SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

'Inquiry into Australia's Human Rights Framework'

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EXECUTIVE SUMMARY

1. ISSUE 1: WHETHER EXISTING MECHANISMS TO PROTECT HUMAN RIGHTS IN THE FEDERAL CONTEXT ARE ADEQUATE AND IF IMPROVEMENTS SHOULD BE MADE?

1.1 THE EXECUTIVE AND PARLIAMENTARY MONOPOLY OVER RIGHTS

At the federal level, Australia does not have comprehensive and formal recognition of human rights within its domestic jurisdiction. The domestic law of Australia lacks effective human rights protections. The representative arms of government have an effective monopoly over the protection and promotion of human rights. The judiciary has a limited role in protecting and promoting rights. In essence, change is needed to better protect human rights within Australia.

The insufficiency of protection and promotion of human rights in Australia is due to four main factors: (a) the lack of constitutionally protected human rights; (b) the partial and fragile nature of statutory human rights protection; (c) the ineffectiveness of parliamentary sovereignty and responsible government as bulwarks for the protection of rights; and (d) the domestic impact (or lack thereof) of our international human rights obligations.

Recommendation 1:

1) **Human rights at the federal level will be best protected and promoted by the introduction of a comprehensive human rights instrument, with rights-protective**

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roles for all arms of government – the executive, parliament and the judiciary. This is consistent with the AHRC Position Paper.

1.2 THE 2010 HUMAN RIGHTS FRAMEWORK

Of the five strands of the 2010 Human Rights Framework, only two strands are ongoing.

Recommendations 2 to 4:

2) **The Government and Parliament should work together to bring the proposed consolidation of the federal anti-discrimination laws back onto the legislative agenda, with a view to the enactment of those laws.**

3) **Comprehensive community education about human rights should be reinstated and properly resourced.**

4) **The NGO Forum should continue.**

1.3 PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS AND STATEMENTS OF COMPATIBILITY

The Parliamentary Joint Committee on Human Rights (PJHRC) and the Statement of Compatibility (SOC) device were both introduced as part of the 2010 Human Rights Framework. After careful analysis of the theoretical underpinnings and past operation of both mechanisms, and comparing the federal mechanisms to the equivalent mechanisms under the *Victorian Charter*, I make the following recommendations.

Recommendations 5 to 10:

5) **I recommend the re-design and implementation of the *Federal Scrutiny Act* so that it achieves a mode and method of "upstream" human rights executive policy development and legislative drafting, and parliamentary scrutiny of policy development and law making, that (a) better facilitates the transparency of and accountability for the human rights impacts of policy and legislative decisions and (b) better develops a culture of justification for the effect on human rights of policy and legislation proposals. This is not inconsistent with the AHRC Position Paper.**

6) **Given the dominance of the Executive over the Parliament in "upstream" human rights scrutiny and the problems this presents for Parliament as legislative scrutineer and human rights bastion, I recommend that the judiciary must be given a role in "downstream", post-legislative scrutiny via a federal human rights instruments that empowers judicial review of legislation against guaranteed human rights. This is consistent with the AHRC Position Paper.**

7) **I recommend that the "pre-introduction" phase of policy development and law making undertaken by the executive becomes more transparent through the introduction of *independent* human rights analysis into that phase (a) by involving the Australian Human Rights Commission in the pre-tabling scrutiny process in a manner similar to the practices in the ACT under the *ACTHRA*, and (b) by**

involving the PJCHR in the pre-tabling scrutiny process – the key to which is the *early* involvement of the ACT Human Rights Commissioner and the PJCHR at the Cabinet submission phase. Such involvement can be confidential, which would allow both the Australian Human Rights Commission and the PJCHR to offer public reports in the "post-introduction" phase of policy development and law making. This is not inconsistent with the AHRC Position Paper.

8) **I recommend legislative changes to the requirements of SoCs to require any statement of (in)compatibility to be accompanied by an explanation that justifies the assessment of (in)compatibility and the evidence upon which that justification is based. Section 8(3) of the *Federal Scrutiny Act* should be amended to read: 'A statement of compatibility must state – (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible including by reference to any reasonable and demonstrably justifiable limitations on human rights and by providing evidence for the assessment; and (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility by reference to any reasonable and demonstrably justifiable limitations on human rights and by providing evidence for the assessment.' This is not inconsistent with the AHRC Position Paper.**

9) **I recommend legislative changes that strengthen the powers of the PJCHR, including a power to prevent a legislative proposal being enacted before the PJCHR has reported to Parliament on that proposal, and a power to require Parliament to give proper consideration to the PJCHR report. Specifically, s 7 of the *Federal Scrutiny Act* should become s 7(1), with the addition of: (a) subs (2) preventing Parliament enacting laws prior to PJCHR reporting; (b) subs (3) requiring Parliament to give "proper consideration" to PJCHR reports; and (c) subs (4) stating 'a failure to comply with sub-sections 7(1), (2) and (3) prevents that bill becoming an act, and any purported act is not valid, has no operation and cannot be enforced'. This is not inconsistent with the AHRC Position Paper.**

10) **Given that early and independent human rights advice in the "pre-introduction" phase does not ensure that advice will be accounted for, and the unwillingness of Ministers to engage promptly and constructively with the PJCHR, I recommend that the judiciary be given a role in "downstream", post-legislative scrutiny via a human rights instruments that empowers judicial review of legislation against guaranteed human rights. This is consistent with the AHRC Position Paper.**

2. ISSUE 2: WHETHER THE AUSTRALIAN PARLIAMENT SHOULD ENACT A FEDERAL *HUMAN RIGHTS ACT*

2.1 RECONCILING HUMAN RIGHTS WITH DEMOCRACY: ROLES OF THE EXECUTIVE, PARLIAMENT AND JUDICIARY

After exploring the spectrum of institutional design options – from a representative monopoly over rights at one extreme, to a judicial monopoly over rights at the other extreme – I explore

the elements of the 'middle-ground' institutional design that creates an inter-institutional dialogue.

2.2 CONSTITUTIONAL VS STATUTORY

I then conclude that Australia should fully and comprehensively protect and promote within its domestic jurisdiction all of the international human rights legal obligations it has voluntarily entered into. This ideally should be done via the enactment of a constitutionally-entrenched human rights instrument based on the *Canadian Charter of Rights and Freedoms* 1982 ('*Canadian Charter*'). Despite being a constitutional document, the *Canadian Charter* has mechanisms that protect the sovereignty of parliament and establishes an inter-institutional dialogue about human rights across the arms of government.

If an entrenched constitutional instrument is not politically viable, the next best alternative is to protect and promote human rights via a statutory human rights instrument, modelled on elements of the *Human Rights Act 1998* (UK) ('*UKHRA*'), the *Human Rights Act 2004* (ACT) ('*ACTHRA*'), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'), and the *Human Rights Act 2019* (Qld) ('*QHRA*').

The *Bill of Rights 1990* (NZ) ('*NZBORA*') does not offer adequate protection, and offers little more protection than the current common law in Australia.

Recommendations 11 to 13:

11) **The Australian Parliament should adopt an inter-institutional dialogue model of rights protection. This is consistent with the AHRC Position Paper.**

12) **The Australian Parliament should enact a constitutionally entrenched Charter of Rights modelled on the inter-institutional dialogue model embedded in the *Canadian Charter*.**

13) **If a constitutional instrument is not politically viable, the Australian Parliament should enact a comprehensive statutory human rights instrument modelled on various aspects of the inter-institutional dialogue models embedded in the *UKHRA*, the *ACTHRA*, the *Victorian Charter*, and the *QHRA*. This is consistent with the AHRC Position Paper.**

3. ISSUE 3: IF THE AUSTRALIAN PARLIAMENT SHOULD ENACT A FEDERAL *HUMAN RIGHTS ACT*, WHAT ELEMENTS SHOULD IT INCLUDE? IN ADDITION, WHAT IS THE EFFECTIVENESS OF EXISTING HUMAN RIGHTS ACTS/CHARTERS IN PROTECTING HUMAN RIGHTS?

3.1 THE SUITE OF RIGHTS

Australia should fully and comprehensively protect and promote civil, political, economic, social and cultural rights, as per its international legal obligations under the *International*

Covenant on Civil and Political Rights (1966), the *International Covenant on Economic, Social, and Cultural Rights* (1966), and the suite of international conventions expanding upon these two primary covenants.

The rights of indigenous peoples should be specifically recognised in any federal human rights instrument, including the right to self-determination, and be modelled on the United Nations *Declaration on the Rights of Indigenous Peoples* (2007). It must also align with the outcomes of upcoming referendum.

Any comprehensive and formal protection of human rights in Australia must extend to all individuals within the territory and subject to the jurisdiction of Australia.

Recommendations 14 to 17:

14) **A federal human rights instrument must guarantee the full range of civil, political, economic, social, cultural, developmental, environmental and other group rights. This is consistent with the AHRC Position Paper.**

15) **Although it is understandable that the AHRC Position Paper takes a risk-averse approach to the protection and promotion of economic, social and cultural rights in a federal human rights instrument, it does not adequately reflect the state of international and comparative jurisprudence regarding the content of economic, social and cultural rights, the obligations on States to (eventually) fully realise those rights, and the numerous methods and modes of enforceability including their justiciability. I support the 14 recommendations put forward in the ESCR Network Submission and endorse the reasoning within the ESCR Network Submission.**

16) **A federal human rights instrument must contain specific recognition of the rights of indigenous peoples, including the right to self-determination; be modelled on the United Nations *Declaration on the Rights of Indigenous Peoples* (2007); align with constitutional recognition and the Voice to Parliament; and further the realisation of the Uluru Statement from the Heart. This is consistent with the AHRC Position Paper.**

17) **A federal human rights instrument must extend to all individuals within the territory and subject to the jurisdiction of Australia. This is consistent with the AHRC Position Paper.**

3.2 LIMITATIONS ON RIGHTS

Rights are not 'absolute trumps', and any federal human rights instrument must allow for reasonable and demonstrably justifiable limitations to be placed on rights, subject to international human rights obligations with respect to a restricted number of absolute rights. There are advantages in providing for limitations via an external/overarching limitations provision (rather than internal limitations provisions), subject again to the recognition of absolute rights under international human rights obligations by their exclusion from the operation of the external limitations provision.

The wording of the global test under the *Victorian Charter* and *QHRA* are very similar, and both are suitable as models for a federal human rights instrument. The wording of the factors relevant to assessing the global test are more nuanced and better articulated under the *QHRA*.

Recommendations 18 to 21:

18) A federal human rights instrument should adopt an external/overarching limitation provision. This is consistent with the AHRC Position Paper.

19) The external limitation provision must explicitly state that the limitation provision does not apply to the following absolute rights:

a) the prohibition on genocide (art 6(3));
b) the prohibition on torture or cruel, inhuman and degrading treatment or punishment (art 7);
c) the prohibition on slavery and servitude (arts 8(1) and (2));
d) the prohibition on prolonged arbitrary detention (part of art 9(1));
e) the prohibition on imprisonment for a failure to fulfil a contractual obligation (art 11);
f) the prohibition on the retrospective operation of criminal laws (art 15);
g) the right of everyone to recognition everywhere as a person before the law (art 16); and
h) the right to freedom from systematic racial discrimination (arts 2(1) and 26).

This is not inconsistent with the AHRC Position Paper, but covers a wider suite of absolute rights.

20) The global test within the external limitations provision should state that: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.' This is consistent with the AHRC Position Paper.

21) The factors relevant to the global test within the external limitations test should be:

a) (a) the nature of the human right;
b) (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
c) (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
d) (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
e) (e) the importance of the purpose of the limitation;
f) (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; and
g) (g) the balance between the matters mentioned in paragraphs (e) and (f).

This is not inconsistent with the AHRC Position Paper.

3.3 MECHANISM 1: MECHANISMS CONCERNING RIGHTS-COMPATIBLE LEGISLATION

3.3.1 Key Drafting Problems and Recommendations for Change

Since 2010, there have been some key developments under the *Victorian Charter* that have undermined the manner in which this mechanism operates; and these developments have not been remedied under the *ACTHRA* and *QHRA* or related jurisprudence.

3.3.2 Role of Limitations in Assessing "Rights-Compatibility"

The scope and meaning of s 32(1) is contested, and the manner in which s 32(1) interacts with the s 7(2) limitations provision is disputed. There are two key drafting matters that need to be accounted for in a federal human rights instrument. First, a definition of 'compatible with human rights' must be inserted into the instrument.

3.3.3 Remedial Interpretation under the Rights-Compatible Interpretation Obligation

Secondly, the phrase 'consistent with their purpose' needs to be removed from the equivalent of s 32(1).

Both amendments to the *Victorian Charter* and any equivalent federal human rights instrument will ensure that the rights-compatible statutory interpretation obligation allows for remedial (as opposed to ordinary) interpretation where 'possible', and that limitations analysis under s 7(2) or an equivalent federal human rights instrument is part of assessing whether a statutory provision is 'compatible with human rights'. These two amendments will also resolve disagreements about the methodological approach to rights-compatible statutory interpretation.

3.3.4 'Possible' as the Limit on Judicial Power

Once the phrase 'consistently with their purpose' is removed from the interpretation obligation, there will be a renewed focus on the phrase 'so far as it is possible to do so'. This phrase provides *the* brake on judicial power under the *UKHRA*, and will become *the* brake on judicial power under any federal human rights instrument. That is, judicial interpretation is possible, whilst judicial acts of legislation will not be possible.

3.3.5 AHRC Position Paper: 'So far as is reasonably possible'

Accepting the AHRC suggestion of 'reasonably possible' interpretations will unreasonably weaken an already weak federal human rights instrument. It will at best dilute, and at worst threaten, the remedial characterisation and strength of the remedial nature of rights-compatible interpretations. It also fails to recognise that the concept of 'possible' is *the* brake on the power of the judiciary. The AHRC suggestion must be resisted.

Recommendations 22 and 28:

22) A federal human rights instrument must clearly indicate that the concept of 'compatible with human rights' includes s 7(2) analysis. Legislation will be considered 'compatible with human rights' where that legislation imposes a

limitation on rights but that limitation is reasonable and demonstrably justifiable. The *QHRA* definition of 'compatible with rights' under s 8 achieves this. This is consistent with the AHRC Position Paper.

23) A federal human rights instrument must clarify the interaction between the limitations provision and the obligation to interpret legislation rights-compatibly, to the effect that limitations analysis is part of the process of undertaking rights-compatible statutory interpretation based on the so-called NZ/UK Methodology. This is not inconsistent with the AHRC Position Paper.

24) A federal human rights instrument that contains a rights-compatible statutory interpretation obligation must be clearly drafted to indicate that rights-compatible interpretation is *remedial* in nature, in that a rights-compatible interpretation is intended to remedy legislation that would otherwise be rights incompatible, so far as it is possible to do so within the realms of interpretation. This may be achieved by removing the words 'consistently with their purpose' from the provision, so that the wording aligns with s 3(1) of the *UKHRA*. Omitting the words 'consistently with their purpose' is consistent with the AHRC Position Paper.

25) A federal human rights instrument that contains a rights-compatible statutory interpretation obligation must be clearly drafted to indicate that the *strength* of the rights-compatible interpretation remedy be equivalent to that establish under the *UKHRA* as expressed in *Ghaidan*. This may be achieved by removing the words 'consistently with their purpose' from the provision, so that the wording aligns with s 3(1) of the *UKHRA*. Omitting the words 'consistently with their purpose' is consistent with the AHRC Position Paper.

26) It is recommended that, either by explicit statutory wording or by the accompanying extrinsic material, it be made clear that the methodology to be used in resolving whether legislation can be interpreted compatibly with rights is the NZ/UK Methodology.

27) The AHRC proposes to add the word 'reasonably' to the rights-compatible statutory interpretation obligation. I do <u>not</u> support the addition of the word 'reasonably' to the rights-compatible statutory interpretation obligation. If based on the wording of the *Victoria Charter*, the provision should read: 'So far as it is possible to do so, all statutory provisions must be interpreted in a way that is compatible with human rights'. If based on the AHRC Position Paper, the provision should read: 'All primary and subordinate Commonwealth legislation [is] to be interpreted, so far as is possible to do so, in a manner that is consistent with human rights'. In this respect, I disagree with the AHRC Position Paper.

28) It is further recommended that consideration be given to not using the *Victorian Charter* words of 'all statutory provisions must be interpreted' but rather the wording in the *UKHRA* that all statutory provisions 'must be read and give effect to'. In *HCA Momcilovic*, Crennan and Kiefel JJ attached significance to this

difference of wording. Even though their Honours reasoning is open to critique,[1] it may be wise to use the *UKHRA* wording to remove all doubt.

3.3.6 Omissions from Mechanism 1

3.3.6(a) Override Provisions

I have long advocated that an override provision is not needed in a statutory human rights instrument, and I support the AHRC Proposal that an override provision be omitted from any federal human rights instrument.

Recommendation 29:

29) That an override provision be omitted from any federal human rights instrument. This is not inconsistent with the AHRC Position Paper.

3.3.6(b) Declarations of Inconsistent Interpretations

Balancing the importance of the mechanism of declarations of inconsistent interpretation to the formalisation of the inter-institutional dialogue between the arms of government about human rights, with the risk of the invalidation of a federal human rights instrument for want of constitutionality, I proposed a staged approach to the question of the inclusion of a formal declaration power in a federal human rights instrument.

Recommendations 30 and 31:

30) I recommend that serious consideration be given to including a declaration of inconsistent interpretation, based on ss 36 and 37 of the *Victorian Charter* as amended based on the Gageler and Burmester 'Opinion' dated 15 June 2009, in a federal human rights instrument. The amendments to be incorporated into an equivalent declaration provision in a federal instrument are: (a) that a declaration be made 'binding as between the parties' to a proceeding in which it is issued; (b) that the Attorney-General 'be joined as a party' to any proceedings where a declaration may be issued; and (c) empowering the parties to the proceedings to enforce the declaration against the Attorney-General.[2]

31) If recommendation 30 is not accepted or considered too constitutionally risky in light of *HCA Momcilovic*, I recommend that any federal human rights instrument should not contain a power for the judiciary to adopt a declaration of inconsistent interpretation, based on ss 36 and 37 of the *Victorian Charter*. Instead, the following legislative obligations should be enacted: (a) an obligation on the Commonwealth Attorney-General to monitor all judicial proceedings that arise under the federal

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[1] 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, 359-64 ('Proportionality, Rights-Consistent Interpretation and Declarations').

[2] Stephen Gageler SC and Henry Burmester QC, *In the Matter of Constitutional Issues Concerning a Chart of Rights: Opinion*, SG No 40 of 2009, 15 June 2009, [20] and [21].

human rights instrument; (b) an obligation imposed on the Commonwealth Attorney-General to bring any judicially assessed rights-incompatible legislation to the attention of the relevant Minister and Parliament; (c) an obligation on the relevant Minister to consider whether the legislation needs to be amended; and (d) an obligation on the relevant Minister to report their assessment to the PJCHR and Parliament. This is consistent with the AHRC Position Paper.

3.4 MECHANISM 2: MECHANISM CONCERNING THE OBLIGAITONS ON PUBLIC AUTHORITIES

3.4.1 Human Rights Obligations on Public Authorities

The second mechanism contained in many statutory human rights instruments relates to the obligation of public authorities. Under the *ACTHRA*, *Victorian Charter*, and *QHRA*, public authorities have the obligation to act and to decide compatibly with the guaranteed human rights. The *Victorian Charter* should be the model for a federal human rights instrument, subject to consideration of the exemption given to religious bodies.

Recommendations 32 to 35:

32) Substantive and procedural human rights obligations should be imposed on public authorities, with s 38(1) of the *Victorian Charter* being an appropriate model provision. This is consistent with the AHRC Position Paper.

33) An exception to the substantive and procedural human rights obligations on public authorities should be provided where a statutory provision or law dictates the unlawfulness, with s 38(2) of the *Victorian Charter* being an appropriate model provision. This is consistent with the AHRC Position Paper.

34) The private activities of 'hybrid/functional' public authorities should be excluded from the substantive and procedural human rights obligations imposed on public authorities, with s 38(3) of the *Victorian Charter* being an appropriate model provision. This is consistent with the AHRC Position Paper.

35) Consideration should be given to *not* extending an exception to the substantive and procedural obligations on public authorities that are religious bodies, contrary to ss 38(4) and (5) of the *Victorian Charter*.

3.4.2 Definition of a 'Public Authority'?

The realities of modern government mean that any definition of 'public authority' must go beyond 'core/wholly' public authorities under a federal human rights instrument, and also include 'hybrid/functional' public authorities.

In the United Kingdom, the courts and tribunals are core public authorities; but courts and tribunals are excluded from the definition of public authority in the sub-national human rights instruments in Australia. The position under the *UKHRA* is to be preferred. Given that courts and tribunals will have human rights obligations in relation to rights-compatible interpretation of statutory provisions under a federal human rights instrument, it is odd and

incomplete to not impose similar obligations on courts and tribunals in the development of the common law.

Recommendations 36 to 38:

36) Both 'core/wholly' public authorities and 'hybrid/functional' public authorities should be subject to substantive and procedural human rights obligations under a federal human rights instrument. This is consistent with the AHRC Position Paper.

37) I support the recommendation in the AHRC Position Paper to include a list of functions that are to be considered 'functions of a public nature' in a federal human rights instrument. This replicates similar inclusive lists of such functions under the *ACTHRA* and the *QHRA* (and which is an improvement on the *Victorian Charter*). This is consistent with the AHRC Position Paper.

38) Subject to constitutional considerations, courts and tribunals should be included in the definition of 'public authorities'.

3.4.3 The Cause of Action and Remedies

Although the *Victorian Charter* does make it unlawful for public authorities to act incompatibly with human rights and to fail to give proper consideration to human rights when acting under s 38(1), it does *not* create a freestanding cause of action or provide a freestanding remedy for individuals when public authorities act unlawfully (s 39(1) and (2)); *nor* does it entitle any person to an award of damages because of a breach of the *Victorian Charter* (s 39(3) and (4)). Rather, s 39 requires a victim to "piggy-back" *Victorian Charter*-unlawfulness onto a pre-existing claim to relief or remedy, including any pre-existing claim to damages. I do *not* recommend remedial provisions for s 38(1) unlawfulness be modelled on s 39 of the Victorian *Charter*.

To address the problems associated with a s 39-style provision, to ensure a federal human rights instrument contains effective remedies as per art 2(3) of the *ICCPR*, and to bring a federal human rights instrument into line with comparable jurisdictions, a federal human rights instrument must include a freestanding cause of action supported by a freestanding remedy where public authorities fail to meet their substantive and procedural human rights obligations.

Recommendations 39 to 41:

39) A federal human rights instrument must include a freestanding cause of action where a public authority fails to meet its substantive and procedural human rights obligations. This is consistent with the AHRC Position Paper.

40) A federal human rights instrument must include a freestanding remedy where a public authority fails to meet its substantive and procedural human rights obligations. This is consistent with the AHRC Position Paper.

