Shared Legislative Responsibilities and Judicial Responsibilities’ (2001) 35 *Journal of Canadian Studies* 161, 170.

<sup>126</sup> See legislative note to *Charter 2006* (Vic), s 31(6).

<sup>127</sup> *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.

<sup>128</sup> See above n 114.

- Appendix 7: pp 304-16;<sup>129</sup>
- Appendix 6: pp 15-4;<sup>130</sup>
- Appendix 4: pp 26-31.<sup>131</sup>

### 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

<sup>129</sup> Julie Debeljak, ‘Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights’, (2002) 26 *Melbourne University Law Review* 285-324.

<sup>130</sup> Julie Debeljak, ‘Rights and Democracy: A Reconciliation of the Institutional Debate’, a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.), *Human Rights Protection: Boundaries and Challenges* (Oxford University Press, Oxford, 2003) 135-57.

<sup>131</sup> 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.

As SARC will be aware, the operation of s (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*,<sup>132</sup> 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 *Charter*<sup>133</sup> achieve a codification of the British jurisprudence in *Ghaidan* and *re S*.<sup>134</sup> 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 name<sup>135</sup> and lifting concepts from that jurisprudence in explaining the effect of the inserted phrase.<sup>136</sup>

Despite this pre-legislative history, the Court of Appeal in *R v Momcilovic* (*‘Momcilovic’*)<sup>137</sup> 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.’<sup>138</sup> It then outlined a three-step methodology for assessing whether a provision infringes a *Victorian Charter* right, as follows (*‘Momcilovic Method’*):

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

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

<sup>132</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

<sup>133</sup> And, for that matter, s 30 of the *Human Rights Act 2004* (ACT) (*‘ACT HRA’*).

<sup>134</sup> *In re S (Minors) (Care Order: Implementation of Care Plan)*; *In re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10.

<sup>135</sup> Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, 82-83.

<sup>136</sup> 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.’

<sup>137</sup> *R v Momcilovic* [2010] VSCA 50 (*‘Momcilovic’*).

<sup>138</sup> *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.<sup>139</sup>

Tentatively,<sup>140</sup> the *Momcilovic* Court held that s 32(1) ‘is a statutory directive, obliging courts ... to carry out their task of statutory interpretation in a particular way.’<sup>141</sup> Section 32(1) is part of the ‘framework of interpretive rules’,<sup>142</sup> which includes s 35(a) of the *ILA* and the common law rules of statutory interpretation, particularly the presumption against interference with rights (or, the principle of legality).<sup>143</sup> 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’,<sup>144</sup> with the concept of “possible” being bounded by the ‘framework of interpretative rules’. For the *Momcilovic* Court, the significance of s 32(1) ‘is that Parliament has embraced and affirmed [the presumption against interference with rights] in emphatic terms’, codifying it such that the presumption ‘is no longer merely a creature of the common law but is now an expression of the “collective will” of the legislature.’<sup>145</sup> The guaranteed rights are also codified in the *Charter*.<sup>146</sup>

As mentioned above, the Court of Appeal decision in *Momcilovic* 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 *Momcilovic*.

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 *Momcilovic* Court is correct, with the reasoning of the Court of Appeal being open to criticism. I refer SARC to Appendix 1,<sup>147</sup> 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 *UK HRA* and its related jurisprudence, I refer you to Appendix 1,<sup>148</sup> Appendix 4 (pp 40-49)<sup>149</sup> and Appendix 2 (pp 51-60).<sup>150</sup> This exploration of s 3(1) of the *UK HRA* 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 *UK HRA*, most particularly *Ghaidan*. Moreover, and of particular relevance to my

<sup>139</sup> *Momcilovic* [2010] VSCA 50 [35].

<sup>140</sup> The *Momcilovic* Court only provided its ‘tentative views’ because ‘[n]o argument was addressed to the Court on this question’: *Ibid* [101]. Indeed, three of the four parties sought the adoption of the Preferred *UKHRA*-based methodology as propounded by Bell J in *Kracke* [2009] VCAT 646 [65], [67] – [235].

<sup>141</sup> *Momcilovic* [2010] VSCA 50 [102].

<sup>142</sup> *Ibid* [103]. It is merely ‘part of the body of rules governing the interpretative task’: [102].

<sup>143</sup> For sound and persuasive arguments about why s 32(1) creates a stronger obligation than the common law presumptions, being arguments that are contrary to this conclusion of the *Momcilovic* Court, see Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, Australia, 2008) [3.11] – [3.17].

<sup>144</sup> *Momcilovic* [2010] VSCA 50 [103].

<sup>145</sup> *Ibid* [104].

<sup>146</sup> *Ibid*.

<sup>147</sup> Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have’ (2011) 22(1) *Public Law Review* 15-51.

<sup>148</sup> Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have’ (2011) 22(1) *Public Law Review* 15-51.

<sup>149</sup> 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.

<sup>150</sup> Julie Debeljak, ‘Submission to the National Consultation on Human Rights’, submitted to the *National Consultation on Human Rights Committee*, 15 June 2009 (extracts).

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),<sup>151</sup> Appendix 4 (pp 49-56)<sup>152</sup> and Appendix 2 (pp 57-60).<sup>153</sup> This discussion is important as a contrast to the reasoning of the Court of Appeal in *Momcilovic*. 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 *Momcilovic* is problematic. The *Momcilovic* Method (see above) undermines the remedial reach of the rights-compatible statutory interpretation provision.<sup>154</sup>

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*<sup>155</sup> and the *NZBORA*.<sup>156</sup> 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”,<sup>157</sup> 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”*

<sup>151</sup> Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have’ (2011) 22(1) *Public Law Review* 15-51.