41) The freestanding cause of action and freestanding remedy should be based on provisions similar to the *UKHRA* and *ACTHRA* (except the limitation on damages), and suggested wording is:[3]

> **(1) This section applies if a person—**
> **(a) claims that a public authority has acted in contravention of [equivalent to s 38 of the *Victorian Charter*]; and**
> **(b) alleges that the person is or would be a victim of the contravention.**
> **(2) The person may—**
> **(a) commence a proceeding in a federal court against the public authority; or**
> **(b) rely on the person's rights under this Act in other legal proceedings.**
> **(3) A federal court may, in a proceeding under subsection (2), grant the relief it considers just and appropriate.**
> **(4) This section does not affect a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority.**

This is not inconsistent with the AHRC Position Paper.

[3] See Julie Debeljak and Tania Penovic, 'Re-Charting the Victorian Charter of Human Rights: Advancing Enforcement in Human Rights legislation' in Becky Batagol, Heli Askola, Jamie Walvisch, Kate Seear, and Janice Richardson (eds), *Feminist Legislation: Australia* (Routledge, 2023, forthcoming).

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SUBMISSION

INTRODUCTION

I have written extensively on models of domestic implementation of international human rights obligations, particularly in relation to the:

- *Canadian Charter of Rights and Freedoms* 1982 ('*Canadian Charter*');[4]
- *Bill of Rights Act 1990* (NZ) ('*NZBORA*');
- *Human Rights Act 1998* (UK) ('*UKHRA*');
- *Human Rights Act 2004* (ACT) ('*ACTHRA*');
- *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'); and
- *Human Rights Act 2019* (Qld) ('*QHRA*').

This submission attempts to convey concise answers the issues put in the Terms of Reference of this Inquiry. More in-depth analysis is contained in my academic writing, which is referred to throughout the Submission and which is listed in an Appendix to this Submission.

ORDER OF SUBMISSION

This submission has combined the broader four questions, with the three particular questions, and will address the terms of reference by discussing three main issues. Each of the broader and particular questions will be answered within the three main issues.

1. ISSUE 1: WHETHER EXISTING MECHANISMS TO PROTECT HUMAN RIGHTS IN THE FEDERAL CONTEXT ARE ADEQUATE AND IF IMPROVEMENTS SHOULD BE MADE?

This section addresses the following questions in the ToR:

- *The specific question:*
  - *whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including:*
    - *to the remit of the Parliamentary Joint Committee on Human Rights*
    - *the role of the Australian Human Rights Commission*
    - *the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and*
- *The broader questions:*
  - *to review the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan; and*

[4] 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 consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made.*

1.1 THE EXECUTIVE AND PARLIAMENTARY MONOPOLY OVER RIGHTS

Federally, Australia does not have comprehensive and formal recognition of human rights within its domestic jurisdiction. The domestic law of Australia lacks effective human rights guarantees and protections. The representative arms of government have an effective monopoly over the protection and promotion of human rights. The judiciary has a limited role in protecting and promoting rights. In essence, change is needed to better protect human rights within Australia.

The insufficiency of protection and promotion of human rights in Australia, driven by the executive and parliamentary monopoly over rights, is due to the following factors.

1.1.1 The Paucity of Constitutionally Protected Human Rights

The *Commonwealth Constitution* does not comprehensively guarantee human rights. Although it contains three human rights (the right to trial by jury on indictment (s 80), freedom of religion (s 116), and the right to be free from discrimination on the basis of interstate residence (s 117)) and three implied freedoms (the implied separation of the judicial arm from the executive and legislative arms of government, the implied freedom of political communication, and implied voting rights), this falls *far short* of a comprehensive list of civil, political, economic, social and cultural, and group rights. A cursory comparison of these rights with the *International Covenant on Civil and Political Rights* (1966) ('*ICCPR'*)[5] and the *International Covenant on Economic Social and Cultural Rights* (1966) ('*ICESCR*')[6] demonstrates this. Moreover, these rights have most often been interpreted narrowly by the courts.

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

See further:

- Julie Debeljak, 'The Fragile Foundations of the Human Rights Landscape: Why Australia needs a Human Rights Instrument' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia: Volume 1* (Thomson Reuters, Australia, 2021) 39, [3.30] – [3.40].
- 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, 287-288.

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[5] The *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[6] The *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*,).

- Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 13-15

1.1.2 The Partial and Fragile Nature of Statutory Human Rights Protection

Commonwealth laws do and can provide statutory protection of human rights. Statutory regimes, in part, implement the international human rights obligations that successive Australian governments have voluntarily entered into. For example, the anti-discrimination laws of the Commonwealth and the States partially implement the *ICCPR*, the *Convention on the Elimination of All Forms of Racial Discrimination* ('*CERD*'),[7] and the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW').[8]

These statutory regimes are more comprehensive than the protections offered under the *Commonwealth Constitution*. However, the disadvantages of mere statutory protection far outweigh this advantage, and include:

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

See further:

- Julie Debeljak, 'The Fragile Foundations of the Human Rights Landscape: Why Australia needs a Human Rights Instrument' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia: Volume 1* (Thomson Reuters, Australia, 2021) 39, [3.50]
- 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, 289-290
- Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 15-17

1.1.3 The Ineffectiveness of Parliamentary Sovereignty and Responsible Government

The constitutional and legal foundations for Australia and its sub-jurisdictions are grounded in 19th century theories that support parliamentary sovereignty and responsible government as

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[7] The *International Convention on the Elimination of All Forms of Racial Discrimination*, open for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*').

[8] The *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*').

adequate protection against government intrusion on individual rights. Although the American approach to rights protection was considered, the founders at Federation preferred the British approach to rights with its reliance upon the rule of law, the doctrine of parliamentary sovereignty, and responsible government.

There are problems with relying on parliamentary sovereignty and responsible government for the promotion and protection of rights, and excluding the judiciary from the institutional design regarding rights protection. First, one must question whether parliamentary sovereignty and responsible government are suitable safeguards of human rights. Secondly, one must acknowledge that neither political conception operates in the same manner today as it did at Federation.

Parliamentary sovereignty focuses on the *source* of the law (that being parliament) rather than the *quality* of the law (that being laws that respect human rights), so is no answer to calls for guarantees of human rights. Moreover, today the executive dominates parliament such that any notion that parliament is the protector of rights is eviscerated.

Responsible government shares the same problem as parliamentary sovereignty: the concept of responsible government has no greater a commitment to human rights than parliamentary sovereignty. If the majority has no expectation of the protection of human rights by the executive, the content of that 'responsibility' is devoid of human rights. Moreover, today the collective and individual responsibility of the executive to parliament have waned as tools for government accountability, let alone rights accountability.

See further:

- Julie Debeljak, 'The Fragile Foundations of the Human Rights Landscape: Why Australia needs a Human Rights Instrument' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia: Volume 1* (Thomson Reuters, Australia, 2021) 39, [3.60]

1.1.4 The (Lack of) Domestic Impact of International Human Rights Obligations

The representative arms of government enjoy a monopoly over the choice of Australia's international human rights obligations, and their implementation within the domestic legal regime – the Commonwealth Executive decides which international human rights treaties Australia should ratify (s 61 of the *Commonwealth Constitution*); and the Commonwealth Parliament controls the relevance of Australia's international human rights obligations within the domestic legal system.

The ratification of an international human rights treaty by the executive gives rise to international obligations *only*. A treaty does *not* form part of the domestic law of Australia until it is incorporated into domestic law by the Commonwealth Parliament. This is known as a 'dualist' system, whereby Australia has two separate systems of law in operation: the international system and the domestic system.

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

a) there are rules of statutory interpretation that favour interpretations of domestic laws that are consistent with our international human rights obligations;

b) our international human rights obligations influence the development of the common law; and
c) international human rights obligations impact on the executive insofar as the ratification of an international treaty alone, without incorporation, gives rise to a legitimate expectation that an administrative decision-maker will act in accordance with the treaty, *unless* there is an executive or legislative indication to the contrary (*Teoh*[9] decision).

However, there are weaknesses with each of these. The rules of statutory interpretation can be displaced by statute. Reliance on the common law is insufficient, given that common law only develops as cases are presented to the courts and so is incomplete; and the common law can be altered by statute. *Teoh* offers only procedural (not substantive) protection, and its effectiveness and status is in doubt.

The executive and parliamentary dominance over the domestic implementation of international human rights obligations results in problematic consequences. First, the full range of international human rights instruments are not ratified by Australia, and those that are ratified are under-enforced. The Commonwealth has ratified only seven of the nine the major international human rights treaties.[10] Moreover, there are insufficient mechanisms to enforce these basic human rights within the domestic system.

Secondly, there is little accountability for human rights violations at the international level. The outcomes of the 'enforcement' mechanisms in international human rights treaties, such as periodic reporting and individual communications by alleged victims of violations,[11] are non-binding. Moreover, Australia has a chequered history of engagement with the 'enforcement' mechanisms, demonstrated by its lack of constructive and good faith cooperation with these mechanisms. The Australian government regularly rejects the conclusions of treaty monitoring bodies, which both undermines the domestic securing of rights and undermines the international rule of law. Indeed, Australia has consistently ignored repeated requests from treaty monitoring bodies to adopt a comprehensive domestic human rights instrument that incorporates Australia's international human rights obligations.[12]

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9 Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 282 ('Teoh').

10 The *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); the *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976); the *CERD*, open for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); the *CEDAW*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*'); and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*'); and *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD'*).

11 For example, under the *ICCPR*, Art 40 imposes a five-yearly periodic reporting requirement on States parties. The individual communications mechanism is established under 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*). Australia ratified the *First Optional Protocol* in September 1991, and it came into effect on 25 December 1991.

12 See, for example, Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc No CCPR/C/AUS/CO/6 (1 December 2017) [6] and [8]; Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, UN

Thirdly, and consequently, aggrieved persons, peoples and groups are denied an effective non-majoritarian forum within which their human rights claims can be assessed.[13] This, in turn, has led to increasing recourse to the judiciary, placing pressures on the judiciary which ultimately test the independence of the judiciary and the rule of law. In particular, when individuals, peoples and groups turn to the judiciary as a means of final recourse to resolve human rights disputes, the judiciary is often accused of illegitimate judicial law-making or judicial activism.

See further:

- Julie Debeljak, 'The Fragile Foundations of the Human Rights Landscape: Why Australia needs a Human Rights Instrument' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia: Volume 1* (Thomson Reuters, Australia, 2021) 39, [3.70], [3.90], [3.100], [3.110]
- 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, 290-93
- Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 17-18

Recommendation 1:

1) **Human rights at the federal level will be best protected and promoted by the introduction of a comprehensive human rights instrument, with rights-protective roles for all arms of government – the executive, parliament and the judiciary. This is consistent with the AHRC Position Paper.**

1.2 THE 2010 HUMAN RIGHTS FRAMEWORK

The 2010 Human Rights Framework was the major outcome from the 2008-09 National Human Rights Consultation. According to the relevant website, the Framework was made up of five elements:

- 'investing in a comprehensive suite of education initiatives to promote a greater understanding of human rights across the community
- establishing a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with our international human rights obligations
- requiring that each new Bill introduced into Parliament is accompanied by a statement of compatibility with our international human rights obligations

Doc No E/C.12/AUS/CO/5 (11 July 2017) [6]; Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, UN Doc No CERD/C/AUS/CO/18-20 (26 December 2017) [5].

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

- combining federal anti-discrimination laws into a single Act to remove unnecessary regulatory overlap and make the system more user-friendly
- creating an annual non-government Human Rights Forum to enable comprehensive engagement with non-government organisations on human rights matters.'[14]

According to Fletcher, 'the parliamentary scrutiny regime, reflecting commitments (b) and (c), is the only aspect of the Framework which remains.'[15] Fletcher explains that the '[f]unding for extra human rights education was discontinued entirely in the 2014 Budget after a change of government';[16] '[t]he *NGO Forum* continues and is still arguably part of the Framework, but in practice exists independently of it (it has been held in various forms since the 1990s – well before the Framework was announced)';[17] and '[t]he anti-discrimination consolidation project also failed to survive the change of government in late 2013'.[18]

Focussing on the proposed consolidation of the federal anti-discrimination laws, this promised to alleviate some of the problems with the federal anti-discrimination laws, and potentially improve the interaction between the federal and State anti-discrimination regimes. Across 2011 to 2013, there was extensive public consultation, the release of draft legislation, and a Senate inquiry on the draft legislation. The consolidation did not proceed, despite recommendations in its favour by the Senate.[19] Parliament did, however, enact the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), which introduced sexual orientation, gender identity and intersex status as prohibited grounds of discrimination.

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[14] As per Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 30, 32 note 15 ('Human Rights Scrutiny') and ('*Law Making and Human Rights*'), see: Australian Government, *National Human Rights Framework, 2010*: the Framework is no longer on the Attorney-General's Department website, but is archived at: <http://webarchive.nla.gov.au/gov/20130328232240/https://www.ag.gov.au/RightsAndProtections/HumanRights/HumanRightsFramework/Pages/default.aspx>).

[15] Adam Fletcher, 'Human Rights Scrutiny' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020) 30, 32.

[16] Ibid, 32 note 16, citing Stephanie Anderson, 'Human Rights funding slashed,' *SBS News*, 14 May 2014: <http://www.sbs.com.au/news/fragment/human-rights-funding-slashed>.

[17] Adam Fletcher, 'Human Rights Scrutiny' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Right* (Thomson Reuters, 2020) 30, 32 note 16.

[18] Ibid.

[19] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Exposure Bill 2012* (Report, February 2013). See further, Attorney-General's Department, *Commonwealth Anti-Discrimination Law Reforms* (Webpage) https://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx; Anne Hewitt, 'Can a Theoretical Consideration of Australia's Anti-Discrimination Laws Inform Law Reform?' (2013) 41 *Federal Law Review* 35; Beth Gaze and Belinda Smith, *Equality and Discrimination Law* (Cambridge University Press, Cambridge, 2017) 45-46.

Recommendations 2 to 4:

2) **The Government and Parliament should work together to bring the proposed consolidation of the federal anti-discrimination laws back onto the legislative agenda, with a view to the enactment of those laws.**

3) **Comprehensive community education about human rights should be reinstated and properly resourced.**

4) **The NGO Forum should continue.**

1.3 PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS AND STATEMENTS OF COMPATIBILITY

1.3.1 The Federal Scrutiny Act

As per the second and third dot points under the 2010 Human Rights Framework, the Commonwealth Parliament enacted the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('*Federal Scrutiny Act*'). Under s 8, Members of Parliament must make a statement about the compatibility with human rights of all Bills presented to Parliament.[20] Under s 4, a dedicated Parliamentary Joint Committee on Human Rights ('PJCHR') has been established, with the specific function of assessing all Bills and Acts for compatibility with human rights and to report back to Parliament under s 7.[21]

The role of the executive and parliament in developing policy and enacting legislation through a human rights lens has been recently and extensively reviewed in an edited collection by myself and Assoc Prof Laura Grenfell: Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020). In our introductory chapter, we make some broader observations and findings relevant to this Inquiry. We explore the constitutional role of parliament as legislative scrutineer and lawmaker, and consider how this is impacted by the dominance of the executive:

- 'Another feature influencing all Australian Parliaments is the dominance of the executive. Our system of responsible government, whereby the government is drawn from the political party with a majority in the lower house, coupled with strong political party discipline amongst the major parties, has resulted in a shift from the theoretical sovereignty of Parliament towards the reality of executive sovereignty (at

[20] See Attorney-General's Office, *Human Rights check for New Laws* (Media Release, 4 January 2012). Statements of compatibility are not binding on courts and tribunals, and a failure to comply with s 8 does not affect the validity, operation of enforcement of subsequent enacted law: *Human Rights (Parliamentary Scrutiny Act) 2011* (Cth) ('*Federal Scrutiny Act*'), s 8(4) and (5).

[21] The Attorney-General may also refer human rights matters to the Committee under s 7 of the *Federal Scrutiny Act*. The definition of 'human rights' for both the executive and parliamentary obligations is by reference to the seven international human rights treaties that Australia is a party to under s 3 of the *Federal Scrutiny Act*: *ICCPR*, *ICESCR*, *CERD*, *CEDAW*, *CAT*, *CRC*, and *CRPD*.

least in lower houses).'[22]

- 'The executive's policy and legislative agenda dominate parliamentary time. The executive controls the pre-introduction phase of policy development and legislative drafting; decides the substantive content of most of the proposed legislation to be considered, scrutinised and enacted by Parliament; dictates the legislative timetable; shapes the discussion about rights- compatibility through the extrinsic materials it develops to accompany proposed legislation (explanatory memorandum/ statements/ factsheets and, where applicable, statements of compatibility and override statements); and dominates the debate and vote in Parliament itself. Indeed, in most Parliaments the prevailing view is that it is near impossible to achieve an amendment – let alone a rights-based amendment – to proposed legislation once the executive's Cabinet has approved it. This weakens the ability of Australia's Parliaments to keep the executive accountable when it comes to human rights – that is, it weakens its role as legislative scrutineer vis- à- vis rights. In particular, it tarnishes Parliament's reputation as a human rights defender – that is, it undermines Parliament's ability to develop a culture of justification for the impacts on human rights of the legislation it enacts, with the concomitant cost to transparent and accountable decision- making. Moreover, it undermines the claim that Parliaments are best positioned to protect human rights through proactive policy development and law- making informed by the views of the electorates they represent – that is, it brings into question the very *sovereignty* of Parliament as lawmaker.'[23]

We then explain the two phases of executive and legislative scrutiny within the law-making process: a) the "pre-introduction scrutiny", 'that takes place before a Bill is introduced into Parliament' and 'takes place behind closed doors when policy is developed and legislation is drafted';[24] and (b) the "post-introduction scrutiny", 'that takes place once a Bill is tabled in Parliament but before it is enacted …, which is transparent because it is conducted by a scrutiny body and/or on the floor of Parliament and it is recorded in Hansard'.[25] We consider the "pre-introduction" and "post-introduction" stages of scrutiny to be "upstream scrutiny", and argue that '[b]oth upstream and downstream human rights scrutiny require close attention in order to evaluate how they boost the *quality* of law-making – both the quality of the process of law-making and the quality of the substantive output, being the legislation enacted'.[26] Note, "downstream" scrutiny refers to "post-legislative" stages of scrutiny.

We then argue in favour of a mode and method of "upstream" human rights scrutiny that facilitates the transparency of and accountability for the human rights impacts of policy and legislative decisions, and that develops a culture of justification for effects on human rights of policy and legislation proposals, as follows:

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22 Julie Debeljak and Laura Grenfell, 'Diverse Australian Landscapes of Law-Making and Human Rights: Contextualising Law-Making and Human Rights' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020) 1, 3 ('Diverse Australian Landscapes').

23 Ibid 3.

24 Ibid 4-5.

25 Ibid 5.

26 Ibid 5.

- 'The legislative scrutiny performed by various human rights scrutiny bodies across Australia is invaluable for identifying and exploring the potential impact on human rights associated with policy and legislative proposals. It is through such identification and exploration that the represented are able to see what the representatives are doing on *their* behalf and in *their* name. Such transparency in decision-making is key to holding policy developers and laws makers to account for the rights consequences of their decisions. Even more importantly, however, scrutiny bodies can and should develop a culture of justification through their scrutiny processes, particularly by requesting the executive to offer a public justification for any impacts of policy and legislative proposals on human rights.'[27]

- 'Developing a culture of justification that bolsters transparency and accountability is particularly pertinent in many Australian jurisdictions where governmental and political structures and practices pull in the opposite direction – that is, where strong party discipline, a bipartisan approach on a political issue (often 'law and order' issues), and/ or executive dominance in a unicameral Parliament mean that such rights implications are not the subject of expansive debate and deliberation on the floor of Parliament.'[28]

- 'The scrutiny bodies are only as effective as their empowering legislation, orders and practices allow them to be, and only as effective as the protagonists (the executive, the Parliament and the scrutiny bodies) allow them to be. Certainly, the scrutiny standards and scrutiny mechanisms can enhance the chances of effective scrutiny, but 'political factors, particularly executive dominance and political competition, are the main determinants".'[29]

The performance of the main mechanisms under the *Federal Scrutiny Act* – being statements of compatibility (SoC) and the PJCHR – are extensively reviewed in the edited collection. I recommend the Inquiry read the following chapters that focus on these mechanisms:

- Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?', chapter 2.[30] Relevantly, this 'chapter identifies problems with the evidence base upon which scrutiny proceeds, the minimal participation by the public, the lack of impact of the PJCHR inside and outside of Parliament and compared to other scrutiny committees, and a raft of practical and political constraints.'[31]

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27 Ibid 6.

28 Ibid 7.

29 Ibid 11, citing Sharon Mo, 'Parliamentary Deliberation in the Operation of the Victorian Human Rights Charter' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020), ch 8, [8.180] ('Parliamentary Deliberation').

30 Fletcher, 'Human Rights Scrutiny', above n 14, ch 2.

31 Debeljak and Grenfell, 'Diverse Australian Landscapes', above n 22, 9.

- Daniel Reynolds and George Williams, 'Evaluating the Impact of Australian's Federal Human Rights Scrutiny Regime', chapter 3.[32] Relevantly, in updating their 2015 study on the *Federal Scrutiny Act* for the 2016 to 2018 period, Reynolds and Williams find that 'problems with the quality of SoCs, the timing of PJCHR reports and ministerial responses to requests for clarification from the PJCHR persist, with little evidence of deliberative, legislative, judicial and media impact arising from the work of the PJCHR.'[33]

- Simon Rice, 'Allowing for Dissent: Opening Up Human Rights Dialogue in the Australian Parliament', chapter 4.[34] Rice 'focuses on the apparent unwillingness of Ministers to cooperate when the PJCHR seeks further clarification of rights issues, particularly in relation to the delay in providing, and inadequacies with, ministerial replies'; and, relevantly, he ultimately concludes 'that the technical compliance approach of the PJCHR drives the ministerial unwillingness to cooperate. He suggests that a more fruitful approach may be to combine technical compliance with contestability – that is, for the PJCHR "technical compliance approach [to be] opened up, informed by broader opinion when making evaluative assessments".'[35]

- Andrew Byrnes, 'Economic and Social Rights in the Australian Parliamentary Human Rights Scrutiny Process', chapter 5.[36] Relevantly, '[p]roblems identified by Byrnes include the inadequacy of SoCs and ministerial responses to PJCHR requests for further information; the lack of justifications offered for limitations on economic and social rights, including an absence of evidence and consideration of less restrictive alternatives; and the timing of PJCHR reports'; with Byrnes ultimately concluding 'that its "impact in directly bringing about legislative change has been very limited".'[37]

- Shawn Rajanayagam, 'Urgent Law-Making and the Human Rights (Parliamentary Scrutiny) Act 2011', chapter 21.[38] Rajanayagam compares the development of counter-terrorism legislation enacted in the mid-2000s *before* the *Federal Scrutiny Act*

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[32] Daniel Reynolds and George Williams, 'Evaluating the Impact of Australian's Federal Human Rights Scrutiny Regime' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020), ch 3 ('Evaluating the Impact').

[33] Debeljak and Grenfell, 'Diverse Australian Landscapes', above n 22, 10.

[34] Simon Rice, 'Allowing for Dissent: Opening Up Human Rights Dialogue in the Australian Parliament', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020), ch 4 ('Allowing for Dissent').

[35] Debeljak and Grenfell, 'Diverse Australian Landscapes', above n 22, 10, citing Rice, 'Allowing for Dissent', above n 34,ch 4, [4.200].

[36] Andrew Byrnes, 'Economic and Social Rights in the Australian Parliamentary Human Rights Scrutiny Process' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020), ch 5 ('Economic and Social Rights').

[37] Debeljak and Grenfell, 'Diverse Australian Landscapes', above n 22, 10, citing Byrnes, 'Economic and Social Rights', above n 36, ch 5, [5.180]

[38] Shawn Rajanayagam, 'Urgent Law-Making and the Human Rights (Parliamentary Scrutiny) Act 2011' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020), ch 21 ('Urgent Law-Making').

> came into operation, with that enacted in 2014 *after* that scrutiny system was in force. The comparison of the two, relevantly, 'leads him to conclude that the *Scrutiny Act* was ineffective in triggering proportionate legislative rights deliberation in the pre-enactment scrutiny of the 2014 legislation', and 'that, in an urgent law-making context, the structural weaknesses of an exclusive parliamentary model are particularly problematic'; with his broader conclusion being 'that the shortcomings in the *Scrutiny Act* suggest significant limitations in the capacity of a purely pre-enactment legislative scrutiny regime to protect human rights.'[39]

In the concluding chapter of the edited collection,[40] Laura Grenfell and I consider the various phases of law-making.

We make the following observations with the "pre-introduction", or first "upstream", phase. This part of our conclusion focuses heavily on the chapter on the *ACTHRA* by Helen Watchirs, Sean Costello and Renuka Thilagaratnam.[41]

- 'The pre-introduction phase of law making is arguably one of the most critical phases of law making, and it is the most opaque component of the "upstream" scrutiny process as it takes place outside of parliament and largely behind closed doors. This lack of transparency impacts on executive accountability, and may hinder the development of a culture of justification – not to mention the substantive human rights outcomes with respect to the policies and laws that are developed and adopted.'[42]

- 'Amongst those jurisdictions with a statutory framework, the ACT emerges as the best-practice model of pre-introduction human rights scrutiny… Key to strengthening a culture of justification in this pre-introduction phase is ensuring some independent input so that it is not simply an echo chamber.'[43]

- '[I]t is the ACT system that currently emerges as the best-practice model. The real game-changer for pre-introduction scrutiny in the ACT is the inclusion of the Human Rights Commissioner in the pre-tabling scrutiny process. Watchirs, Costello and Thilagaratnam explain that ACT Cabinet practice grants the Commissioner access to cabinet submissions, giving the Commissioner "a unique opportunity to influence policymaking early in the process". The Commissioner is involved in both "the first pass" stage, where Cabinet agrees on a policy and to the drafting of legislation, and

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39 Debeljak and Grenfell, 'Diverse Australian Landscapes', above n 22, 26.

40 Laura Grenfell and Julie Debeljak, 'Future Directions for Engaging with Human Rights in Law-Making: is a Culture of Justification Emerging across Australian Jurisdictions?', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020) ('Future Directions'), ch 25.

41 Helen Watchirs, Sean Costello and Renuka Thilagaratnam, 'Human Rights Scrutiny under the Human Rights Act 2004 (ACT)', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020), ch 6 ('Scrutiny in the ACT').

42 Grenfell and Debeljak, 'Future Directions', above n 40, 798.

43 Ibid 800.

"the second pass" stage, where the presentation of a bill to the Assembly is agreed. The Commissioner's involvement means that pre-introduction scrutiny cannot be reduced to a "box-ticking" exercise by bureaucrats. Watchirs, Costello and Thilagaratnam confirm that the Commissioner's input on rights issues "is taken very seriously", and "[i]n the overwhelming majority of cases…, the relevant directorates took the Commissioner's comments into consideration and made necessary changes". In their opinion, including the Commissioner in the Cabinet process "has ensured a high degree of healthy contestability about human rights assessment at the pre-legislative scrutiny stage".'[44]

- 'There is consensus amongst those with firsthand experience of pre-introduction scrutiny processes that the earlier rights are accounted for in policy and legislative development, the more fully rights can be considered and adequately accommodated. If measured by an absence of SoICs, the ACT's record support this. The twinning of *independent* scrutiny to *early* scrutiny takes legislative scrutiny in the ACT a step closer to ensuring a culture of justification for rights incursions, and enhances transparency and accountability in public decision-making impacting on rights.'[45]

- 'This points to the conclusion that all jurisdictions should consider adopting the ACT pre-introduction scrutiny process. Equally, it should not be overlooked that the ACT Cabinet is under no obligation to change its law making path based on the Commissioner's input, and none of the Commissioner's input to Cabinet is publicly available or publicly scrutinised. This underlines that pre-introduction legislative scrutiny processes must *always* be paired with robust parliamentary scrutiny at the time a bill is introduced (post-introduction scrutiny) and, ideally, post-enactment scrutiny.'[46]

We make the following observations regarding the "post-introduction", or second "upstream", phase:

- 'While pre-introduction scrutiny is critical, post-introduction forms of scrutiny are more transparent and open to the public, and they function to inform both law makers and the broader public of human rights implications. It is the post-introduction transparency that drives executive and legislative accountability vis-à-vis rights, and the post-introduction phase where the culture of justification from the executive to the legislature must develop.'[47]

- In relation to SoCs:

    - '[D]uring the post-introduction phase [SoCs] operate to inform law makers and the public of these implications and the evidence base for the law. SoCs

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44 Ibid 803, citing Watchirs, Costello and Thilagaratnam, above note 41, chap 6 [6.190], [6.190] and [6.260] respectively.

45 Grenfell and Debeljak, 'Future Directions', above n 40, 804.

46 Ibid 804.

47 Ibid 796.

therefore have huge potential – … ensuring transparency about how the proposed policy and legislation are conceived, drafted, and justified, which in turn improves accountability and fuels the culture of justification.'[48]

- 'According to the authors in Part I, federal SoCs are lacklustre in offering evidence justifying limitations to rights. In common, the authors note the low and variable quality of SoCs. The inconsistent quality of federal SoCs is so poor that Reynolds and Williams have suggested legislative amendments to the *Scrutiny Act* improving the information contained in SoCs, including a justification about *how* a law is compatible and an *explanation* of any incompatibility. The problem of a quality deficit in federal SoCs is particularly acute when it comes to how Ministers justify limitations to economic and social rights. According to Byrnes, the PJCHR faces a constant battle on this front.'[49]

- In relation to the PJCHR:

  - 'In common, the authors in Part I observe that federal parliamentary engagement with PJCHR reports remain low. They express concern about the PJCHR's lack of direct legislative impact and its low deliberative impact. Fletcher, for example, finds little evidence that PJCHR scrutiny resulted in rights-influenced substantive amendments to legislation. Similar to Mo, Fletcher finds that parliamentary rights deliberation tends to come from scrutiny body members and Crossbenchers.'[50]
  - 'The timing of PJCHR access to proposed legislation (post-introduction) means that legislation is often enacted *before* the PJCHR issues a final report on proposed legislation. This can stymy rights debate on the floor of parliament. Rajanayagam 's chapter illustrates these problems with the federal system in the context of anti-terror laws "which are often deliberated upon and enacted in a context of asserted urgency". This urgency enables the government to justify its truncation of any deliberative processes.'[51] This problematic timing issue is also referred to in the context of the *Victorian Charter*.[52]

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48 Ibid 800.

49 Ibid 800 (citations omitted), referring variously to Fletcher, 'Human Rights Scrutiny', above n 14, ch 2, [2.40]; Reynolds and Williams, 'Evaluating the Impact', above n 32, ch 3, [3.30]; Rice, 'Allowing for Dissent', above n 34, ch 4, [4.70]; Byrnes, 'Economic and Social Rights', above n 36, ch 5, for example [5.120]; Rajanayagam, 'Urgent Law-Making', above n 38, ch 21, [21.70].

50 Grenfell and Debeljak, 'Future Directions', above n 40, 799, referring to Fletcher, 'Human Rights Scrutiny', above n 14, ch 2; and Mo, 'Parliamentary Deliberation', above n 29, ch 8.

51 Grenfell and Debeljak, 'Future Directions', above n 40, 799, citing Rajanayagam, 'Urgent Law-Making', above n 38, ch 22, [22.10].

52 Julie Debeljak, 'Rights Dialogue where there is Disagreement under the Victorian Charter', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020) 263, 283, 288 ('Rights Dialogue and Disagreement').

- In relation to ministerial correspondence:

    - 'Another evidence base integral to transparency of reasoning, accountability for rights impacts, and developing a culture of justification comes from the practice of correspondence between parliamentary scrutiny committees and the executive. Such correspondence generally takes place when a parliamentary scrutiny body requires clarification from the Minister regarding assertions of compatibility made in a SoC.'[53]
    - 'Issues pertaining to this correspondence have emerged in the federal scrutiny system. Fletcher notes that Ministers do not systematically respond to PJCHR requests for further information. Reynolds and Williams make a similar point when they find that Ministerial responses are not always based on productive and constructive dialogue. Byrnes notes that together the SoCs and the ministerial correspondence often demonstrate a lack of understanding of the human rights in issue, and a failure by the executive to acknowledge limitations to human rights and to offer adequate justifications for those limitations.'[54]
    - 'The timing of ministerial correspondence also poses challenges to the performance of robust scrutiny. Reynolds and Williams and Byrnes observe that Ministerial responses often come *after* the proposed legislation is enacted. This is a problem because the PJCHR does not issue its final reports until the Minister responds, such that the PJCHR reports also *post-date* legislative enactment. This snowball of a problem prompts Fletcher and Reynolds and Williams to suggest a new parliamentary standing order preventing legislation being enacted until the PJCHR issues its final report. Such a Standing order exists in the Senate for the Scrutiny of Bills Committee.'[55]
    - 'There is the additional problem of Ministers being *unwilling* to engage with the PJCHR. Rice argues that the absence of the judicial voice in the federal dialogue about rights fails to incentivise executive engagement in pre-introduction scrutiny. This lack of incentive may explain the inconsistent quality of SoCs at the federal level and the often problematic timing of ministerial correspondence. As Rice recognises, "[t]he PJCHR is, therefore, relying in large part on ministers' goodwill when it writes [to them] and expects a response."'[56]
    - 'Given the quality deficit of federal SoCs, Rice suggests the ministerial correspondence is key to the representative dialogue about rights. He undertakes an assessment of ministerial correspondence with the PJCHR through a case study analysis, conveying a bleak picture: "openly dismissive"

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53 Grenfell and Debeljak, 'Future Directions', above n 40, 802.

54 Ibid 802, referring to Fletcher, 'Human Rights Scrutiny', above n 14, ch 2; Reynolds and Williams, 'Evaluating the Impact', above n 32, ch 3; and Byrnes, 'Economic and Social Rights', above n 36, ch 5.

55 Grenfell and Debeljak, 'Future Directions', above n 40, 802-803, referring variously to Fletcher, Human Rights Scrutiny', above n 14, ch 2; Reynolds and Williams, 'Evaluating the Impact', above n 32, ch 3; and Byrnes, 'Economic and Social Rights', above n 36, ch 5. Referring also to Senate Standing Order 115(5).

56 Grenfell and Debeljak, 'Future Directions', above n 40, 803, citing Rice, 'Allowing for Dissent', above n34, ch 4, [4.50].

> attitudes are "reflected in ministerial correspondence"; ministerial correspondence can be "perfunctory, dismissive and even impolite"; "ministers fail to engage in constructive dialogue"; and "ministers' responses are variously responsive and evasive, courteous and dismissive, obliging and unhelpful".'[57]

- In relation to whether the SoC and PJCHR mechanisms should be coupled with human rights legislation:

  - 'Given that executive dominance is an in-built weakness of the federal scrutiny system, Reynolds and Williams recommend "that the parliamentary scrutiny regime be incorporated within a national human rights act that combines parliamentary deliberation with appropriate judicial protection for human rights". Other contributors, including Fletcher, Rice and Rajanagayam, lament the absence of a judicial role in the promotion and protection of human rights.'[58]

1.3.2 Lessons from the Victoria Charter

Lessons may also be gleaned from the experience of the executive and parliamentary rights mechanisms in the *Victorian Charter*. For example, like under the *Federal Scrutiny Act*, a consistent gap in SoCs that have been presented to the Victorian Parliament is a failure to explain '*how'* the Bill was compatible or incompatible with rights. The Scrutiny of Acts and Regulations Committee ('SARC') has, time and again, commented on this problem.[59] Parliamentarians have also lamented that limited evidence is provided for the legislative programs presented, particularly when legislation violates rights.[60]

Moreover, a book chapter I wrote is of relevance: Julie Debeljak, 'Rights Dialogue under the Victorian *Charter*: the Potential and the Pitfalls' in Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017, ANU Press), ch 38. The overarching concerns expressed in the 2017 book chapter about the *Victorian Charter* are analogues of the concerns expressed about the *Federal Scrutiny Act* in the 2020 edited collection, as the following demonstrates:

> 'In decision-making that impacts on rights, the executive retains its dominance: it controls the "pre-tabling-in-Parliament" phase of legislative development; shapes the rights discussion via extrinsic materials accompanying proposed legislation; and

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57 Grenfell and Debeljak, 'Future Directions', above n 40, 803, citing Rice, 'Allowing for Dissent', above n34, ch 4, [4.90] and [4.100].

58 Grenfell and Debeljak, 'Future Directions', above n 40, 809, citing Reynolds and Williams, 'Evaluating the Impact', above n 32, ch 3, [3.100]; and referring to Fletcher, 'Human Rights Scrutiny', above n 14, ch 2, [2.10]; Rice, 'Allowing for Dissent', above n 34, ch 4, [4.20]; and Rajanagayam, 'Urgent Law-Making', above n 38, ch 21, [21.110]

59 See e.g., SARC, *Alert Digest*, No 2 of 2009, 10-11.

60 See e.g., Victoria, *Parliamentary Debates*, Legislative Council, 19 August 2014, 2513 (Ms Pennicuik); Victoria, *Parliamentary Debates*, Legislative Council, 4 December 2008, 5492 (Mr Barber); Victoria, *Parliamentary Debate*, Legislative Council, 29 July 2010, 3413 and 3427 (Ms Pennicuik).

> dominates Parliament itself. Contributions by members of Parliament to rights dialogue on the floor of Parliament and through its committees are weak, with little incentive for stronger action. Parliamentary rights culture is nascent at best, and there is no political or legal cost for disregarding rights. The judiciary has the limited power of interpreting laws to be compatible with rights, which leaves the executive and Parliament free reign in their responses. Reforms must focus on these elements.'[61]

The 2017 book chapter focuses on 'complete cycles of dialogue' under the *Victorian Charter* – that is, when each arm of government has contributed to the discussion about the rights-impact of a law. One category of 'cycles' focuses on the dialogue where judicial decisions turned on the *Victoria Charter*, and prompted a legislative response from the executive and parliament; and another category of 'cycles' focuses on dialogue where judicial decisions did not turn on the *Victorian Charter*, but nevertheless prompted the executive and parliament to enact legislative amendments that did impact on human rights.

First, focusing on the problems uncovered, and the suggestions for reform, vis-à-vis SoC:

- 'These examples demonstrate the need for reform across the dialogue process. During the "pre-tabling-in-Parliament" phase of policy and legislative design, although the executive accounts for rights, this is in secret and there is no guarantee of outside influence. This is problematic because once Cabinet gives "in-principle" agreement to legislative proposals, it is difficult to secure amendments. If the window for *real* rights-influence ends at Cabinet, dialogue is nothing more than an executive monologue.'[62]

- 'Reforms must include: (a) changes to the political culture surrounding amendments in Parliament; and (b) an expansion of voices influencing the pre-Cabinet-approval phase of legislative development, with SARC and the Victorian Equal Opportunity and Human Rights Commission being consulted, in confidence, on draft legislation pre-Cabinet-approval.'[63]

- 'SoCs consistently failed to explain "how" a Bill was (in)compatible. Section 28 must be amended to require consideration of s 7(2) as part of compatibility assessments and evidence-based assessments. Section 28(3) could read: "A statement of compatibility must state – (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible *by reference to s 7(2) providing evidence for the assessment*; and (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility *by reference to s 7(2) providing evidence for the assessment*".'[64]

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61 Julie Debeljak, 'Rights Dialogue under the Victorian *Charter*: the Potential and the Pitfalls' in Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017, ANU Press) 407, 407-408 (''Urgent Law-Making', above n 38,').

62 Ibid 414.

63 Ibid 414.

64 Ibid 415.

Second, focusing on the problems uncovered, and the suggestions for reform, vis-à-vis SARC (which is the Victorian equivalent of the PJCHR):

- 'SARC needs strengthening. First, SARC has two weeks to report on *all* Bills introduced. SARC reports are often not available *before* Bills pass either the lower or both Houses. This mutes SARC's contribution to the dialogue. Parliamentarians have suggested that SARC be convened *ad hoc* whenever "urgent bills" are presented to Parliament. In addition, the *Charter* should be amended to prevent a Bill becoming a valid Act until SARC has reported, and Parliament has "properly considered" the report.'[65]

- 'Secondly, although rights-incompatible analysis and ministerial requests for clarification convey SARC's opinion, SARC's recommendations are mild. This may be consistent with the practice of scrutiny committees, but SARC's current practice "has had little influence over the content of legislation once the bill has been presented to Parliament". Were SARC *privately* consulted on proposed legislation before Cabinet approval, the executive might be induced to present more rights-compatible bills. SARC's *public* reports could then be frank rights assessments with (stronger) conclusions (particularly where SARC's private concerns are not addressed).'[66]

- 'Parliament must develop and nurture a *rights culture*, ensuring there is a political cost for *not* protecting rights and *not* convincingly justifying limitations on rights…

  Legal methods [of cultural change] include imposing an obligation on Parliament to "give proper consideration" to SoCs and SARC reports, with a failure to give proper consideration precluding a bill becoming an act. In relation to SARC, s 30 should become s 30(1), with: subs (2) preventing Parliament enacting laws prior to SARC reporting; subs (3) requiring Parliament to give "proper consideration" to SARC reports; and subs (4) stating "a failure to comply with sub-sections 30(1), (2) and (3) prevents that bill becoming an act, and any purported act is not valid, has no operation and cannot be enforced".'[67]

Finally, my submission to the Queensland Human Rights Inquiry of 2016 addresses the difficulties of a technical approach to scrutiny, as follows:

> 'Thirdly, scrutiny committees in general tend to focus on technical drafting issues, and avoid analysis of policy pursuits and outcomes. This has impacted on SARC's reports, and is likely to impact on the reports of any rights committee introduced into Queensland. Although the tenor of SARC's opinion can be gleaned from its analysis and whether it has sought clarification from the responsible Minister, SARC's recommendations are mild – usually simply 'referring questions to Parliament' rather than reporting that a bill *is* or *may be* incompatible. This may be consistent with the practise of scrutiny committees, but SARC's current practice "has had little influence

[65] Ibid 415 (citations omitted).

[66] Ibid 415 (citations omitted).

[67] Ibid 415 – 416.

over the content of legislation once the bill has been presented to Parliament." Were SARC consulted on draft legislation pre-Cabinet approval and in private, SARC could be more frank in its public rights assessment, allowing for and justifying public reports to Parliament with (stronger) conclusions.'[68]

1.3.3 Concluding Remarks

Finally, this discussion must return to the broader question of how effective the *Federal Scrutiny Act* has been in generating rights-respecting outcomes. Unfortunately, based on the 2015 study, Williams and Reynolds conclude that 'there is no evidence' that the 'culture of justification' envisaged via statements of compatibility 'has in fact led to better laws'; rather, 'there is evidence that recent years have each seen extraordinarily high numbers of rights-infringing Bills passed into law.'[69] Rajanayagam notes that, although the *Federal Scrutiny Act* 'ought to have sounded a clarion call for the protection of human rights… the legislators who are subject to its obligations have not lived up to that promise.'[70]

The prognosis for the creation of a representative dialogue – that is, between the executive and parliament – about the rights-impacts of policy and legislative decisions is also disappointing: Fletcher concludes that 'the scrutiny regime has so far failed to engender good faith human rights debate in any significant measure'.[71]

This brings me back to the theme of the executive human rights monopoly over rights:

> 'Although a framework for debate about human rights within and between the executive and the parliament in developing policy and laws is welcomed, it does not

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[68] Julie Debeljak, 'Human Rights Inquiry', a Submission to the Queensland Parliament's Legal Affairs and Community Safety Committee, April 2016, 20-21 (citations omitted).

[69] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41 *Monash University Law Review* 469, 506 ('Operation and Impact: 2015'). They also conclude that the PJCHR has had little impact: 'at least 73 per cent of the time (and according to insiders and commentators, a considerably higher percentage), the Committee's findings have had no effect at all on the form or fate of legislation that it has considered': at 507. Similarly, Fletcher concludes that the 'evidence to date … demonstrates that the incorporation of human rights into the legislative development process has so far failed to effect a significant improvement in the consistency of new laws with Australia's international human rights obligations': Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or mere Window Dressing?* (Melbourne University Press, Carlton Victoria, 2018) 309 ('*Democratic Masterstroke or Window Dressing?*').

[70] Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act*' (2015) 38 *UNSW Law Journal* 1046, 1076. See further Gillian Triggs, *Speaking Up* (2018, Melbourne University Press, Carlton) 78 – 80, 158 – 160, 277; *contra* Tom Campbell and Stephen Morris, 'Human Rights for Democracies: A Provisional Assessment of the Australian *Human Rights (Parliamentary Scrutiny) Act 2011*' (2015) 34 *University of Queensland Law Journal* 7.