<sup>152</sup> 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.

<sup>153</sup> Julie Debeljak, ‘Submission to the National Consultation on Human Rights’, submitted to the *National Consultation on Human Rights Committee*, 15 June 2009 (extracts).

<sup>154</sup> See especially, Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have’ (2011) 22(1) *Public Law Review* 15, 21, 40-41, 44-46.

<sup>155</sup> *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].

<sup>156</sup> *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 “*Moonen No I*”).

<sup>157</sup> 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, 28 and 32.

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 *Momcilovic* decision, three Supreme Court judges in separate decisions, sanctioned the Preferred Method. In *RJE*, Nettle JA followed the Preferred Method<sup>158</sup> 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.<sup>159</sup> Similarly, in *Das*, Warren CJ in essence followed the Preferred Method<sup>160</sup> 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.<sup>161</sup> In *Kracke*, Bell J adopted the Preferred Method<sup>162</sup> and held that s 32(1) codified s 3(1) as interpreted in *Ghaidan*.<sup>163</sup> This issue of methodology is more fully discussed in Appendix 1.<sup>164</sup>

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 *Momcilovic* (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

<sup>158</sup> See Nettle JA in *RJE* [2008] VSCA 265, [114] – [116].

<sup>159</sup> Ibid [118] – [119].

<sup>160</sup> *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 *HK SAR 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.

<sup>161</sup> *Das* [2009] VSC 381 [172] – [175].

<sup>162</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646, [52] – [65] (*‘Kracke’*).

<sup>163</sup> Ibid [65], [214].

<sup>164</sup> Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have’ (2011) 22(1) *Public Law Review* 15-51.

the Court of Appeal decision in *Momcilovic* – that is, adoption of the wording of s 32(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 *Momcilovic*, 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 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 *Momcilovic* 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.<sup>165</sup>

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 *Momcilovic* 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 *Momcilovic* Court. This has now been confirmed by the Deputy-President of VCAT

<sup>165</sup> 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*.<sup>166</sup> 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 *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 *ICCPR* – 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

<sup>166</sup> *Dawson v TAC* [2010] VCAT (Reference No. G796/2009).



reasonableness (that is, demonstration of a pressing social need) and proportionality (being made up of rationality, minimum impairment and proportionality).<sup>167</sup>

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’).<sup>168</sup>

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.<sup>169</sup> 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 specifically listed 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 thereto, 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 an 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

<sup>167</sup> Debeljak, *Balancing Rights*, above n 175, 425.

<sup>168</sup> *R v Oakes* [1986] 1 SCR 103, 138.

<sup>169</sup> For example, art 22(2) of the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) states that:

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

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

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

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.<sup>170</sup> Absolute rights in the *ICCPR*<sup>171</sup> 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).<sup>172</sup> 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.<sup>173</sup>

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).<sup>174</sup>

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*.

<sup>170</sup> 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.

<sup>171</sup> 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*.

<sup>172</sup> See American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987) vol 2, 161; Oscar Schachter, *International Law in Theory and Practice* (1991) 85, extracted in Henry Steiner and Philip Alston, *International Human Rights in Context* (2<sup>nd</sup> edition, Clarendon Press, Oxford, 2000) 230-231; Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2<sup>nd</sup> edition, Oxford University Press, 2004) [1.66], [25.75]. The Human Rights Committee describes the prohibitions against the taking of hostages, abductions and unacknowledged detention as non-derogable. ‘The absolute nature of these prohibitions, even in times of emergency, is justified by status as norms of general international law’: Human Rights Committee, *General Comment No 29: States of Emergency* (Article 4), UN Doc No CCPR/C/21/Rev.1/Add.11 (31 August 2001) [13] (‘General Comment No 29’).

<sup>173</sup> 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.

<sup>174</sup> Julie Debeljak, ‘Submission to the National Consultation on Human Rights’, submitted to the *National Consultation on Human Rights Committee*, 15 June 2009 (extracts).

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.<sup>175</sup> The issue of whether a small number of rights ought to be excluded from the external limitations provision is directly addressed (Appendix 3, pp 433-435). 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 427-432), 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 instrument, 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,

<sup>175</sup> 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.

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 *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 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 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 threatens the safety, security and welfare of the people of Victoria.’<sup>176</sup> 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).<sup>177</sup> The executive and parliament must be accountable for limiting rights and provide convincing justifications for such action. The judiciary then has the opportunity to contribute its opinion as to whether the limit is justified. If 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.

<sup>176</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21  
<sup>177</sup> Section 7(2) of the *Victorian Charter* outlines factors that must be balanced in assessing a limit, as follows: (a) the nature of the right; (b) the importance of the purpose of the right; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purposes; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve – a minimum impairment test.

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.<sup>178</sup> 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*.<sup>179</sup> 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*<sup>180</sup> 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.

...

<sup>178</sup> 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.

<sup>179</sup> *Constitution of the Republic of South Africa 1996* (RSA), s 37.

<sup>180</sup> *Constitution of the Republic of South Africa 1996* (RSA), s 37.

(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.<sup>181</sup>

### 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 1: Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15-51.
- 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).
- Appendix 3: Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422-469.
- Appendix 4: Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9-71.
- Appendix 5: 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).

<sup>181</sup> 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.

- Appendix 6: Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.), *Human Rights Protection: Boundaries and Challenges* (Oxford University Press, Oxford, 2003) 135-57.
- Appendix 7: Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights', (2002) 26 *Melbourne University Law Review* 285-324.

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