[71] Fletcher, *Democratic Masterstroke or Window Dressing?*, above n 69, 307. Fletcher also makes the point that 'dialogue has seriously faltered since the 44th Parliament', with '[r]esponses from Ministers to PJCHR correspondence reveal[ing] a prevailing attitude that the regime is at best an inconvenience; at worst a source of infuriation': at 309. According to Williams and Reynolds, 'the scrutiny regime is only very occasionally referred to in parliamentary debate: a total of 106 times over the first four years of its operation': Williams and Reynolds, 'Operation and Impact: 2015', above n 69, 507.

alter the monopoly power the executive and parliament have over the granting or undermining of human rights. Pre-legislative scrutiny poses a procedural hurdle, not a substantive hurdle. The executive and parliament are still able to enact laws that substantively restrict our rights; but when doing so, procedurally they have to identify and debate any rights that will be limited and the justification for the limitation. To be sure, this increases human rights transparency and accountability; but it does not constrain the executive and parliament in its substantive law making power – that is, it does not alter the monopoly.'[72]

Recommendations 5 to 10:

5) **I recommend the re-design and implementation of the *Federal Scrutiny Act* so that it achieves a mode and method of "upstream" human rights executive policy development and legislative drafting, and parliamentary scrutiny of policy development and law making, that (a) better facilitates the transparency of and accountability for the human rights impacts of policy and legislative decisions and (b) better develops a culture of justification for the effect on human rights of policy and legislation proposals. This is not inconsistent with the AHRC Position Paper.**

6) **Given the dominance of the Executive over the Parliament in "upstream" human rights scrutiny and the problems this presents for Parliament as legislative scrutineer and human rights bastion, I recommend that the judiciary must be given a role in "downstream", post-legislative scrutiny via a federal human rights instruments that empowers judicial review of legislation against guaranteed human rights. This is consistent with the AHRC Position Paper.**

7) **I recommend that the "pre-introduction" phase of policy development and law making undertaken by the executive becomes more transparent through the introduction of *independent* human rights analysis into that phase (a) by involving the Australian Human Rights Commission in the pre-tabling scrutiny process in a manner similar to the practices in the ACT under the *ACTHRA*, and (b) by involving the PJCHR in the pre-tabling scrutiny process – the key to which is the *early* involvement of the ACT Human Rights Commissioner and the PJCHR at the Cabinet submission phase. Such involvement can be confidential, which would allow both the Australian Human Rights Commission and the PJCHR to offer public reports in the "post-introduction" phase of policy development and law making. This is not inconsistent with the AHRC Position Paper.**

8) **I recommend legislative changes to the requirements of SoCs to require any statement of (in)compatibility to be accompanied by an explanation that justifies the assessment of (in)compatibility and the evidence upon which that justification is based. Section 8(3) of the *Federal Scrutiny Act* should be amended to read: 'A statement of compatibility must state – (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible including by reference to any reasonable and demonstrably justifiable limitations on human rights and by providing evidence for the assessment; and (b) if, in the member's**

[72] Julie Debeljak, 'The Fragile Foundations of the Human Rights Landscape: Why Australia needs a Human Rights Instrument' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia: Volume 1* (Thomson Reuters, Australia, 2021) 39, [3.80].

opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility by reference to any reasonable and demonstrably justifiable limitations on human rights and by providing evidence for the assessment.' This is not inconsistent with the AHRC Position Paper.

9) **I recommend legislative changes that strengthen the powers of the PJCHR, including a power to prevent a legislative proposal being enacted before the PJCHR has reported to Parliament on that proposal, and a power to require Parliament to give proper consideration to the PJCHR report. Specifically, s 7 of the *Federal Scrutiny Act* should become s 7(1), with the addition of: (a) subs (2) preventing Parliament enacting laws prior to PJCHR reporting; (b) subs (3) requiring Parliament to give "proper consideration" to PJCHR reports; and (c) subs (4) stating 'a failure to comply with sub-sections 7(1), (2) and (3) prevents that bill becoming an act, and any purported act is not valid, has no operation and cannot be enforced'. This is not inconsistent with the AHRC Position Paper.**

10) **Given that early and independent human rights advice in the "pre-introduction" phase does not ensure that advice will be accounted for, and the unwillingness of Ministers to engage promptly and constructively with the PJCHR, I recommend that the judiciary be given a role in "downstream", post-legislative scrutiny via a human rights instruments that empowers judicial review of legislation against guaranteed human rights. This is consistent with the AHRC Position Paper.**

1.4 THE ROLE OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

I will not provide commentary on the role of the Australian Human Rights Commission separately. Throughout the submission, I refer to the Australian Human Rights Commission's role when relevant to my area of expertise.

2. ISSUE 2: WHETHER THE AUSTRALIAN PARLIAMENT SHOULD ENACT A FEDERAL *HUMAN RIGHTS ACT*?

This section addresses the following questions in the ToR:

- *whether the Australian Parliament should enact a federal Human Rights Act…?*

2.1 RECONCILING HUMAN RIGHTS WITH DEMOCRACY: ROLES OF THE EXECUTIVE, PARLIAMENT AND JUDICIARY

When embedding comprehensive human rights protection within a domestic setting, the institutional design is key. One issue that dominates debates about the institutional design is how guarantees of human rights can be reconciled with democracy. In particular, it is often argued that judicial enforcement of human rights against the representative arms of government may produce anti-democratic tendencies.

I have rehearsed the arguments and the solutions to the arguments in the following works:

- 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, 297-302
- 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, 138-48
- Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 21-27

2.1.1 Representative Monopoly

For present purposes, I will provide a brief summary only. There is a spectrum of institutional models for protecting human rights. At the one end, you have the current Australian model whereby the representative arms of government – the executive and parliament – by and large have a monopoly on the promotion and protection of rights, subject to the *Federal Scrutiny Act*.

Such a monopoly produces numerous problems. The representative arms must assess their actions insofar as SoCs are mandatory and the PJCHR may issue a report, but neither requires policy or legislative output that is consistent with human rights. Moreover, when the representative arms undertake rights assessments, the assessments proceed from a particular 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.

Currently, the representative arms are not required to seek out and engage with institutionally diverse viewpoints, such as that of the differently placed and motivated judicial arm of government. Judicial evaluations of policy and legislative output would overlay matters of principle to the consideration of competing interests and values; add consideration of necessity, rationality, proportionality and minimum impairment to the collective good; bring the interests of the unpopular, minority or vulnerable to the mix in addition to majoritarian sentiment. The addition of a judicial perspective provides an institutional check on the partiality of the representative arms, helps to broaden the interests and issues accounted for when developing policy and legislation, and expands the substantive knowledge base behind and processes of decision-making.

Such a monopoly undermines Australia's international human rights obligations: there is no domestic requirement to take human rights into account in law-making and governmental decision-making; and, when human rights are accounted for, the majoritarian-motivated perspectives of the representative arms are not necessarily challenged by other institutionally-diverse interests, aspirations or views.

2.1.2 Judicial Monopoly

At the other end of the spectrum, you have a judicial monopoly on rights. Judicial review of the decisions of the representative arms against human rights standards is often characterised as anti-democratic – allowing the unelected judiciary to review and invalidate the decisions of the elected arms supposedly undermines democracy. These anti-democratic concerns are

grounded in the United State model. Under the *United States Constitution* ('*US Constitution*'),[73] the judiciary is empowered to invalidate legislative and executive actions that violate the guaranteed rights contained therein.

If the legislature or executive disagrees with the judiciary's interpretation and/or application of the rights, they have two options, both of which are problematic. The representative arms can seek to alter the guarantee of rights by amending the *US Constitution*, which is onerous in a manner similar to Australian constitutional amendment.[74] Alternatively, the representative arms can attempt to manipulate the meaning of rights through court-stacking and/or court-bashing[75] – neither of which are attractive, given the potential to undermine key elements of modern democracies, such as the independence of the judiciary, the autonomous administration of justice, and the rule of law.

Consequently, the *US Constitution* is said to gives judges the final word on the breadth of human rights and the limits of democracy, which feeds arguments about human rights instruments: (a) transferring supremacy from the elected arms of government to the unelected judiciary; (b) replacing the representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); and (c) resulting in illegitimate judicial sovereignty, rather than legitimate representative sovereignty.

2.1.3 Inter-Institutional Dialogue Models

Somewhere in the middle of this spectrum are more modern human rights instruments that establish an inter-institutional dialogue between the arms of government about the definition, scope and limits of democracy and human rights. With such models, all arms of government have a legitimate and constructive role to play in interpreting and enforcing the guaranteed human rights; and no arm has a monopoly over human rights. Examples of inter-institutional dialogue models include the *Canadian Charter*, the *NZBORA*, the *UKHRA*, the *ACTHRA*, the *Victorian Charter* and the *QHRA*.

For a detailed discussion of the features of the *Canadian Charter* and *UKHRA* that establish the inter-institutional dialogue, refer to:

- 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, 304-24
- Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.), *Human*

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73 *United States Constitution* (1787) ('*US Constitution*').

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

75 Rainer Knopff and FL Morton, *Charter Politics*, Nelson Canada, 1992, ch 5.

Rights Protection: Boundaries and Challenges (Oxford University Press, Oxford, 2003) 135, 153-56

- 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, 26-39.
- Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 27-45

As per the 2017 book chapter referred to above, the mechanisms employed under the *Victorian Charter* to create an inter-institutional dialogue are as follow:

> 'There are numerous dialogue mechanisms under the *Charter*. First, the scope of rights, and the legitimacy of limiting rights, are open to debate and reasonable disagreement. The *Charter* recognises this through open-textured rights, and by allowing the imposition of reasonable and demonstrably justifiable limitations on rights under s 7(2) – both of which encourage rights dialogue among the executive, Parliament and judiciary.
>
> Secondly, *Charter* mechanisms regarding the creation and interpretation of legislation are meant to generate dialogue. Under s 28, parliamentarians must issue Statements of Compatibility ('SoC') for all proposed laws, which indicate (with reasons) whether proposed laws are rights-compatible or rights-incompatible. Under s 30, the Scrutiny of Acts and Regulations Committee ('SARC') must scrutinise all proposed laws and accompanying SoCs against *Charter* rights. SARC reports to Parliament, and Parliament debates the proposals, deciding whether to enact proposed laws given the rights considerations.
>
> These pre-legislative scrutiny obligations make rights explicit considerations in law-making, creating greater transparency around, and accountability for, decisions that impact on rights. The obligations also create a dialogue between arms of government, allowing each to educate the other about their understanding of relevant rights, whether legislation limits those rights, and whether limits are justified under s 7(2).
>
> Regarding the judiciary, s 32(1) of the *Charter* requires all legislation to be interpreted in a way that is compatible with rights, so far as it is possible to do so consistently with statutory purpose. Where legislation cannot be interpreted rights-compatibly, the judiciary is not empowered to invalidate it; rather, the superior courts may issue an unenforceable 'declaration of inconsistent interpretation' under s 36(2). Under s 37, the responsible Minister must table a written response to s 36(2) declarations in Parliament within six-months.
>
> The executive and Parliament can respond to judicial rulings. They may neutralise an unwanted s 32(1) rights-*compatible* interpretation by legislatively reinstating rights-*incompatible* provisions. They may amend legislation to address rights-*incompatibility* identified in s 36(2) declarations; equally, they may retain the rights-

incompatible legislation. The dialogue process continues, with executive and parliamentary responses being open to further challenge before the judiciary.'[76]

2.2 CONSTITUTIONAL VS STATUTORY

I am in favour of enacting comprehensive protection of human rights federally. My strong preference is the enactment of a constitutionally-entrenched human rights instrument based on the *Canadian Charter*. As explained in my submission to the 2008-09 National Human Rights Consultation,[77] although the *Canadian Charter* is constitutionally entrenched, it contains mechanisms that promote and maintain parliamentary sovereignty. Moreover, despite being a constitutional document, the *Canadian Charter* has numerous mechanisms which allow parliament to restrict and limit rights in the public interest (e.g. s 1 limitations provision and s 33 override provision).

If an entrenched constitutional instrument is not politically viable, the next best alternative would be to protect and promote human rights via an ordinary statute. If the statutory protection route is preferred, it should be modelled on the *UKHRA*, the *ACTHRA*, the *Victorian Charter* and the *QHRA*. These models are very similar and, where there are differences, they will be noted and an indication of the preferred model indicated.

The *NZBORA* is not preferred. The *NZBORA* offers little more protection than the current common law in Australia. By way of advantage over the common law, the *NZBORA* does expressly list the protected rights in domestic legislation and guide the judiciary on the interpretation of legislation in light of the protected rights and allowable limitations. However, the interpretative provision under the *NZBORA* is not that dissimilar to the current common law position, and there are no obligations on public authorities to act and decide compatibly with the protected rights – reasons to eschew the *NZBORA*.

For a more detailed explanation of my position, refer to:

- Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 45

In summary, the *Canadian Charter* better addresses two problems with the current Australian arrangements: (a) the under-enforcement of human rights; and (b) the constant refrain of judicial activism and illegitimacy when judicial decisions support the protection of human rights. Statutory inter-institutional dialogue models do not address these issues as effectively.

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[76] Debeljak, 'Rights Dialogue: Potential and Pitfalls', above n 61, 408-409.

[77] Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 2-3, 20-21, 25-51 ('Submission: National Consultation').

Regarding under-enforcement of rights, statutory models risk falling prey to legislative inertia.[78] Under the *Canadian Charter*, a law that unreasonably and/or unjustifiably limits rights and is thus rights-incompatible is invalidated, forcing the executive and parliament to take active steps to re-enact the rights-incompatible law subject to an override provision, or re-enact a law that pursues a legitimate legislative objective via legislative means that comply with the limitations provisions. However, under statutory models, the rights-incompatible law remains valid, operative and effective, and legislative inertia may prevent or delay remedial legislation. Legislative inertia poses a greater risk in the Australian jurisdictions than the British jurisdiction because the international human rights treaties that Australia is a party to are effectively unenforceable in international law, compared the to the obligation on Britain to implement decisions of the European Court of Human Rights under the *European Convention on Human Rights* (1950).[79]

Regarding judicial activism and illegitimacy, under the *Canadian Charter*, the judiciary invalidates laws that unreasonably and/or unjustifiably limit rights and are thus rights-incompatible, and the executive and parliament need to reframe and develop the policy basis and draft legislation in response. Under statutory instruments, once the judiciary establishes that a law is an unreasonable and/or unjustifiable limit on rights and is thus rights-incompatible, the judiciary is given the additional task of attempting to 'save' the law through re-interpretation: that is, the judiciary is tasked with conceiving of a rights-compatible interpretation of the law *so far as it is possible to do so* (and in some jurisdictions *consistently with statutory purpose*). The legitimacy of the re-interpretation task turns on one's opinion of what is legitimate judicial interpretation and what is illegitimate judicial legislation. Moreover, where a re-interpretation is not possible within the judicial method (and/or not consistent with statutory purpose), the law stands and the judiciary may issue a declaration of incompatibility. Thus, the judiciary can achieve a rights-compatible outcome for legislation through interpretation which cannot be achieved through declaration.[80] The temptation for judges will be to pursue a rights-remedy through judicial re-interpretation, rather than the executive and parliament re-conceiving the legislative objectives and legislative means by which to pursue their policy goal. In summary:

> 'the Canadian judges are only empowered to invalidate rights-incompatible laws; they are *not required* to re-interpret them. Judicial invalidation passes the power back to the representative arms to create a new, alternative law, or to re-enact the impugned law notwithstanding the protected rights.

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

79 *European Convention on Human Rights* ("*ECHR*") (*Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222, art 46 (entered into force 3 September 1953), commonly known as the *European Convention on Human Rights* ('*ECHR*'). Under art 46, a State party must respond to an adverse decision of the European Court of Human Rights by fixing the human rights violation. The judgments impose obligations of results: the State Party must achieve the result (fixing the human rights violation), but the State Party can choose the method for achieving the result.

80 Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (The Constitution Unit, University College London, London, 2002) 48.

> Thus, the argument that, in order to retain parliamentary sovereignty, judicial powers should be limited to interpretation rather than invalidation does not hold true. In Canada, parliamentary sovereignty is preserved by the use of general limitations powers and the s 33 override power, even though judges can invalidate legislation. In Britain (and now in the ACT and Victoria), instead, we must angst over "proper" judicial interpretation versus "improper" judicial law-making, the meaning of "possibility", deciphering when a re-interpretation is "possible" or when a declaration is required, and balancing the legislative intention behind the rights instrument against the legislative intention behind rights-incompatible legislation – in addition to the limits and override questions.'[81]

The AHRC Position Paper is based on a statutory human rights instrument, and the 2008-09 National Human Rights Consultation also proceeded on the basis of a statutory human rights instrument. The remainder of this submission will focus on statutory human rights instruments. However, at the request of the PJCHR, I can supply an additional submission on the *Canadian Charter* as a model for a constitutional instrument.

Recommendations 11 to 13:

11) The Australian Parliament should adopt an inter-institutional dialogue model of rights protection. This is consistent with the AHRC Position Paper.

12) The Australian Parliament should enact a constitutionally entrenched Charter of Rights modelled on the inter-institutional dialogue model embedded in the *Canadian Charter.*

13) If a constitutional instrument is not politically viable, the Australian Parliament should enact a comprehensive statutory human rights instrument modelled on various aspects of the inter-institutional dialogue models embedded in the *UKHRA*, the *ACTHRA*, the *Victorian Charter*, and the *QHRA.* This is consistent with the AHRC Position Paper.

3. ISSUE 3: IF THE AUSTRALIAN PARLIAMENT SHOULD ENACT A FEDERAL *HUMAN RIGHTS ACT*, WHAT ELEMENTS SHOULD IT INCLUDE? IN ADDITION, WHAT IS THE EFFECTIVENESS OF EXISTING HUMAN RIGHTS ACTS/CHARTERS IN PROTECTING HUMAN RIGHTS?

Because the federal human rights instrument will come after the human rights instruments operating in sub-national jurisdictions, it is very difficult to discuss what the federal instrument should include to the exclusion of how the sub-national instruments work. Therefore, these elements are combined here.

[81] Debeljak, 'Submission: National Consultation', above n 77, 49-50.

This section addresses the following questions in the ToR:

- *The broader question:*
  - *to consider developments since 2010 in Australian human rights laws (both at the Commonwealth and State and Territory levels) and relevant case law; and*
- *The specific questions:*
  - *if [the Australian Parliament should enact a federal Human Rights Act], what elements it should include (including by reference to the Australian Human Rights Commissions Position Paper); and*
  - *the effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant caselaw, and relevant work done in other states and territories?*

3.1 THE SUITE OF RIGHTS

3.1.1 A Comprehensive Range of Rights

Australia has international human rights obligations that span the range of civil, political, economic, social and cultural rights. Australia has ratified seven of the nine major international human rights treaties,[82] as follows:

- *International Covenant on Civil and Political Rights* (1966) ('*ICCPR*'),
- *International Covenant on Economic Social and Cultural Rights* (1966) ('*ICESCR*'),
- *International Convention on the Elimination of all Forms of Racial Discrimination* (1966) ('*CERD*'),
- *Convention on the Elimination of all Forms of Discrimination against Women* (1979) ('*CEDAW*'),
- *Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment* (1987) ('*CAT*'),[83]
- *Convention on the Rights of the Child* (1989) ('*CROC*'), [84]
- *Convention on the Rights of Persons with Disabilities* (2006) ('*CPD*').[85]

The two major Covenants guarantee the full range of civil, political, economic, social and cultural rights. The additional sectoral/issue-specific treaties focus on particular human rights contained in the Covenants, in an effort to further elaborate the minimum standards States Parties are obliged to secure in order to guarantee those rights. Many of the specific human rights treaties contain a combination of civil, political, economic, social and cultural rights.[86]

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82 Australia is yet to ratify the *Convention on the Protection of the Rights of All Migrant Workers and members of their Families* (1990), and the *Convention for the Protection of All Persons from Enforced Disappearance* (2006).

83 The *CAT*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

84 The *CRC*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

85 The *CRPD*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

86 For example, *CERD*, *CEDAW*, *CROC*, *CRPD*.

As the AHRC Position Paper recommends,[87] a federal human rights instrument must guarantee the full range of civil, political, economic, social and cultural, developmental, environmental and other group rights. This is for a number of reasons. First, it will ameliorate the impact of Australia's dualist approach to international law, whereby Australia readily guarantees quite comprehensive human rights at the international law level, but refuses to embed comprehensive protection of human rights at the domestic law level.

Second, if the purpose of protecting human rights is to ensure 'that basic safeguards for equality and fairness are in place so that we can prevent the violation of rights, and provide remedies when a violation does occur' – as was stated in the 2008-09 *National Human Rights Consultation: Background Paper*[88] – at a minimum economic, social and cultural rights, in addition to civil and political rights, must be protected.

Third, the universality, indivisibility, interdependence, inter-relatedness and mutually reinforcing nature of all human rights – civil, political, economic, social, cultural, developmental, environmental and other group rights – is now beyond question. This was confirmed in the *Vienna Declaration and Programme of Action*, as adopted by the UN World Conference on Human Rights in Vienna in 1993.[89] Any federal human rights instrument must comprehensively protect and promote all categories of human rights for it to be effective.[90]

There are three areas of anticipated controversy: (a) the difficulty of enforcing economic, social and cultural rights; (b) specifically recognising the rights of indigenous peoples, particularly the right to self-determination; (c) whether rights should extend to Australian citizens only or people within the territory and jurisdiction of Australia. I will address these in turn.

3.1.2 Economic, Social and Cultural Rights

Two arguments are often rehearsed against the domestic incorporation of economic, social and cultural rights. The two arguments are: (a) that Parliament rather than the courts should

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87 Australian Human Rights Commission ('AHRC'), *Free & Equal – Position Paper: A Human Rights Act for Australia, 2*022 ('*AHRC Position Paper*').

88 National Human Rights Consultation Secretariat (Attorney-General's Department), *National Human Rights Consultation Background Paper* (2009) 6.

89 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.

90 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).

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.[91]

These arguments are basically about justiciability. Civil and political rights have historically been considered to be justiciable; whereas economic, social and cultural rights have not been considered to be justiciable. These historical assumptions have been based on the absence or presence of certain qualities. What qualities must a right, and its correlative duties, possess in order for the right to be considered justiciable? To be justiciable, a right is to be stated in the negative, be cost-free, be immediate, and be precise, manageable, non-ideological and 'real'.[92] By way of contrast, a non-justiciable right imposes positive obligations, is costly, is to be progressively realised, is vague, is complex, is ideologically divisive and merely aspirational.[93] Traditionally, civil and political rights are considered to fall within the former category, whilst economic, social and cultural rights fall within the latter category.[94]

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.[95] Let us consider some examples.

The right to life is a classic civil and political right. Assessing this right in line with the Maastricht principles,[96] first, States have the duty to *respect* the right to life, which is largely comprised of negative, relatively cost-free duties, such as, the duty not to take life. Secondly, States have the duty to *protect* the right to life. This is a duty to regulate society so as to diminish the risk that third parties will take each other's lives, which is a partly negative and partly positive duty, and partly cost-free and partly costly duty. Thirdly, States have a duty to *fulfil* the right to life, which is comprised of positive and costly duties, such as, the duty to ensure low infant mortality, and to ensure adequate responses to pandemics and epidemics.

The right to adequate housing – a classic economic and social right – also highlights the artificial nature of the distinctions. First, States have a duty to *respect* the right to adequate housing, which is a largely negative, cost-free duty, such as, the duty not to forcibly evict people from their homes. 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.

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91 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.

92 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.

93 See generally Warner, above n 92, 395. See further Hunt, above n 92, 141.

94 See generally Warner, above n 92, 395. See further Hunt, above n 92, 141.

95 See generally Warner, above n 92, 395. See further Hunt, above n 92, 141.

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

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, and so on. 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 under the *South African Bill of Rights* (*SABOR'*)[97] 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 (see the s 26 right to housing and the s 27 right to health care, food, water and social security). 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.[98] 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 associated with economic, social and cultural rights, the limited approach to the progressive realisation of the positive obligations, and the focus on rationality and reasonableness, there is no reason to preclude formal and justiciable protection of economic, social and cultural rights in Australia. The following summary of some of the early jurisprudence generated under the South African Constitution demonstrates these points.

In *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997),[99] Soobramoney argued that a decision by a hospital to restrict dialysis to acute renal/kidney patients who did not also have heart disease violated his right to life and health. The Constitutional Court rejected this claim, given the intense demand on the hospital's resources. It held that a 'court will be slow to interfere with rational decisions taken in good faith by the political organs and medical

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97 In South Africa, the human rights guarantees are found in ch 2 of the *Constitution of the Republic of South Africa 1996* (RSA) and are commonly referred to as the 'Bill of Rights'. In this submission, the *Constitution of the Republic of South Africa 1996* (RSA) ch 2 will be referred to as the '*South African Bill of Rights*' ('*SABOR'*).

98 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).

99 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC).

authorities whose responsibility it is to deal with such matters.'[100] In particular, it found that the limited facilities had to be made available on a priority basis to patients who could still qualify for a kidney transplant (i.e. those that had no heart problems), not a person like the applicant who was in an irreversible and final stage of chronic renal failure.

In *Government of the Republic South Africa & Ors v Grootboom and Ors* (2000),[101] 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),[102] 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 childbirth. 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

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100 Ibid [29].

101 *Government of the Republic South Africa & Ors v Grootboom and Ors* 2000 (11) BCLR 1169 (CC).

102 *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).

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.'[103]

The increasing acceptance of the justiciability of economic, social and cultural rights has led to a remarkable generation of jurisprudence on these rights. Interestingly, this reinforces the fact the economic, social and cultural rights do indeed have justiciable qualities – the rights are becoming less vague and more certain, and thus more suitable for adjudication. Numerous countries have incorporated economic, social and cultural rights into their domestic jurisdictions and the courts of these countries are adding to the body of jurisprudence on economic, social and cultural rights.[104]

Moreover, the scope of, content of, and minimum obligations associated with economic, social and cultural rights are constantly being developed by the United Nations Committee on Economic, Social and Cultural Rights[105] through its concluding observations to States Parties' periodic reports,[106] through its General Comments, and through the resolution of individual communications.[107] This ever-increasing body of expert opinion will allow Australia 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

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103 *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 [80].

104 See generally Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008).

105 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)).

106 *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, arts 16 and 17 (entered into force 3 January 1976).

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

the realities faced by a State when implementing its obligations.[108] It essentially 'imposes an obligation to move *as expeditiously and effectively as possible* towards'[109] the goal of eventual full realisation. Surely this is not too much to expect of a developed, wealthy, democratic country such as Australia?

Furthermore, both the *ACTHRA* and *QHRA* have now incorporated elements of economic, social and cultural rights in their instruments. Section 27A of the *ACTHRA* contains 'the right to have access to free school education appropriate to … needs' and 'the right to have access to further education and vocational and continuing training'. Both rights are limited to two 'immediately realisable aspects', being the enjoyment of 'these rights without discrimination', and the power to choose the religious or moral education in conformity with a child's parent's or guardian's conviction. This is very limited protection: (a) the scope of the right is limited by the words 'access to' the right, rather than the *ICESCR* guarantee of the right in full; (b) it is limited to immediately realisable goals rather than progressive realisation; (c) with the protection of rights via non-discrimination provisions being very familiar to the Australian legal landscape.

The *QHRA* goes further, protecting rights to education and health services. Section 36 provides that '[e]very child has the right to have access to primary and secondary education appropriate to the child's needs', and '[e]very person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all'. Section 37 provides that '[e]very person has the right to access health services without discrimination' and that a 'person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.' Again, this is limited protection of these rights, with (a) the rights to education limited by the words 'access to', (b) the right to health services being limited by non-discriminatory access to, and (c) the emergency medical treatment being very specifically limited in its terms.

Let us pause for a moment to explore 'access to'. As Ssenyonjo states, 'the right of *access to*' is not the same as *the right to*'.[110] The term 'access to' guarantees non-discriminatory access to a service that is being offered and is available; whereas the 'right to' suggests an entitlement to the service provided by the right even where is it not currently offered or available – that is, while the former does not force a State to provide anything; the latter obliges a State to utilise its resources to make the service available.[111]

I welcome the inclusion of economic, social and cultural rights in the *ACTHRA* and *QHRA*, even if limited in scope and application. Recognition of *some* economic, social and cultural

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[108] 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).

[109] Ibid [9].

[110] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd ed, Hart Publishing, Oxford, 2016), ch 5, 275

[111] Ibid, 275-276. He states: '"right to" … implies an entitlement to the protected right even when it may not be available, i.e. a state would be obliged to make it available (where this is beyond the State's available resources, a State would need actively to seek international assistance and co-operation)': at 276.

rights is a *first step* toward comprehensive recognition of the full suite of economic, social and cultural rights, and the obligation for progressive realisation.

The AHRC Position Paper takes a risk-averse approach to the recognition and enforcement of economic, social and cultural rights. In essence, the AHRC seeks to guarantee economic, social and cultural rights in a federal human rights instrument in a manner that is justiciable and constitutionally compliant, which means (a) an initial focus on 'access to' to those rights, and (b) a guarantee of the essential, core and/or immediately realisable aspects of those rights, (c) with the inclusion of procedural safeguards. The AHRC recognises that this is risk-averse, but potentially constitutionally necessary, approach:

> 'The Commission has designed its proposals for ICESCR implementation with the aim of ensuring compliance with Australia's Constitution. The Commission therefore proposes articulations of ICESCR rights that are somewhat narrower than the full expression of those rights contained in ICESCR. Specifically, the Commission has chosen not to require progressive realisation principles to be considered by the courts.
>
> The Commission notes that it does not consider progressive realisation principles to be inherently non-justiciable. However, it acknowledges the importance of providing certainty that the implementation of ICESCR is constitutional, suitably adapted for the Australian context, and directly enforceable by the courts. It also recognises the importance of providing sufficient clarity about the contents of rights – both for the benefit of judges and public authorities interpreting and applying the rights; and for the benefit of individuals that seek to rely upon them through complaints and judicial review processes.
>
> The Commission has focused on including the essential, core and/or immediately realisable aspects of ICESCR rights. This renders the rights more specific, but also somewhat narrower. All ICESCR rights are implemented through the Commission's proposals, to varying degrees.'[112]

I have had the opportunity to read the following submission: Assoc Prof Cristy Clark, Prof Beth Goldblatt, Assoc Prof Jessie Hohmann, and Dr Genevieve Wilkinson, *Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework: Submission from the undersigned members of the Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand)*, June 2023 ('ESCR Network Submission'). The views expressed in ESCR Network Submission more closely align with the state of international and comparative jurisprudence I outline above. I endorse the ESCR Network Submission, and draw particular attention to the following overarching points:

- It is important 'to argue for the full equivalence of economic, social and cultural rights (ESCRs) with civil and political rights (C&PRs) in any proposed Human Rights legislation emerging from this Inquiry and within a proposed human rights framework for Australia and for the inclusion of environmental rights.'[113]

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112 AHRC, *AHRC Position Paper*, above n 87, 164.

113 Assoc Prof Cristy Clark, Prof Beth Goldblatt, Assoc Prof Jessie Hohmann, and Dr Genevieve Wilkinson, *Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights*

- Constitutional issues 'that arose in the 2009 Report of the National Human Rights Consultation Committee (NHRCC), [have] been subject to expert critique in the years that followed, and should now be considered outdated.'[114]

- 'Australia finds itself in the unique position of being able to enshrine a Commonwealth Human Rights Act that is forward looking and responds to the present and future. The aim of the Australian government and public should be a charter of rights for our 21st century challenges and opportunities, including the relationship between human beings and the unique and precious Australian land/seascape and environment; the relationship between Australia's First Peoples and those who have since made Australia home; emerging technologies and new ways of living; and new forms of inequality or disadvantage.'[115]

- 'Once bills of rights are enshrined, they can be legally or politically difficult to update or change. This is why it is vital for Australia to embrace the potential of future-facing human rights. The major challenges of the 21st century (which include climate change, unregulated AI, economic inequality, democratic erosion, insecurity and growing inequality) require a visionary approach to human rights that equips our society and governments with the tools to ensure these challenges are informed by appropriate rights and rights frameworks.'[116]

I support the 14 recommendations put forward in the ESCR Network Submission and endorse the reasoning within the ESCR Network Submission.

3.1.3 Specific Rights of Indigenous Australians

Any formal and comprehensive domestic recognition of human rights should contain specific recognition of the rights of indigenous peoples, which must include the right to self-determination and the economic, social and cultural rights that flow from this. It must also be modelled on the United Nations *Declaration on the Rights of Indigenous Peoples* (2007). Moreover, the rights protected must be broad enough to counter the dispossession, discrimination and inequalities suffered and continuing to be suffered by First Nations peoples.

Subsuming the rights of indigenous peoples under the generic human right aimed at protecting minorities – art 27 of the *ICCPR* – is not sufficient. Such generic minority protection does not recognise the special place that indigenous peoples have in Australian history (vis-à-vis other minority groups) and it does not address all the areas of human rights protection owed to indigenous peoples (rather, it only covers religious, linguistic and cultural issues).

Framework: Submission from the undersigned members of the Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand), June 2023, 4 ('ESCR Network Submission').

114 Ibid 5 (citations omitted).

115 Ibid 5.

116 Ibid 5 (citations omitted).

Further, any federal human rights instrument must align with the constitutional recognition of First Nations peoples through a Voice to Parliament, and the subsequent complete realisation of the Uluru Statement from the Heart.

3.1.4 Rights to Extent to all Individuals within the Territory and Jurisdiction of Australia

To ensure consistency with Australia's international human rights obligations, particularly under art 2(1) of the *ICCPR*,[117] any comprehensive and formal protection of human rights in Australia must extend to all individuals within the territory and subject to the jurisdiction of Australia. Any suggestion to limit the protection of rights to Australian citizens or residents must be vigorously resisted.

Recommendations 14 to 17:

14) A federal human rights instrument must guarantee the full range of civil, political, economic, social, cultural, developmental, environmental and other group rights. This is consistent with the AHRC Position Paper.

15) Although it is understandable that the AHRC Position Paper takes a risk-averse approach to the protection and promotion of economic, social and cultural rights in a federal human rights instrument, it does not adequately reflect the state of international and comparative jurisprudence regarding the content of economic, social and cultural rights, the obligations on States to (eventually) fully realise those rights, and the numerous methods and modes of enforceability including their justiciability. I support the 14 recommendations put forward in the ESCR Network Submission and endorse the reasoning within the ESCR Network Submission.

16) A federal human rights instrument must contain specific recognition of the rights of indigenous peoples, including the right to self-determination; be modelled on the United Nations *Declaration on the Rights of Indigenous Peoples* (2007); align with constitutional recognition and the Voice to Parliament; and further the realisation of the Uluru Statement from the Heart. This is consistent with the AHRC Position Paper.

17) A federal human rights instrument must extend to all individuals within the territory and subject to the jurisdiction of Australia. This is consistent with the AHRC Position Paper.

3.2 LIMITATIONS ON RIGHTS

Rights are not 'absolute trumps' over all other majority preferences and aspirations. In fact, most rights are *not* absolute. Rights may be balanced against and limited by competing rights, and by other valuable but non-protected principles, interests, values and communal needs within a polity. Moreover, rights instruments need to be flexible enough to respond to unforeseen events and future necessities. There are three main considerations.

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[117] See also Human Rights Committee, *General Comment 15: The Position of Aliens under the Covenant* (11 April 1986).

3.2.1 Internal vs External Limitations provisions

A limitation provision may be drafted *internally* to each right, or *externally* and thus apply to all of the protected rights.

The *ICCPR* uses *internal* limitations provisions. The appropriateness of allowing a limitations provision is assessed right by right, and the particular legislative objectives that are considered a reasonable basis upon which to impose a limit are articulated right by right. Examples of these are to be found in arts 12, 18, 19, 21, and 22 of the *ICCPR*. The range of particular legislative objectives, include: the protection of public health, order or morals; the national interest; national security, public safety or the well-being of the country; public order; the prevention of disorder or crime; or the protection of the rights and freedoms of others.[118] Such internal limitations must be in accordance with law (or prescribed by law), and necessary in a democratic society (which is acquitted by a proportionality test).

More modern rights instruments, including those adopted in the sub-jurisdictions in Australia, utilise *external* limitations provisions (sometimes referred to as 'overarching' or 'general' limitations). For example, section 7(2) of the *Victorian Charter* provides that the protected 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.' Section 7(2) then lists the factors to be balanced when assessing limits, as follows: '(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purposes; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve' – a minimum impairment test. The global test is borrowed from s 1 of the *Canadian Charter*,[119] whilst the factors are borrowed from s 36 of the *SABOR*[120], which itself is modelled on the jurisprudence developed under the *Canadian Charter*.

The main difference between internal limitations and external limitations is the range of legislative objectives that are considered sufficiently pressing to allow a limitation on a right.

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118 For example, art 22(2) of the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) states that '[n]o restrictions may be placed on the exercise of [the right to freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others; and art 9(2) of the *ECHR*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) states that '[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

119 The general limitations clause in s 7 of the *Victorian Charter* is based on the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 1 ('*Canadian Charter*'). Oddly, the Explanatory Memorandum notes that the general limitations clause is based on the *Bill of Rights 1990* (NZ): Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 9. However, it is more honest to acknowledge the influence of the *Canadian Charter*, which predates the New Zealand legislation by eight years and upon which the New Zealand legislation was based.

120 *SABOR 1996* (RSA), s 36.

The range of objectives are specified for internal limitations (albeit in very broad terms), whereas the objectives are left open to what is 'reasonable' for external limitations.

Although any federal human rights instrument will seek to domestically implement the *ICCPR*, I recommend an external limitations provision be adopted in favour of internal limitations. External limitations allow for much greater flexibility when identifying rights-limiting legislative objectives, and the adoption of a singular analytical framework for assessing the demonstrable justifiability of the legislative means adopted to implement the limitation will allow for more consistent development of the test, and foster greater clarity and predictability.

3.2.2 Absolute Rights and the External Limitations Provision

As mentioned above, *not* all rights are absolute; hence the need to provide for a limitations provision. However, a human rights instrument must accommodate those rights that *are* "absolute rights" under international law.

Currently, the sub-national human rights instruments fail to accommodate absolute rights. For example, the s 7(2) limitations provision under the *Victoria Charter* applies to all of the protected rights, and thus violates international human rights law to the extent that it applies absolute rights.

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, 432-435.

Any federal human rights instrument must exclude absolute rights from the coverage of the external limitations provision to be consistent with Australia's international human rights obligation.

3.2.3 The Factors for 'Demonstrable Justification'

Each sub-national jurisdiction allows reasonable limits as can be demonstrably justified in a free and democratic society. However, there is variation in the factors listed to assist with the assessment of the global questions of reasonableness and demonstrable justification.

As mentioned above, s 7(2) of the *Victorian Charter* lists: '(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purposes; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve' – a minimum impairment test.

By contrast, s 13(2) the *QHRA* lists: '(a) the nature of the human right; (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom; (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose; (d) whether there are any less restrictive and reasonably available ways to achieve the purpose; (e) the importance of the purpose of the limitation; (f) the importance of preserving the human right,

taking into account the nature and extent of the limitation on the human right; and (g) the balance between the matters mentioned in paragraphs (e) and (f).'

In my opinion, the factors under s 7(2)(b) and (c) of the *Victorian Charter* are better articulated under s 13(2)(b), (f) and (g) of the *QHRA*, particularly in the nuance that is added to each factor and the clarity given to the proportionality test through ss 13(2)(e) – (g). The *QHRA* formulation of factors should be adopted in a federal human rights instrument.

The issue of the role of limitations in assessing 'rights compatibility' will be addressed under "Mechanism 1" below.

Recommendations 18 to 21:

18) A federal human rights instrument should adopt an external/overarching limitation provision. This is consistent with the AHRC Position Paper.

19) The external limitation provision must explicitly state that the limitation provision does not apply to the following absolute rights:

- **a) the prohibition on genocide (art 6(3));**
- **b) the prohibition on torture or cruel, inhuman and degrading treatment or punishment (art 7);**
- **c) the prohibition on slavery and servitude (arts 8(1) and (2));**
- **d) the prohibition on prolonged arbitrary detention (part of art 9(1));**
- **e) the prohibition on imprisonment for a failure to fulfil a contractual obligation (art 11);**
- **f) the prohibition on the retrospective operation of criminal laws (art 15);**
- **g) the right of everyone to recognition everywhere as a person before the law (art 16); and**
- **h) the right to freedom from systematic racial discrimination (arts 2(1) and 26).**

This is not inconsistent with the AHRC Position Paper, but covers a wider suite of absolute rights.

20) The global test within the external limitations provision should state that: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.' This is consistent with the AHRC Position Paper.

21) The factors relevant to the global test within the external limitations test should be:

- **a) (a) the nature of the human right;**
- **b) (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;**
- **c) (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;**
- **d) (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;**
- **e) (e) the importance of the purpose of the limitation;**

f) (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; and
g) (g) the balance between the matters mentioned in paragraphs (e) and (f).

This is not inconsistent with the AHRC Position Paper.

3.3 MECHANISM 1: MECHANISMS CONCERNING RIGHTS-COMPATIBLE LEGISLATION

The first 'enforcement' mechanism under statutory human rights legislation is the obligation to interpret statutory provisions compatibly with human rights.

Since 2010, there have been some key developments under the *Victorian Charter* that have undermined the manner in which this mechanism operates; and these developments have not been remedied under the *ACTHRA* and *QHRA* or related jurisprudence. This part of the submission will focus on the problems as they relate to the *Victorian Charter*, but these problems have analogues under the *ACTHRA* and the *QHRA*, and should be remedied in all three sub-national instruments and avoided in a federal instrument.

The key provisions from the *Victorian Charter* are as follows:

- Section 7(2) states: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom…'
- 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.'
- Note: there is no definition of the term 'compatible with human rights'.

3.3.1 Key Drafting Problems and Recommendations for Change

The scope and meaning of s 32(1) is contested, and the manner in which s 32(1) interacts with the s 7(2) limitations provision is disputed. There are two key drafting matters that need to be accounted for in a federal human rights instrument: (a) a definition of 'compatible with human rights' must be inserted into the instrument; and (b) the phrase 'consistent with their purpose' needs to be removed from the equivalent of s 32(1).

Both amendments to the *Victorian Charter* and any equivalent federal human rights instrument will ensure that the rights-compatible statutory interpretation obligation allows for remedial (as opposed to ordinary) interpretation where 'possible', and that limitations analysis under s 7(2) or an equivalent federal human rights instrument is part of assessing whether a statutory provision is 'compatible with human rights'. These two amendments will also resolve disagreements about the methodological approach to rights-compatible statutory interpretation.

The issues surrounding the interpretation of ss 7(2) and 32(1) and their interaction have arisen through the Victorian Court of Appeal decision in *R v Momcilovic* ('*VCA Momcilovic*')[121] and the High Court of Australia decision in *Momcilovic v R* ('*HCA Momcilovic*').[122] I have provided extensive commentary around both decisions. It is not appropriate to reproduce a detailed analysis of this commentary here due to its complexity, but such analysis is available in:

- 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, 'Legislating Statutory Interpretation under the Victorian *Charter*: An Unusual Tale of Judicial Disengagement with Rights-Compatible Interpretation' in Micah Rankin, Lorne Neudorf and Christopher Hunt (eds), *Legislating Statutory Interpretation: Perspectives from the Common Law World* (2018, Thomson Reuters Canada, Toronto), 183-234

In brief, s 32(1) of the *Victoria Charter* is based on s 3(1) of the *UKHRA*:

> Section 32(1): 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.
>
> Section 3(1): 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 relevant difference[123] between the provisions is the addition of 'consistently with their purpose' in s 32(1). This addition has produced two competing judicial opinions. On one view, 'consistently with their purpose' was intended to codify the jurisprudence on s 3(1) of

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121 *R v Momcilovic* [2010] VSCA 50 ("*VCA Momcilovic*").

122 *Momcilovic v R* [2011] HCA 34 ("*HCA Momcilovic*").

123 Another difference is that s 32(1) refer to 'be interpreted' whereas s 3(1) of the *UKHRA* uses the words 'read and given effect to' as did the Draft Victorian Charter: Draft Charter of Human Rights and Responsibilities, s 32 in Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005, Appendix, 191 ('*Rights Responsibilities and Respect*'). Commentators had failed to attribute any significant to these differences in terminology: Priyanga Hettiarachi (2007) 7 *Oxford University Commonwealth Law Journal* 61, 83; 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. However, some judges have given them significance: see *VCA Momcilovic* (2010) VSCA 50 [77]; *HCA Momcilovic v R* [2011] HCA 34, 544 (Crennan and Kiefel JJ). For critical analysis of the judicial reasoning, see 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, 29-30 ('Who is Sovereign Now?').

the *UKHRA* into the *Victorian Charter*.[124] The legislative history to the *Victorian Charter* supports the view that 'consistently with their purpose' was intended to codify the British jurisprudence – both by referring to that jurisprudence by name[125] and using concepts from that jurisprudence in explaining the effect of the inserted phrase.[126] Three individual judges of the Supreme Court of Victoria, sitting as individual judges on three individual cases, issued judgements supportive of that view – being Nettle JA,[127] Warren CJ[128] and Bell J.[129]

On another view, 'consistently with their purpose' enacted a unique interpretive obligation, with three judges sitting as the Victorian Court of Appeal in the one case – being *VCA Momcilovic* – finding that 'consistently with their purpose' were 'words of limitation [that] stamped s 32(1) with quite a different character from that of s 3(1) of the *UKHRA*'.[130] This view was supported by a majority of High Court judges in *HCA Momcilovic*.[131] According to the *VCA Momcilovic* Court, the significance of s 32(1) 'is that Parliament has

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124 Most particularly *Ghaidan v Godin-Mendoza* [2004] UKHL 30 ('*Ghaidan*').

125 Human Rights Consultation Committee, *Rights Responsibilities and Respect*, above n 123, 82-83.

126 Ibid, 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.'

127 See Nettle JA in *RJE v Secretary to the Department of Justice & Others* [2008] VSCA 265, [114] – [116] ('*RJE*'), where his Honour followed the NZ/UK Methodology.

128 Chief Justice Warren essentially followed the NZ/UK methodology in *Re Application under the Major Crime (Investigative Powers Act); Das v Victorian Equal Opportunity and Human Rights Commission* 2004 [2009] VSC 381 [50] – [53] ('*Das*'). Her Honour refers to Nettle JA's endorsement in *RJE* of the approach of Mason NPJ in *HKSAR v Lam Kwong Wai* [2006] HKCFA 84 ('*HKSAR*'), 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 Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 ('*Donoghue*'), and expressly follows the *Donoghue* approach: see *RJE* [2008] VSCA 265, [116]. This is why Warren CJ's approach is described as essentially following the UKHRA approach.

129 Justice Bell held that s 32(1) and s 3(1) 'express the same special interpretative obligation and are of equal force and effect': *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 [215] ('*Kracke'*). His Honour held that "consistently with [statutory] purpose" 'was intended to put into s 32(1) the approach to s 3(1) adopted by the House of Lords in *Ghaidan v Godin-Mendoza* (which had been decided before the *Charter* was enacted)': at [214] (citations omitted). His Honour stated that '[t]he boundaries identified in *Ghaidan v Godin-Mendoza*, on which the requirement [in s 32(1)] is based, provide an adequate balance between giving the special interpretative obligation full force and proper scope on the one hand and safeguarding against its impermissible use on the other. Adopting narrower boundaries would weaken the operation of s 32(1) in a way that was not intended': at [216]. Justice Bell approved statements from *Ghaidan* and *Sheldrake*, suggesting that s 32(1) was a 'very strong and far reaching' obligation, and may even require 'the court to depart from the legislative intention of Parliament' (at [218]), and Justice Bell adopted the NZ/UK methodology (at [52] – [65]).

130 *VCA Momcilovic* (2010) VSCA 50 [74].

131 Six of seven HCA judges agreed that s 32(1) of the *Charter* was not analogous to s 3(1) of the *UKHRA*: see *HCA Momcilovic* (2011) 280 ALR 221, 37 [18], 50 [51] (French CJ); 210 [544], 217 [565], [566] (Crennan and Kiefel JJ); 92 [170] (Gummow J); 123 [280] (Hayne J); 250 [684] (Bell J). See further, *Victoria Police Toll Enforcement & Ors v Taha and Others; State of Victoria v Brookes and Another* (2013) 49 VR 1; [2013] VSCA 37, 62 [190] (Tate JA).

embraced and affirmed [the principle of legality] 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.'[132]

The *VCA Momcilovic* Court held that s 32(1) 'does not create a "special" rule of interpretation [in the *Ghaidan* remedial 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.'[133] Their Honours then suggested the following methodology for assessing whether a legislation violates a *Victorian Charter* right, as follows ("*VCA 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*.
>
> Step 3: If so, apply s 7(2) of the *Charter* to determine whether the limit imposed on the right is justified.[134]

Of relevance, s 7(2) is not given a role in deciding whether legislation in 'compatible with rights', but is rather a preparatory step for judges to consider in exercising their discretion to issue a declaration of inconsistent interpretation under s 36(2). The *HCA Momcilovic* split on the issue of the role of s 7(2).

The *HCA Momcilovic* decision did not resolve the differences amongst the Victorian judiciary – in particular, the differences between the three individual judges and the three-judge judgment. If anything, the *HCA Momcilovic* decision muddied the waters even further. The current approach to s 32(1) of the *Victorian Charter* by the Victorian courts has been summarized by me as follows:[135]

'6. CURRENT APPROACHES TO SECTION 32

Confronted with no *ratio* or clear majority from *HCA Momcilovic*, Victorian superior courts consider *VCA Momcilovic* to not be overruled and, to varying degrees, continue to rely on *VCA Momcilovic*. The Victorian superior court judgments fall into two

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132 *VCA Momcilovic* (2010) VSCA 50 [104].

133 *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.

134 *VCA Momcilovic* [2010] VSCA 50 [35].

135 Julie Debeljak, 'Legislating Statutory Interpretation under the Victorian *Charter*: An Unusual Tale of Judicial Disengagement with Rights-Compatible Interpretation' in Micah Rankin, Lorne Neudorf and Christopher Hunt (eds), *Legislating Statutory Interpretation: Perspectives from the Common Law World* (2018, Thomson Reuters Canada, Toronto), 183, 222-228. (citations omitted).

categories: first, judgments that follow *VCA Momcilovic* based primarily on French CJ's judgment; and secondly, judgments that suggest s 32(1) reaches beyond the codification of the principle of legality.

This current approach is unsatisfactory given *VCA Momcilovic* offered only tentative views; the flawed reasoning underlying *VCA Momcilovic*; and the tendency to coalesce around the lowest common denominator of the HCA judgments when considering provisions in isolation – in a context where judicial commentary on isolated provisions is misleading without consideration of how the interconnected provisions were thought to interact with that provision.

6.1 Follow *VCA Momcilovic*

The preponderance of Victorian decisions post-*Momcilovic* support *VCA Momcilovic* and French CJ's judgment. *Slaveski* set the tone. In *Slaveski*, Warren CJ, Nettle and Redlich JJA summarised the different approaches in *HCA Momcilovic*, searching for a ratio on s 32(1). Their Honours noted that all judges except Heydon J held:

> that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision … in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky*.

In their Honours opinion, *HCA Momcilovic* indicated that 'the effect of s 32(1) is limited'.

Their Honours cited from French CJ's opinion that s 32(1) is a codification of the principle of legality, and summarised French CJ's judgment into four rules. First, 'if the words of a statue are clear, the court must give them that meaning'; secondly, '[i]f the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings *best accords* with the human right in question'; thirdly, '[e]xceptionally, a court may depart from grammatical rules to give an *unusual or strained* meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment'; and fourthly, '[e]ven if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.'

Given the lack of *any* ratio in *HCA Momcilovic*, *Slaveski* is problematic for identifying statutory construction under *Project Blue Sky* as *the* s 32(1) ratio. Moreover, the difference between '*unusual or strained*' interpretation under *Project Blue Sky* is not distinguished from *remedial* interpretation in *Ghaidan*. Further, to discuss s 32(1) in isolation from the broader methodology is incomplete. French CJ implicitly sanctioned the VCA methodology giving s 32(1) no remedial reach. However, the VCA methodology was rejected by all other judges; whilst four judges approved the NZ/UK methodology. Finally, and relatedly, the disparate views on the interconnecting provisions must be accounted for. To accept French CJ's characterisation as representative of *HCA Momcilovic* overlooks the significant

differences in opinion amongst the judges on the role of ss 7(2) and 36(2), and the interaction of the three provisions.

In *Slaveski*, their Honours noted the absence of a ratio concerning s 7(2), but held it was 'unnecessary to decide' whether it was bound by *VCA Momcilovic*. In *Noone*, Warren CJ and Cavanough AJA more fully explore the divisions in *HCA Momcilovic* on s 7(2), identifying 'a 4:3 majority in the High Court that s 7(2) informs the s 32(1) interpretative task.' However, their Honours opined that because Hayne and Heydon JJ dissented on the final orders, their judgments 'could not form part of the ratio of *Momcilovic* and hence there is no ratio on this point in the High Court.' Their Honours discussed whether the VCA is bound by *VCA Momcilovic*, but did not making a ruling. Similarly, Nettle J could not discern a ratio from *HCA Momcilovic* on s 7(2); but in contrast, his Honour preferred to follow the *VCA Momcilovic* 'approach until and unless the High Court determine that it is incorrect'.

The decisions of *Nigro*, *Kaba*, *Kuyken*, *Bare* and *DA* essentially follow *Slaveski*, and do not progress matters much further. In *Nigro*, Redlich, Osborn and Priest JJA held that *VCA Momcilovic* and *HCA Momcilovic* 'rejected the argument' that 'consistently with their purpose' was intended to codify *Ghaidan* and thereby allow a 'court where necessary [to] "depart from the intention of the Parliament which enacted the legislation."' Moreover, Justice Bell in *Kaba* held 'that, unlike s 3(1) of the *Human Rights Act* …, s 32(1) of the *Charter* did not permit an interpretation to be adopted which was contrary to parliament's intention when originally enacting the provision in question', and 'in this respect, the scope of s 32(1) of the *Charter* is *narrower* than that of s 3(1) of the *Human Rights Act*.' Bell J accepted that s 32(1) 'should be approached in accordance with … *Slaveski*'; that is, 'that s 32(1) operates like the principle of legality but with a wider field of operation, i.e. one that takes the human rights specified in the *Charter* into account at their highest and without regard to s 7(2).'

6.2. **Section 32(1) Beyond Principle of Legality**

In *WK*, Nettle JA acknowledged that *HCA Momcilovic* did 'not yield a single or majority view' on s 32(1). His Honour considered French CJ, and Crennan and Kiefel JJ, to have adopted a view similar to *VCA Momcilovic*; but that Gummow, Hayne and Bell JJ 'took a broader view of s 32, which attributes greater significance and utility to s 7.' The impact of the differing opinions was demonstrated through the disputed right to privacy: it was either an unqualified right on the former's reasoning or a qualifiable right on the latter's reasoning. His Honour did not have to choose between the approaches, and did not express a preference. Yet Nettle JA's judgment is significant for recognising the *impact* s 7(2) characterisation has on the (non-)absoluteness of rights and on s 32(1) characterisation, and that *HCA Momcilovic* cannot be reduced to *a* ratio based on *a* provision.

In *Taha*, Tate JA referred to and cited from French CJ's judgment. Her Honour stated that 'the proposition that s 32 applies to the interpretation of statutes in the same manner as the principle of legality but with a broader range of rights in its field of application should *not* be read as implying that s 32 is no more than a "codification" of the principle of legality.' Her Honour noted that 'this would be to misread the reasoning of the High Court', and 'to overlook' the 'observations made by Gummow

J (with whom Hayne J relevantly agreed)', citing the above-quoted passage where Gummow J discusses legislative intention, *Project Blue Sky*, and departures from the literal or grammatical meaning.

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

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

Tate JA did not need to resolve 'the interaction between s 32 and the principle of legality' because it was 'sufficient to treat s 32 … as *at least* reflecting the common law principle of legality.'

Such nuanced consideration of the judgments in *HCA Momcilovic* is welcomed. Including consideration of Bell and Heydon JJ's judgments may take Victorian courts even further from the principle of legality characterisation.

7. DIFFICULTIES WITH THE JURISPRUDENCE

Reliance by Victorian superior courts on the 'tentative views' in *VCA Momcilovic* as confirmed by French CJ is understandable given the conflicting multiplicity of views on the HCA, but it is lamentable. The *Slaveski*-based response to *HCA Momcilovic* failed to acknowledge the differences in reasoning between the judgments, and the differing implications for provisions and their interaction with other provisions that flows from the different reasoning. Nettle and Tate JJA better recognized the nuances, but their opinions may not prevail.

Beyond this, there are serious flaws in the jurisprudence. These flaws must be addressed and, in doing so, the preferred methodology may more closely reflect the NZ/UK methodology.'[136]

The *ACTHRA* and the *QHRA* are also affected by the decisions discussed above, given that their provisions are similar to the *Victorian Charter*.

The following commentary is based on my extensive scholarly commentary, and will offer a summary of the complex arguments underlying my recommendations for the two key amendments.

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[136] Julie Debeljak, 'Legislating Statutory Interpretation under the Victorian *Charter*: An Unusual Tale of Judicial Disengagement with Rights-Compatible Interpretation' in Micah Rankin, Lorne Neudorf and Christopher Hunt (eds), *Legislating Statutory Interpretation: Perspectives from the Common Law World* (2018, Thomson Reuters Canada, Toronto), 183, 222-228. (citations omitted).

3.3.2 Role of Limitations in Assessing "Rights-Compatibility"

Let us consider the role of s 7(2) of the *Victorian Charter*. As stated, some judges have held that s 7(2) has no role to play in relation to statutory interpretation under s 32(1); whilst some judges have held that it is only relevant to the exercise of judicial discretion under the s 36(2) power to issue a declaration of inconsistent interpretation. In my opinion, both interpretations of the role and interaction of s 7(2) are *incorrect*. The reasoning behind my opinion is quite complex, and is summarised in:

- Julie Debeljak, 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, 1-13.

Were the federal Parliament to adopt a federal human rights instrument modelled on the *Victorian Charter*, I recommend that any equivalent to the s 7(2) limitations provision clearly indicate that the concept of 'compatibility with human rights' includes s 7(2) analysis – that is, legislation will be 'compatible with human rights' where the legislation imposes a limitation on rights but that limitation is reasonable and demonstrably justifiable. The *QHRA* has achieved this through the adoption of a definition of 'compatible with human rights', and this would resolve the uncertainties and disagreements surrounding the operation of limitations under the *Victorian Charter*. Section 8 of the *QHRA* states:

> An act, decision or statutory provision is ***compatible with human rights*** if the act, decision or provision—
> (a) does not limit a human right; or
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.

Moreover, I recommend that a federal human rights instrument clarify the interaction between the limitations provision and the obligation to interpret legislation rights-compatibly, and that this clarification explicitly indicate that limitations analysis is part of the process of undertaking rights-compatible statutory interpretation based on the so-called "NZ/UK Methodology", as follows:

> *The "Rights Questions"*
> First: Does the legislative provision limit/engage any of the protected rights?
>
> Second: If the provision does limit/engage a right, is the limitation justifiable under the general limitations power? [e.g. s 7(2) *Victorian Charter*/ s 13 *QHRA*.]
>
> *The "Charter Questions"*
> Third: If the provision imposes an unjustified limit on rights, interpreters must consider whether the provision can be "saved" through a rights-compatible interpretation; accordingly, the interpreter must alter the meaning of the provision in order to achieve rights-compatibility. [e.g. s 32(1) *Victorian Charter*/ s 48(1) and (2) *QHRA*.]

Fourth: The interpreter must then decide whether the altered rights-compatible interpretation of the provision is "possible". [e.g. based on an amended s 32(1) of the Victorian *Charter*/ s 48(1) and (2) *QHRA*.]

The Conclusion…
Interpretative Remedy: If the rights-compatible interpretation is "possible", this is a complete remedy to the human rights issue. [e.g. based on an amended s 32(1) Victorian *Charter*/ s 48(1) and (2) *QHRA.*]

No Interpretative Remedy:

Victorian Charter/*QHRA*-equivalent: If the rights-compatible interpretation *is not* 'possible', the judge may issue a declaration of inconsistent interpretation; but the rights-incompatible legislation remains valid, operative and enforceable.

OR

AHRC Proposal: If the rights-compatible interpretation *is not* "possible", the legislation remains valid, operative and enforceable; and the executive and parliament will be notified of this by the Attorney-General and will need to consider whether to address the rights-incompatibility through legislative amendment.

The NZ/UK method is important for the role of s 7(2), as I have explained earlier:

> '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.
>
> … 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.'[137]

[137] Julie Debeljak 'Eight-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, 4 ('Eight-Year Review').

It is important to note here that including limitations assessment at the second step of analysis in fact supports the sovereignty of parliament. If a limitation is reasonable and demonstrably justifiable, the interpretation task ends here and judges apply the law as enacted by parliament. Recall, human rights are not 'absolute trumps' over democratic decision-making, and limitations are acceptable provided that they are reasonable and demonstrably justified. This assessment ought to be made from the outset, and judges should not be invited to re-interpret legislation unless and until a limitation is shown to be unreasonable and/or demonstrably unjustifiable, particularly if the intention is to preserve the sovereignty of parliament.

More generally, it is most unusual for an external/overarching limitations power to be part of the enforcement/remedial analysis of a violation, rather than part of the assessment of whether the right has been violated. The power to reasonably and justifiably limit protected rights is intimately connected with the right, not the remedy. Indeed, in all comparative instruments, the reasonable and justifiable limitation power is connected to the statement of the rights, rather than the remedial provisions.[138] To undertake the limitations assessment as part of exercising a power to issue a declaration of inconsistent interpretation confuses the assessment of whether there has been an unjustifiable restriction/limitation placed on rights, with the assessment of the appropriate remedy if the former has occurred.

According, the NZ/UK Method is preferable to the *VCA Momcilovic* Method.

Recommendations 22 and 23:

22) A federal human rights instrument must clearly indicate that the concept of 'compatible with human rights' includes s 7(2) analysis. Legislation will be considered 'compatible with human rights' where that legislation imposes a limitation on rights but that limitation is reasonable and demonstrably justifiable. The *QHRA* definition of 'compatible with rights' under s 8 achieves this. This is consistent with the AHRC Position Paper.

23) A federal human rights instrument must clarify the interaction between the limitations provision and the obligation to interpret legislation rights-compatibly, to the effect that limitations analysis is part of the process of undertaking rights-compatible statutory interpretation based on the so-called NZ/UK Methodology. This is not inconsistent with the AHRC Position Paper

3.3.3 Remedial Interpretation under the Rights-Compatible Interpretation Obligation

3.3.3(a) Remedial Interpretation

This brings me to s 32(1) of the *Victorian Charter* and s 3(1) of the *UKHRA*, but I first digress.

The underlying concern of all statutory human rights instruments is the preservation of parliamentary sovereignty. This is achieved by *not* giving judges the power to invalidate legislation based on rights-incompatibility. Rather, the power of the judiciary is usually

[138] See, for example, s 1 of the *Canadian Charter*; s 36 of the *SABORA*; s 5 of the *NZBORA*; arts 8 to 11 of the *ECHR*; s 7 of the *Victorian Charter*.

limited to an obligation to secure rights-compatible interpretations; and, where it is not possible to interpret legislation compatibility with rights, the rights-incompatible legislation remains valid, operative and enforceable, and the executive and parliament decide whether to amend the legislation or not. In the sub-national jurisdictions, the judiciary may formally notify the executive and parliament of the rights-incompatibility by exercising their discretion to issue an unenforceable declaration of inconsistent interpretation.[139]

I have written extensively about the differences between the institutional approaches to domestic rights implementation. As I discuss above, the current federal approach to rights focuses on executive and parliamentary sovereignty, with the approach to rights in the United States of America focussing on judicial supremacy. Modern statutory human rights instruments fall between the two, and tend to encourage an inter-institutional dialogue about human rights and their justifiable limits between the executive, legislature and judiciary. As stated, my preference between the instruments that create an inter-institutional dialogue is the *Canadian Charter*. However, the 2008-09 National Consultation and the AHRC Position Paper clearly favour a statutory rights instrument – hence my focus on such models as adopted in the sub-national Australian jurisdictions.

Constitutional and statutory instruments differ in one important respect: the remedy. Under constitutional instruments, the remedy is the invalidation of the rights-*incompatible* law, such that the law is no longer valid and operative, and can no longer unreasonably and/or unjustifiably infringe on rights. Under statutory instruments, rights-*compatible* interpretation becomes the remedy. If a law unreasonably and/or unjustifiably limits a right, a complete remedy is to give the law an interpretation that avoids the unreasonable and/or unjustifiable limitation. In other words, a rights-*compatible* interpretation is a *complete remedy* to an otherwise rights-*incompatible* law. These statutory interpretative techniques are also available and used under constitutional rights instruments – that is, under constitutional instruments, the judiciary may find an interpretation of legislation that is rights-compatible and thus avoid invalidation; but invalidation is the outcome if the legislation is rights-incompatible.

In my opinion, s 32(1) of the *Victorian Charter* was intended to be a remedial interpretation provision, and I recommend that a federal human rights instrument enacts an interpretation obligation that allows for remedial interpretation. The NZ/UK Method gives the rights-compatible interpretation provisions a remedial reach. As discussed above, numerous Victorian and High Court judges have characterised s 32(1) as remedial; but some Victorian and High Court judges have, essentially, denied the remedial reach of s 32(1).

Again, the reasoning behind my opinion, and the differing judicial opinions, are quite complex, and are summarised in:

- Julie Debeljak, 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, 1-15.

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[139] Section 36(2) declarations do not affect the validity, operation or enforcement of the legislation, or create in any person any legal right or give rise to any civil cause of action (s 36(5)). A declaration will not affect the outcome of the case in which it is issued, with the judge compelled to apply the rights-*in*compatible law; nor will a declaration impact on any future applications of the rights-*in*compatible law because it remains in force and is applied to all future cases.

In brief, as I noted in my 8-Year *Charter* Review submission:

> '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-compatible 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.'[140]

I recommend that any federal human rights instrument that contains a s 32(1)-equivalent provision providing for rights-compatible interpretation must be clearly drafted to indicate that rights-compatible interpretation is *remedial*, in that rights-*compatible* interpretation is intended to remedy legislation that would otherwise be rights-*incompatible*, so far as it is possible to do so within the realms of judicial interpretation. This will be achieved by removing the words 'consistently with their purpose' from the interpretative obligation, so that the wording aligns with s 3(1) of the *UKHRA*. It was the addition of these words that encouraged the *VCA Momcilovic* Court to interpret the *Victorian Charter* differently. I remind you that their Honours stated that "consistently with their purpose" were 'words of limitation' and:

> stamped s 32(1) with quite a different character from that of s 3(1) of the *UKHRA*, which was said in *Ghaidan* to *require* the court where necessary to 'depart from the intention of the Parliament which enacted the legislation.' In our opinion the inclusion of the purpose requirement made it unambiguously clear that nothing in s 32(1) justified, let alone required, an interpretation of a statutory provision which overrode the intention of the enacting Parliament.[141]

I also remind you that their Honours held that s 32(1) 'does not create a "special" rule of interpretation [in the *Ghaidan* remedial 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.'[142] Their Honours then suggested the following methodology for assessing whether a

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140 Debeljak, 'Eight-Year Review', above n 137, 14.

141 *VCA Momcilovic* [2010] VSCA 50 [74] (emphasis in original).

142 *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'

legislation infringes a *Charter* right ("*VCA 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*.
>
> Step 3: If so, apply s 7(2) of the *Charter* to determine whether the limit imposed on the right is justified.[143]

Any federal human rights instrument must be drafted to ensure the approach to assessing rights-compatibility follows the NZ/UK Method, and not the *VCA Momcilovic* Method. I re-state the NZ/UK Method again here:

> *The "Rights Questions"*
> First: Does the legislative provision limit/engage any of the protected rights?
>
> Second: If the provision does limit/engage a right, is the limitation justifiable under the general limitations power? [e.g. s 7(2) *Victorian Charter*/ s 13 *QHRA*.]
>
> *The "Charter Questions"*
> Third: If the provision imposes an unjustified limit on rights, interpreters must consider whether the provision can be "saved" through a rights-compatible interpretation; accordingly, the interpreter must alter the meaning of the provision in order to achieve rights-compatibility. [e.g. s 32(1) *Victorian Charter*/ s 48(1) and (2) *QHRA*.]
>
> Fourth: The interpreter must then decide whether the altered rights-compatible interpretation of the provision is "possible". [e.g. based on an amended s 32(1) of the *Victorian Charter*/ s 48(1) and (2) *QHRA*.]
>
> *The Conclusion…*
> Interpretative Remedy: If the rights-compatible interpretation *is* "possible", this is a complete remedy to the human rights issue. [e.g. based on an amended s 32(1) *Victorian Charter*/ s 48(1) and (2) *QHRA.*]
>
> No Interpretative Remedy:
>
> > *Victorian Charter*/*QHRA*-equivalent: If the rights-compatible interpretation *is not* 'possible', the judge may issue a declaration of inconsistent interpretation; but the rights-incompatible legislation remains valid, operative and enforceable.

(Presented at *Courting Change: Our Evolving Court*, Supreme Court of Victoria 2007 Judges' Conference, Melbourne 9-10 August 2007) 4.

143 *VCA Momcilovic* [2010] VSCA 50 [35].

OR

AHRC Proposal: If the rights-compatible interpretation *is not* "possible", the legislation remains valid, operative and enforceable; and the executive and parliament will be notified of this by the Attorney-General and will need to consider whether to address the rights-incompatibility through legislative amendment.

Not only is the NZ/UK method important for limitations analysis, it is also important for the role of s 32(1), as I have explained earlier:

> '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.'[144]

3.3.3(b) Strength of Remedial Interpretation

The second issue that needs to be addressed is the 'strength' of remedial interpretation. The word 'strength' is used to measure how far judges are willing to push the concept of 'interpretation' to achieve rights-compatibility. In essence, the question is: how far can the concept of rights-*compatible* interpretation be pushed and still be considered *legitimate* judicial interpretation (that is, 'possible') and not an *illegitimate* act of judicial legislation (that is, not 'possible').

In the United Kingdom, the choice appeared to be between the *Ghaidan* approach and the *Wilkinson* approach. The *Hansen* approach under the *NZBORA* seems to fall somewhere between the two. I have summarised the British jurisprudence in 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, 18-21 (citations retained), as follows:

> For the purposes of discussion, the British jurisprudence is of three categories. The earlier case of *R v A*[145] is considered the 'high water mark'[146] for s 3(1),[147] when a non-discretionary general prohibition

[144] Debeljak, 'Eight-Year Review', above n 137, 4.

[145] *R v A (No 2)* [2001] UKHL 25 ('*R v A*').

[146] John Wadham, 'The *Human Rights Act*: One Year On' [2001] *European Human Rights Law Review* 620, 638.

[147] In *R v A*, Lord Steyn established some general principles in relation to s 3(1) interpretation. His Lordship confirmed that s 3 required a 'contextual and purposive interpretation' and that 'it will be

on the admission of prior sexual history evidence in a rape trial was re-interpreted under s 3(1) to allow discretionary exceptions.[148] 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,[149] suggesting that 'interpretation is more in the nature of a "delete-all-and-replace" amendment.'[150]

The middle ground is represented by *Ghaidan*.[151] In *Ghaidan*, the heterosexual definition of "spouse" under the *Rents Act*[152] was found to violate the art 8 right to home when read with the art 14 right to non-discrimination.[153] 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

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sometimes necessary to adopt an interpretation which linguistically may appear strained': at *R v A* [2001] UKHL 25 [44]. His Lordship held that s 3 empowers judges to *read down* express legislative provisions or *read in* words so as to achieve compatibility, provided the essence of the legislative intention was still viable (at [44]). Judges could go so far as the 'subordination of the niceties of the language of the section': at [45]. His Lordship justified this interpretative approach by reference to the parliamentary intention in enacting the *UKHRA*: Parliament clearly intended that a declaration be 'a measure of last resort', with 'a *clear* limitation on Convention rights [to be] stated *in terms*': at [44] (emphasis in original). Nevertheless, Lord Nicholls quelled any doubts about the breadth of Lord Steyn's comments in *re S* when Lord Nicholls expressly stated that 'Lord Steyn's observations in *R v A* … are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise': *In re S (Minors) (Care Order: Implementation of Care Plan); In re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10 [40] ('*re S*').

148 This case addressed the admissibility of evidence in a rape trial. Section 41 of the *Youth Justice and Criminal Evidence Act* 1999 (UK) c 23 prohibited the leading of prior sexual history evidence, without the leave of the court. Accordingly, there was a general prohibition with some narrowly defined exceptions, notably the court could grant leave to lead evidence where the sexual behaviour was contemporaneous to the alleged rape (s 41(3)(b)) or the sexual behaviour is similar to past sexual behaviour (s 41(3)(c)). The House of Lords held that the provision unjustifiably limited the defendant's right to a fair trial under art 6 of the *ECHR* – although the legislative objective was beyond reproach, the legislative means were excessive. The provision was saved through s 3 "possible" interpretation, with the House of Lords interpreting the provision as being 'subject to the implied provision that evidence or questioning which is required to ensure a fair trial … should not be treated as inadmissible': at [45]. In particular, s 41(3)(b) was interpreted so as to admit evidence of contemporaneous sexual behaviour, only if it was truly contemporaneous to the alleged rape; and s 41(3)(c) was interpreted so as to admit evidence of similar past sexual behaviour, only if it was so relevant to the issue of consent, that to exclude it would endanger the fairness of the trial.

149 Section 4(2) of the *UKHRA* is the equivalent to s 36(2) of the *Charter*.

150 Danny Nicol, 'Are Convention Rights a No-Go Zone for Parliament?' [2002] Autumn *Public Law* 438, 442 and 443 respectively. Keir Starmer describes Lord Steyn's decision in *R v A* as the 'boldest exposition': Keir Starmer, 'Two Years of the *Human Rights Act*' [2003] *European Human Rights Law Review* 14, 16. See also Lord Irvine, 'The Impact of the *HRA*', 320. For a not so radical take on *R v A*, see Aileen Kavanagh, 'Unlocking the *Human Rights Act:* The "Radical" Approach to Section 3(1) Revisited' (2005) 3 *European Human Rights Law Review* 259 ('Unlocking the *UKHRA'*).

151 *Ghaidan* [2004] UKHL 30.

152 *Rents Act 1977* (UK) sch 1, para 2(2).

153 *ECHR*, opened for signature 4 November 1950, 213 UNTS 222, arts 8 and 14 (entered into force 3 September 1953).

with the statutory tenant as *if they were* his wife or husband".[154] Although *Ghaidan*[155] is considered a retreat from *R v A*,[156] 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:

> [T]he interpretative obligation decreed by s 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear… Section 3 *may* require the court to depart from … the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires the court to depart from the intention of the enacting Parliament. The answer … depends upon the intention reasonably to be attributed to the Parliament in enacting section 3.[157]

It is questionable whether the *obiter* comments are in truth that "radical". Lord Nicholls is *not* saying that the will of Parliament as expressed in the *UK HRA* will *always prevail* over the will of parliament as expressed in challenged legislation. Indeed, it is not at all clear that Lord Nicholls instructs courts to go against the will of parliament, especially given that His Lordship proceeds to articulate a set of guidelines about what s 3 does and does not allow. Section 3 *does* enable 'language to be interpreted restrictively or expansively'; is 'apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant'; can allow a court to 'modify the meaning, and hence the effect, of … legislation' to 'an extent bounded by what is "possible"'.[158] However, s 3 *does not* allow the courts to 'adopt a meaning inconsistent with a fundamental feature of legislation'; any s 3 re-interpretation 'must be compatible with the underlying thrust of the legislation being construed' and must '"go with the grain of the legislation."'[159]

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154 *Ghaidan* [2004] UKHL 30, [35] – [36] (Lord Nicholls]; [51] (Lord Steyn); [129] (Lord Rodger); [144], [145] (Baroness Hale). Lord Millett dissented. His Lordship agreed that there was a violation of the rights [55], and agreed with the general approach to s 3(1) interpretation [69], but did not agreed that the particular s 3(1) interpretation that was necessary to save the provision was 'possible' on the facts: see espec [57], [78]. [81], [82], [96], [99], [101].

155 And the cases leading up to *Ghaidan*, for example, *R v Lambert* [2001] UKHL 37 ('*Lambert'*); *re S* [2002] UKHL 10; *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 ('*Anderson'*); *Bellinger v Bellinger* [2003] UKHL 21.

156 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, 45-46 ('Parliamentary Sovereignty and Dialogue').

157 *Ghaidan* [2004] UKHL 30 [30] (Lord Nicholls). Prior to this statement, in contemplating the reach of s 3, Lord Nicholls admits that '… section 3 itself is not free from ambiguity' (at [27]) because of the word "possible."' However, his Lordship noted that ss 3 and 4 read together make one matter clear: 'Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant' (at [27]). Given the ambiguity in s 3 itself, Lord Nicholls pondered by what standard or criterion "possibility" is to be adjudged, concluding that '[a] comprehensive answer to this question is proving elusive' (at [27]).

158 Ibid [32].

159 Ibid [33]. Lord Rodger agreed with these propositions ([121], [124]), as did Lord Millett ([67]). Lord Nicholls concluded on the facts: 'In some cases difficult problems may arise. No difficulty arises in the present case. There is no doubt that s 3 can be applied to section 2(2) of *Rents Act* so it is read and given effect 'to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant.'

Focusing on departures from parliamentary intention, *Ghaidan*, and for that matter *Sheldrake*,[160] do not state that judges *must* depart from the legislative intention of parliament. These cases indicate that judges *may* depart from legislative intention, *but not* where to do so would undermine the fundamental features of legislation, would be incompatible with the underlying thrust of legislation, or would go against the grain of legislation. The judiciary gets close to the line of improper judicial interpretation (read judicial legislation) only where a s 3(1) re-interpretation is compatible with the fundamental features, the underlying thrust and the grain, but is incompatible with the legislative intent. But it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation would clash with parliamentary intention; that is, it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation were *compatible* with an interpretation, but the interpretation was *incompatible* with the parliamentary intention.[161] In effect, these obiter comments place boundaries around the judicial interpretation power, and indicate that s 3(1) does not sanction the exercise of non-judicial power – being acts of judicial legislation – by the judiciary.[162]

Moreover, as numerous Law Lords have indicated,[163] more instructive than the *obiter* comments of judges is analysis of the *ratio* of the cases. The *ratio* of *Ghaidan* was grounded in a s 3(1) re-interpretation that was expressly demonstrated to be consistent with the purposes of the statutory provision in question.[164] Further, it is questionable whether the re-interpretation of the legislation in *Ghaidan* was that "radical". In the pre-*UKHRA* equivalent case of *Fitzpatrick*,[165] Ward LJ 'was able to interpret the words "living together as his or her husband" to include same-sex couples'.[166] As Aileen Kavanagh notes, this demonstrates that the *Ghaidan* re-interpretation 'was possible using traditional

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160 *Sheldrake v DPP* [2005] 1 AC 264 [28] ('*Sheldrake'*).

161 See further Kavanagh, 'Unlocking the *UKHRA'*, above n 150.

162 See further, Debeljak, 'Submission: National Consultation', above n 77, 51-57.

163 Indeed, as Lord Bingham states in *Sheldrake* [2005] 1 AC 264, after giving a similar exposition on s 3 to that of Lord Nicholls (at [28]): 'All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: "so far as it is possible to do so…' Similar sentiment was earlier expressed by Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 ('*Donoghue*'), when he acknowledged that '[t]he most difficult task which courts face is distinguishing between legislation and interpretation', with the 'practical experience of seeking to apply section 3 … provid[ing] the best guide' (at [76]). The lesson from these statements is not to angst too much in the abstract about the meaning of s 32(1) of the *Charter*, and to simply understand it through its applications in particular cases.

164 See *Ghaidan* [2004] UKHL 30 [35], where Lord Nicholls explicitly bases his s 3(1) re-interpretation on the social policy underlying the impugned statutory provision:

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

165 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 ('*Fitzpatrick'*).

166 Aileen Kavanagh, 'Choosing Between Sections 3 and 4 of the *Human Rights Act 1998*: Judicial Reasoning after *Ghaidan v Mendoza*' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning Under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2007) 114, 142, fn 131.

methods of statutory interpretation even before the *UKHRA* came into force.'[167] Unfortunately, these points of moderation are rarely acknowledged in the debate.

The "narrowest"[168] interpretation of s 3(1) was proposed by Lord Hoffman in *Wilkinson*.[169] 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',[170] 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.'[171] Although the reasoning of Lord Hoffman was accepted by the other Law Lords in that case,[172] *Wilkinson* has failed to materialise as the leading case on s 3(1); rather, *Ghaidan* remains the case relied upon.[173]

In my opinion, the addition of the phrase 'consistently with their purpose' in s 32(1) of the *Victorian Charter* was intended to be a codification of the principles in *Ghaidan*. This is based on report of the Victorian Human Rights Consultation Committee.[174] The Victorian Committee recommended the insertion of "consistently with their purpose" to the *UKHRA* s 3(1) formula,[175] explaining that the additional words would provide the courts:

> with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question. This is consistent with some of the more recent cases in the United Kingdom, where a

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167 Ibid. See further, Debeljak, 'Submission to the National Consultation', above n 162, 51-57.

168 The "narrowness" *of R (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30 ('*Wilkinson'*) is disputed by Aileen Kavanagh, Constitutional Review Under the UK Human Rights Act (Cambridge University Press, 2009) 94-95 ("Constitutional Review"):

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

169 *Wilkinson* [2005] UKHL 30.

170 Ibid [17].

171 Ibid [2005] UKHL 30 [17] (emphasis added).

172 Ibid [2005] UKHL 30 [1] (Lord Nicholls); [32] (Lord Hope); [34] (Lord Scott); [43] (Lord Brown).

173 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, 208) [5-64] – [5-127]; Kavanagh, *Constitutional Review*, above n 168, 28: 'In what is now the leading case on s 3(1), *Ghaidan*, ...'

174 Human Rights Consultation Committee, *Rights Responsibilities and Respect*, above n 123.

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

> more purposive approach to interpretation was favoured. In the United Kingdom House of Lords decision in *Ghaidan v Godin-Mendoza*, Lord Nicholls of Birkenhead said: 'the meaning imported by application of s 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must ... "go with the grain of the legislation."'
>
> Or as Lord Rodger of Earlsferry stated: 'It does not allow the Courts to change the substance of the provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen.'[176]

A federal human rights instrument must provide clarity on the intended 'strength' of remedial rights interpretation. In my opinion, the *Ghaidan* approach is preferred for the following reasons.

Given that judges are not empowered to invalidate laws that unreasonably and/or unjustifiably limit the protected rights, rights interpretation must provide a remedy.

Moreover, strong remedial rights-compatible interpretation is part of the 'dialogue' scheme underlying the statutory human rights instruments, 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.[177]

Finally, the concept of rights-compatibility is also used in the context of the obligations to be placed on public authorities, which I discuss more fully below. For example, under s 38(1) of the *Victorian Charter*, 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.' Section 38(2) then outlines an exception to this obligation: 'Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.' The note to s 38(2) gives an example: 'Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.' The strength of remedial rights interpretation is relevant here, as I mentioned in the Four-Year Review of the *Charter*:

> '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

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176 Ibid 82-83.

177 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, pp 11-17 ('Four-Year Review').

> 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.'[178]

A strong remedial reach for rights-compatible interpretation provides stronger protection for individuals against acts of unlawfulness of public authorities.

Given that the difference of judicial opinion has centred on the addition of 'consistently with their purpose' in the *Victorian Charter*, removal of these words is recommended allowing for a closer alignment to the *UKHRA*. I recommend that any federal human rights instrument that contains a rights-compatible statutory interpretation obligation must be clearly drafted to indicate that the *strength* of the rights-compatible interpretation remedy be equivalent to that establish under the *UKHRA* as expressed in *Ghaidan*. This may be achieved by removing the words 'consistently with their purpose' from the provision, so that the wording aligns with s 3(1) of the *UKHRA*.

3.3.4 'Possible' as the Limit on Judicial Power

Once the phrase 'consistently with their purpose' is removed from the interpretation obligation, there will be a renewed focus on the phrase 'so far as it is possible to do so'. This phrase is *the* brake on judicial power under the *UKHRA*, and will become *the* brake on judicial power under any federal human rights instrument.

We return to how Lord Nicholls' obiter comments place boundaries around the judicial interpretation power, and indicate that s 32(1) of the *Victorian Charter* and s 3(1) of the *UKHRA* do *not* sanction the exercise of non-judicial power – being acts of judicial legislation – by the judiciary.[179] Indeed, the concept of 'possibility' is intended to be *the* operative limit on judicial power under such statutory rights instruments.[180]

3.3.4(a) Conflicting Parliamentary Intentions

This brings us to the issue of conflicting parliamentary intentions, and whether removal of the phrase 'consistent with their purpose' will cause problems in resolving or accommodating such conflicts.

It is readily foreseeable that the judiciary will have to accommodate: (a) the intention of a rights-instrument-enacting Parliament that legislation should be interpreted 'so far as it is possible to do so' *compatibly* with human rights; and (b) legislation enacted by a later parliament which presents an intention to enact rights-*incompatible* legislation. If the interpretative obligation no longer requires an interpretation that is 'consistent with [the statutory] purpose' of the latter legislation, all this means is that the intention of the latter Parliament will not *automatically* trump the intention of the rights-instrument-enacting Parliament – that is, the rights-*incompatible* intention of the latter legislation will not *automatically* trump the rights-*compatible* intention of the rights instrument. Inclusion of the

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178 Ibid 22.

179 See further Debeljak, 'Submission: National Consultation', above n 77, 51-57.

180 Debeljak, 'Who is Sovereign Now?', above n 123, 30.

phrase 'consistently with their purpose' as currently applied means that the rights-*inconsistent* parliamentary intention in the latter law *too readily trumps* the rights-*compatible* parliamentary intention of the rights-instrument-enacting Parliament (and the rights within that instrument).

Resolving conflicts of intentions will require close attention to whether the two intentions are in competition and, if so, whether they can be reconciled.[181] The first and most obvious issue will be to consider whether the legislation was enacted after the *Federal Scrutiny Act*. All legislation enacted since the *Federal Scrutiny Act* came into force (January 2012) will have a s 8 statement of (in)compatibility attached and will have been subject to the s 7 rights scrutiny process undertaken by the PJCHR. Both are relevant to the interpretation of the legislation. If a s 8 statement of incompatibility is issued, it is clear that the rights-*incompatible* parliamentary intention in the latter legislation clashes with the rights-*compatible* parliamentary intention of the rights-instrument-enacting Parliament, and this clash will need to be resolved. However, if a s 8 statement of compatibility is issued, it should not be presumed that there is a clash of intentions. Moreover, if the s 7 PJCHR report identified rights-*incompatibility* with the proposed legislation and that legislation was enacted by Parliament without amendment, that may indicate a rights-*incompatible* parliamentary intention in the latter legislation and this will clash with the rights-*compatible* parliamentary intention of the rights-instrument-enacting Parliament, However, if the s 7 PJCHR report identified rights-compatibility with the proposed legislation, it should not be presumed that there is a clash of intentions.

In other words, parliament has mechanisms through which to convey a rights-*incompatible* intention and these mechanisms must be used. They include: (a) the use of clear language in the statutory provisions so that only one interpretation of the provisions is possible; (b) a clear statement of intent which conveys the parliamentary intention to limit rights; (c) the issuing of a s 8 statement of incompatibility; (d) and parliamentary debate that engages with any s 7 PJCHR report which indicates potential rights-incompatibility and a desire for parliament to legislate regardless. All of these mechanisms will ensure that a clash of intentions is readily identified; and all of these mechanisms will develop and support a culture of justification for the rights-impacts of legislation, and greater rights-based transparency and accountability about policy formulation and law making.

In short, rights-*incompatibility* of a law-enacting Parliament should *not* be too readily identified where these mechanisms are not used; and we should *not* too readily identify a clash of intentions between a law-enacting Parliament and a rights-instrument-enacting Parliament where these mechanisms are *not* employed. A culture of justification, transparency and accountability ought to demand use of these mechanisms where parliament intends to enact rights-incompatible legislation.

3.3.4(b) The Line between Judicial Interpretation and Judicial Legislation

Secondly, the limits of the judicial task – being one of judicial interpretation not judicial legislation – will need to be considered. As discussed above, *Ghaidan* gives guidance on this. Recall, Lord Nicholls did not hold that the rights-*compatible* intentions of a rights-instrument-enacting Parliament will always trump the rights-*incompatible* intentions of a later

[181] See discussion above regarding laws enacted after the commencement of the *Victorian Charter*, and that have been filtered through ss 28 and 30 of the *Victorian Charter*.

law-enacting Parliament. Rather, his Lordship outlined a series of highly circumscribed circumstances where they '*may'* and where they '*may not'*. When focusing on a clash of intentions, it is most telling to repeat the circumstances when the rights-*compatible* intentions *may not* trump the rights-*incompatible* intentions: s 3 (1) does not allow the courts to 'adopt a meaning inconsistent with a fundamental feature of legislation'; any s 3 re-interpretation 'must be compatible with the underlying thrust of the legislation being construed' and must '"go with the grain of the legislation."'[182] I repeat here section from 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, 19-20 (citations retained):

> 'judges *may* depart from legislative intention, *but not* where to do so would undermine the fundamental features of legislation, would be incompatible with the underlying thrust of legislation, or would go against the grain of legislation. The judiciary gets close to the line of improper judicial interpretation (read judicial legislation) only where a s 3(1) re-interpretation is *compatible* with the fundamental features, the underlying thrust and the grain, but is *incompatible* with the legislative intent. But it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation would clash with parliamentary intention; that is, it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation were *compatible* with an interpretation, but the interpretation was *incompatible* with the parliamentary intention.[183] In effect, these obiter comments place boundaries around the judicial interpretation power, and indicate that s 3(1) does not sanction the exercise of non-judicial power – being acts of judicial legislation – by the judiciary.'[184]

This quote, in plain language, attempts to highlight the unlikelihood (or 'impossibility' if you will) of a rights-compatible interpretation that, at the one time, (a) undermines parliamentary intention whilst (b) not falling foul of the 'may not' scenarios. Is not parliamentary intention derived from fundamental features, underlying thrusts and grains of legislation? If so, how will it be possible to both (a) depart from parliamentary intention and (b) not also undermine the fundamental features and underlying thrust of legislation or go against its grain?

Recognition must be given to both sets of parliamentary intentions, and consideration given to whether the intentions may be reconciled. It may be that the rights-instrument-enacting parliamentary intention would prevail (such as, reading legislation expansively or restrictively, reading-in words, modifying the meaning of words and the like) or that the law-enacting parliamentary intention would prevail (such as, when a fundamental feature is displaced). Even where there is an apparent clash of intentions, and that is resolved by a re-interpretation that is rights-*compatible* (as it was in *Ghaidan*), parliament remains sovereign and can thus respond to this through fresh legislation that uses explicit rights-*incompatible*

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182 *Ghaidan* [2004] UKHL 30 [33]. Lord Rodger agreed with these propositions ([121], [124]), as did Lord Millett ([67]). Lord Nicholls concluded on the facts: 'In some cases difficult problems may arise. No difficulty arises in the present case. There is no doubt that s 3 can be applied to section 2(2) of *Rents Act* so it is read and given effect 'to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant.'

183 See further Kavanagh, 'Unlocking the *UKHRA'*, above n 150.

184 See further, Debeljak, 'Submission: National Consultation', above n 77, 51-57.

language within its provisions, that contains clear statements of parliamentary intent to enact rights-*incompatible* provisions, is accompanied by a s 8 statement of *incompatibility*, and which is enacted into law *regardless* of any rights concerns of the PJCHR.[185]

Beyond *Ghaidan*, many British cases support 'consistently with [statutory] purpose' as an example of *im*possible interpretations. The British jurisprudence suggests that a displacement of parliamentary intention would not constitute a possible interpretation. Indeed, even in the 'high water mark'[186] judgment of Lord Steyn in *R v A*,[187] his Lordship recognised the need to ensure the viability of the essence of the legislative intention of the legislation being construed under s 3.[188] Lord Hope in *R v A* emphasised that a s 3 interpretation is not possible if it contradicted express or necessarily implicit provisions in the impugned legislation because express legislative language or necessary implications thereto are the 'means of identifying the plain intention of Parliament.'[189] His Lordship further highlighted in *Lambert* that interpretation involves giving 'effect to the presumed intention'[190] of the enacting parliament. Lord Nicholls in *re S* identified a clear parliamentary intent to give the courts threshold jurisdiction over care orders with no continuing supervisory role, which the s 3 interpretation of the Court of Appeal improperly displaced.

A final key point is that judicial attempts to define the limits of 'possible' fall into a common trap – that their definition is better in application than in seeking judicial exposition. Indeed, as Lord Bingham states in *Sheldrake*, after giving a similar exposition on s 3(1) to that of Lord Nicholls: 'All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: "so far as it is possible to do so…".'[191] Similar sentiment was earlier expressed by Woolf CJ in *Donoghue*, when he stated that that '[t]he most difficult task which courts face is distinguishing between legislation and interpretation', with the 'practical experience of seeking to apply section 3 … provid[ing] the best guide.'[192] Perhaps the lesson for Australia is not to angst too much in the abstract about the meaning of s 3(1), and to simply understand it through its applications in particular cases.

3.3.4(c) Common Law and Statutory Rules of Construction

Thirdly, we must consider the question of whether the limit imposed on the judicial task by 'possible' is consistent with the common law and statutory rules of construction in Australia.

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185 Julie Debeljak, 'Rights Dialogue and Disagreement', above n 52, 273 - 275; Debeljak, 'Four-Year Review', above n 177, 11-17.

186 John Wadham, 'The *Human Rights Act*: One Year On' [2001] *European Human Rights Law Review* 620, 638.

187 *R v A* [2001] UKHL 25.

188 Ibid [44] – [45].

189 Ibid [108] (Lord Hope).

190 *Lambert* [2001] UKHL 37 [81].

191 *Sheldrake* [2005] 1 AC 264 [28].

192 *Donoghue* [2001] EWCA Civ 595 [76].

Considering the set of guidelines given for what 'may' be achieved via a s 32(1)/s 3(1) interpretation, nothing in this list is unusual for the regular judicial interpretative tool box. Judges regularly interpret legislation expansively and restrictively, read in words, or modify meaning to avoid injustices and absurdities. These exercises of judicial interpretation are within or incidental to the normal range of judicial powers: they are 'possible' exercises of proper judicial power.

In a forthcoming chapter, Tania Penovic and I more expansively argue that 'possible' as applied under the *UKHRA* is consistent with the common law and statutory rules of construction in Australia. The analysis offered is based on an amended s 32(1) of the *Victorian Charter* that excises the words 'consistently with their purpose', which is what I am proposing for any federal human rights instrument. I quote the passage from Julie Debeljak and Tania Penovic, 'Re-Charting the Victorian Charter of Human Rights: Advancing Enforcement in Human Rights legislation', with Tania Penovic, in Becky Batagol, Heli Askola, Jamie Walvisch, Kate Seear, and Janice Richardson (eds), *Feminist Legislation: Australia* (Routledge, 2023, forthcoming) (citations retained):

> In *HCA Momcilovic*, French CJ noted *Zheng's* reference to judicial interpretation being 'an expression of the constitutional relationship between the arms of government'[193], and referring to the 'constitutional tradition' that judges interpret legislation 'according to the intent of them that made it'.[194] His Honour noted that the 'duty of the court' is 'to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have',[195] with the ascertainment of legislative intention being a matter of complying with the common law and statutory rules of construction.[196] According to common law rules, '[t]he meaning given to [statutory] words must be a meaning which they can bear';[197] subject to 'an exceptional case' where 'the common law allows a court to depart from grammatical rules and to give an *unusual* or *strained* meaning to statutory words where the ordinary meaning and grammatical construction would contradict the apparent purpose of the enactment', although 'the court is not thereby authorised to legislate.'[198]
>
> Similarly, Gummow J in *HCA Momcilovic* refers to the principles of statutory interpretation 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', with the latter qualification 'apply[ing] *a fortiori* where there is a canon of construction mandated … by a specific provision such as s 32(1).'[199]

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193 *HCA Momcilovic* [2011] HCA 34 [38].

194 Ibid [37] (citations omitted).

195 Ibid [38], citing *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

196 *HCA Momcilovic* [2011] HCA 34 [38], citing *Lacey v Attorney-General (Qld)* [2011] HCA 10 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

197 *HCA Momcilovic* [2011] HCA 34 [39], then quoting Lord Reid in *Jones v Director of Public Prosecutions* [1962] AC 635, 662.

198 *HCA Momcilovic* [2011] HCA 34 [40] (emphasis added).

199 Ibid [170] (citations omitted) (emphasis added), citing *Project Blue Sky* (1998) 194 CLR 355 [78].

These principles cohere with s 32(1) as amended. The s 32(1) limitation of 'possible' ensures that the judicial task remains within the constitutional realm of interpretation. Moreover, s 32(1) may require deeper thinking about statutory purpose, especially where there is an apparent conflict between a *Charter*-enacting purpose and a law-enacting purpose. However, s 32(1) does not sanction interpretations that undermine the fundamental features of legislation, are incompatible with the underlying thrust of legislation, or go against the grain of legislation – or, in short hand, that are inconsistent with statutory purpose. Further, it is significant that both French CJ and Gummow J accept that, under the rules of statutory interpretation, ordinary meaning *may* need to give way to an alternative meaning. Acknowledgment that a canon of construction may justify meaning *other than* the literal or grammatical meaning is *not* substantially different to the British jurisprudence. That s 3(1) 'allowed the court to depart from unambiguous meaning' was 'the most important premise in *Ghaidan*.'[200] Indeed, a commentator recently reminded us of the 'long history of common law courts utilising presumptions of interpretation to promote literal or even *strained meanings in disregard* of *statutory purpose*'.[201]

In sum, just as French CJ considers the common law rules of construction 'help[] to define the boundaries between the judicial and legislative functions',[202] so too does the British experience help to define the boundaries between *possible* and *impossible* interpretation – which, in turn, helps to define the boundaries between *legitimate* judicial remedial interpretation and *illegitimate* judicial remedial legislation.

3.3.5 AHRC Position Paper: 'So far as is reasonably possible'

Having sensibly removed the phrase 'consistent with their purpose' from the rights-compatible statutory interpretation obligation, the AHRC Position Paper recommends inserting the word 'reasonably' into the provision so that it would read: 'All primary and subordinate Commonwealth legislation [is] to be interpreted, so far as is reasonably possible, in a manner that is consistent with human rights.'

I do *not* support the addition of the word 'reasonably' into the rights-compatible statutory interpretation obligation for numerous reasons, and thus do *not* agree with the AHRC Position Paper on this point.

The limitation on the power of the judiciary comes from the word 'possible'. What is 'possible' is judicial interpretation; what is not 'possible' is acts of judicial legislation. It is unnecessary and indeed dangerous to add 'reasonably' to the word 'possible' for numerous reasons.

First, the concept of reasonable interpretations is associated with the *NZBORA*. The British Parliament expressly chose *not* to adopt the New Zealand model, which would have required s 3(1) interpretations to be *reasonable* interpretations. In the words of Lord Steyn in *Ghaidan*: 'the draftsman of the Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable. Parliament specifically rejected the legislative model of requiring a reasonable interpretation'.[203] The sub-national human rights instruments, and the proposed federal human

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200 See Kavanagh, *Constitutional* Review, above n 168, 94.

201 Geiringer, above n 123, 63.

202 *HCA Momcilovic* [2011] HCA 34 [42].

203 *Ghaidan* [2004] UKHL 30 [44].

rights instruments are closely aligned to the *UKHRA*, not the *NZBORA*. Elements of the *NZBORA* should not be introduced into the drafting based on the *UKHRA*.

Second, there is no clear, sensible or legitimate purpose to inserting 'reasonably' into a provision based on the *UKHRA* when 'possible' provides a sufficient limitation on the power of the judiciary. It is unclear what the word 'reasonably' would add to 'possible'; and the case for adding *two* brakes to the power of the judiciary has not been made out. If anything, using the composite phrase 'reasonably possible' introduces great uncertainty into the meaning of the provision, and will undermine the guidance currently available from the British jurisprudence from use of the singular 'possible'.

Third, if have learnt anything from the experience under the *Victoria Charter*, it is that courts will attach meaning to alterations of words. As discussed above, the addition of the words 'consistent with their purpose' to s 32(1) of the *Victorian Charter* has been its Achilles Heel. Despite the clear parliamentary intention that the additional phrase was to codify the British jurisprudence, the *VCA Momcilovic* Court held that 'consistently with their purpose' were 'words of limitation [that] stamped s 32(1) with quite a different character from that of s 3(1) of the *UKHRA*'.[204] If the word 'reasonably' is added to 'possible' in an equivalent provision within a federal human rights instrument, the judiciary will attach some meaning to the word 'reasonably', again risking the scope, meaning and efficacy of the rights-compatible interpretation obligation.

Fourth, a statutory rights instrument is a much weaker model for implementation of an inter-institutional dialogue about rights and the limits of democracy. In my opinion, a constitutional instrument that establishes an inter-institutional dialogue based on the *Canadian Charter* strikes a better balance. However, if you accept that a statutory rights instrument is the only politically viable option for rights protection, it should *not* be weakened further by adding 'reasonably' to 'possible' when there is ample evidence from the British jurisprudence that 'possible' is an effective and sufficient limit on judicial power. Accepting 'reasonably possible' interpretations will unreasonably weaken an already weak federal human rights instrument. It will at best dilute, and at worst threaten, the remedial characterisation and strength of the remedial nature of rights-compatible interpretations.

Fifth, the AHRC Position Paper adopts the 'reasonably possible' phrase from the Law Council. It is not clear to me how the Law Council position is any different to that of *Ghaidan*. The AHRC quotes the Law Council as follows: 'The Law Council elaborates that "such a provision should require courts, tribunals and others interpreting legislation to depart from accepted interpretations of legislative provisions [in a way that is consistent with human rights] where this is reasonably possible and does not fundamentally undermine or distort the purpose of the legislation".'[205] Fundamentally undermining and distorting purposes of legislation would not be 'possible' interpretations under the *UKHRA* as per *Ghaidan*.

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[204] *VCA Momcilovic* (2010) VSCA 50 [74].

[205] AHRC, *AHRC Position Paper*, above n 87, 319, citing Law Council of Australia, *Human Rights Charter Policy* (November 2020) https://www.lawcouncil.asn.au/publicassets/c517fdbd-9a28-eb11-9436-005056be13b5/Law%20Council%20of%20Australia%20-%20Federal%20Human%20Rights%20Charter.pdf

Sixthly, it is clear to me that the AHRC does not appreciate the work done by 'possible'. For instance, the AHRC Position Paper states that the "reasonably possible" 'approach still ensures that interpretation that that contravene the clear purpose of the statute and the intent of Parliament would not be viewed as *acceptable* – or reasonable – by the courts, even where there is a breach of human rights.'[206] This statement should simply read 'would not be viewed as *possible* by the courts'. The AHRC has fallen into the same trap as the *VCA Momcilovic* Court and the *HCA Momcilovic* Court in not recognising the limitations inherent in 'possible'. The concept of 'possible' is the brake on judicial power, and there is no need to introduce the word 'reasonably' as a brake or an additional brake.

Recommendations 24 to 28:

24) A federal human rights instrument that contains a rights-compatible statutory interpretation obligation must be clearly drafted to indicate that rights-compatible interpretation is *remedial* in nature, in that a rights-compatible interpretation is intended to remedy legislation that would otherwise be rights incompatible, so far as it is possible to do so within the realms of interpretation. This may be achieved by removing the words 'consistently with their purpose' from the provision, so that the wording aligns with s 3(1) of the *UKHRA*. Omitting the words 'consistently with their purpose' is consistent with the AHRC Position Paper.

25) A federal human rights instrument that contains a rights-compatible statutory interpretation obligation must be clearly drafted to indicate that the *strength* of the rights-compatible interpretation remedy be equivalent to that establish under the *UKHRA* as expressed in *Ghaidan*. This may be achieved by removing the words 'consistently with their purpose' from the provision, so that the wording aligns with s 3(1) of the *UKHRA*. Omitting the words 'consistently with their purpose' is consistent with the AHRC Position Paper.

26) It is recommended that, either by explicit statutory wording or by the accompanying extrinsic material, it be made clear that the methodology to be used in resolving whether legislation can be interpreted compatibly with rights is the NZ/UK Methodology.

27) The AHRC proposes to add the word 'reasonably' to the rights-compatible statutory interpretation obligation. I do not support the addition of the word 'reasonably' to the rights-compatible statutory interpretation obligation. If based on the wording of the *Victoria Charter*, the provision should read: 'So far as it is possible to do so, all statutory provisions must be interpreted in a way that is compatible with human rights'. If based on the AHRC Position Paper, the provision should read: 'All primary and subordinate Commonwealth legislation [is] to be interpreted, so far as is possible to do so, in a manner that is consistent with human rights'. In this respect, I disagree with the AHRC Position Paper.

28) It is further recommended that consideration be given to not using the *Victorian Charter* words of 'all statutory provisions must be interpreted' but rather the wording in the *UKHRA* that all statutory provisions 'must be read and give effect

[206] AHRC, *AHRC Position Paper*, above n 87, 319 (emphasis added).

to'. In *HCA Momcilovic*, Crennan and Kiefel JJ attached significance to this difference of wording. Even though their Honours reasoning is open to critique,[207] it may be wise to use the *UKHRA* wording to remove all doubt.

3.3.6 Omissions from Mechanism 1

There are two elements to Mechanism 1 that are included in the *ACTHRA*, the *Victorian Charter* and the *QHRA* that are omitted from the AHRC Proposal.

3.3.6(a) Override Provision

I have long advocated that an override provision is not needed in a statutory human rights instrument. My reasoning is explained in detail in the following articles:

- Julie Debeljak, 'Of Parole and Public Emergencies: Why the Victorian Charter Override Provision Should be Repealed' (2022) 45(2) *University of New South Wales Law Journal* 1
- 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

I support the AHRC Proposal that an override provision be omitted from any federal human rights instrument.

Recommendation 29:

29) That an override provision be omitted from any federal human rights instrument. This is not inconsistent with the AHRC Position Paper.

3.3.6(b) Declaration of Inconsistent Interpretation

The *ACTHRA*, *Victorian Charter* and *QHRA* instruments add an additional step to the inter-institutional dialogue.

Referring to the Victoria iteration, under s 36(2) of the *Victoria Charter*, where legislation cannot be interpreted rights-compatibly, the superior courts have a discretion to issue an unenforceable declaration of inconsistent interpretation. Such a declaration does not affect the validity, operation or enforcement of the legislation, or create in any person any legal right or give rise to any civil cause of action.[208] As such, a declaration does not affect the outcome of the case in which it is issued and the judge applies the rights-incompatible law; and it does not affect future applications of the rights-incompatible law. Under ss 36(6) and (7), the Supreme Court of Victoria must cause a copy of the declaration to be sent to the Attorney-General, who must give a copy to the relevant Minister within various timeframes. Within six months of receiving the declaration, the relevant Minister must prepare a written response to

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[207] Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations', above n 1, 359-64.

[208] *Charter* 2006 (Vic), s36(5). The latter part of this subsection is linked to the legal proceedings available under s 39.

the declaration, and cause it to be laid before both Houses of Parliament and published in the Government Gazette under s 37.[209]

A declaration is often referred to as an alarm bell, allowing the judiciary to alert the executive and parliament that legislation is inconsistent with the *judiciary's understanding* of the protected rights. The declaration then prompts the executive and legislature to review the impact of the legislation on rights, but it does not force the representative arms to amend the legislation to make it rights-compatible – that is, although the *Victoria Charter* requires a response from the relevant Minister, it does not dictate the content of the response.[210]

The issue of the constitutionality of a federal equivalent of a declaration of inconsistent interpretation under an equivalent federal human rights instrument arose in *HCA Momcilovic*. Like many aspects of this decision, the judges split on their reasoning on whether a federal declaration of inconsistent declaration would be constitutional. The issue came down to whether federal judges would be exercising federal judicial power (as is required of Chapter III courts) in exercising a discretion to issue an unenforceable declaration. All judge found that exercises of discretion under an equivalent of s 36(2) would not be an exercise of federal judicial power, and five of those seven judges found that it would not even be incidental to an exercise of federal judicial power.[211] Thus, there is a risk that an unenforceable declaration of inconsistent interpretation power if vested in the federal judiciary would violate the separation of powers principles implied into the *Constitution*. See further:

- '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, 371-2, 381-2.

Because of *HCA Momcilovic*, the AHRC Position Paper takes a risk-averse approach to declarations of inconsistent interpretations. The AHRC recommends *not* extending a *formal* declaration power to the judiciary, but to achieve the same outcome via an *informal* process. Accordingly, it recommends that a federal human rights instrument should not contain a power for the judiciary to issue an unenforceable declaration of inconsistent interpretation, like s 36(2) of the *Victorian Charter*. Instead, a series of duties should be imposed on the Commonwealth Attorney-General as follows:

- The AHRC assumes that '[i]f a court finds that it is not reasonably possible to interpret a statute in a way that is consistent with the Human Rights Act, this would usually be indicated in the reasons for judgment regardless of whether a "formal" DOI power exists'.[212]
- Where this occurs, 'the Attorney-General should be required to trigger a process for reviewing the law in question. For example, the Attorney-General could be required

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209 This is an improvement on the *Canadian Charter* and *UKHRA* which do not have this requirement. This requirement is borrowed from the *ACTHRA*, s 33.

210 *Victorian Charter* 2006 (Vic), s 37.

211 *HCA Momcilovic v The Queen* (2011) 245 CLR 1 [89], [90]–[91] (French CJ); [187] (Gummow J); [280] (Hayne J); [457] (Heydon J); [584] (Crennan and Kiefel JJ); and [661] (Bell J).

212 AHRC, *AHRC Position Paper*, above n 87, 332.

to table a notification in Federal Parliament and Government could be required to respond within a set time-period, and proposed amendments could also be reverted to the PJCHR for review'.[213]

- 'There need not be a formal DOI issued by the court to Parliament – the court would not play any role in this process other than to publish reasons for judgment in the usual way. This approach would simply require the Attorney-General's Department to have processes in place to monitor cases that arise under the Human Rights Act, and a statutory mechanism for the Attorney-General to trigger the review of relevant laws when cases arise that highlight incompatibilities'.[214]

I agree with the AHRC that this would still achieve the essential purposes of a formal declaration, in that the executive and parliament would be notified of judicially-assessed rights-incompatible legislation; and there would be an obligation on the executive to consider whether the legislation needs to be amended, and an obligation on the executive to report back to the PJCHR and parliament on their conclusions.

On the other hand, I also agree with the advice of the former Solicitor-General Stephen Gageler SC (as his Honour was then) and Henry Burmester QC. That is, with careful drafting, a declaration of inconsistent interpretation could be a constitutionally valid exercise of federal judicial power. The essential elements to be incorporated into a declaration provision are: (a) that a declaration be made 'binding as between the parties' to the proceedings; (b) that the Attorney-General is 'joined as a party to' any proceedings where a declaration may be issued; and (c) empowering the parties to the proceedings to enforce the declaration against the Attorney-General, which means enforcing the reporting 'obligations imposed on the Attorney-General by the making of the declaration'.[215]

The advice warrants closer consideration. Gageler and Burmester were confident that there would be a matter involving an actual controversy, as follows:

> 'In order to get to the stage of considering making such a declaration, a court would therefore need to have: (a) identified the Commonwealth law as bearing upon the determination of the matter before it; (b) ascertained what the relevant human right requires; and (c) formed an opinion as to whether, and, if so, to what extent, the Commonwealth law is compatible with that requirement.
>
> … If the Commonwealth law were not able to be interpreted as consistent with the relevant human right, the court would still be required to apply the law as so interpreted to determine the matter incompatibly with the relevant human right… [T]he court would have formed an opinion as to the compatibility of the legislation with the human right as an integral step in making a decision that determines a dispute as to the rights, duties or liabilities of the parties before the court. It is just that, in the latter event, the court would be empowered to go on expressly to translate the opinion it had formed in reaching that decision into a formal declaration. The declaration

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213 Ibid (citations omitted).

214 Ibid.

215 Gageler SC and Burmester QC, above n 2, [20] and [21].

> would in this way flow out of an integral part of the court's determination of the matter.'[216]

However, Gageler and Burmester were of the opinion that amendments to the usual approach to declarations of inconsistent interpretation were advisable to bolster the binding and enforceable element of the exercise of judicial power. They stated 'it is the lack of any consequence directly for the parties as a result of the making of a declaration that is a principal concern in terms of possible constitutional risk', with the problematic feature of the *ACTHRA*, *Victorian Charter*, *QHRA* being 'that the declaration of incompatibility does not bind the parties to the dispute'.[217] To 'enhance' the 'prospects of constitutional validity', Gageler and Burmester recommended:

- the declaration be 'binding as between the parties', which would 'strengthen an argument that a party could enforce the obligations imposed on the Attorney-General by the making of a declaration, obligations that might otherwise be seen as essentially matters for parliamentary, rather than judicial, enforcement'; and such a provision would continue to 'not give rise to any civil remedy other than against the Attorney-General to compel compliance with the express obligations imposed on him or her';[218]
- 'a requirement for the Attorney-General to be joined as a party to a proceeding in order for a declaration to be made.'[219]

On the one hand, the mechanism of declarations of inconsistent interpretation plays an important role in formalising the inter-institutional dialogue between the arms of government about human rights, as discussed elsewhere.[220] Indeed, the AHRC reported that '[b]ecause the DOI would come directly from the courts, it would be imbued with institutional power, and Parliament would be inclined to respond by amending the relevant legislation, which would lead to better rights protections for all.'[221] On the other hand, the *HCA Momcilovic* decision gives rise to genuine constitutional questions about the validity of a *Victoria Charter*-style declaration of inconsistent interpretation provision. The *HCA Momcilovic* Court, however, did not consider an amended federal equivalent provision as proposed by Gageler and Burmester.

I propose a stepped approach to considering declarations of inconsistent interpretation in a federal human rights instrument, with a strong preference for its inclusion based on an amended version of the *Victorian Charter* as proposed by Gageler and Burmester, with the AHRC proposal as an alternative.

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216 Ibid [14] and [15] respectively.

217 Ibid [18] and [19] respectively.

218 Ibid [20].

219 Ibid [21].

220 Debeljak, 'Parliamentary Sovereignty and Dialogue', above n 156, 31-35; Debeljak, 'Four-Year Review, above n 177, 11-17.

221 AHRC, *AHRC Position Paper*, above n 87, 331

Recommendations 30 and 31:

30) **I recommend that serious consideration be given to including a declaration of inconsistent interpretation, based on ss 36 and 37 of the *Victorian Charter* as amended based on the Gageler and Burmester 'Opinion' dated 15 June 2009, in a federal human rights instrument. The amendments to be incorporated into an equivalent declaration provision in a federal instrument are: (a) that a declaration be made 'binding as between the parties' to a proceeding in which it is issued; (b) that the Attorney-General 'be joined as a party' to any proceedings where a declaration may be issued; and (c) empowering the parties to the proceedings to enforce the declaration against the Attorney-General.**[222]

31) **If recommendation 30 is not accepted or considered too constitutionally risky in light of *HCA Momcilovic*, I recommend that any federal human rights instrument should not contain a power for the judiciary to adopt a declaration of inconsistent interpretation, based on ss 36 and 37 of the *Victorian Charter*. Instead, the following legislative obligations should be enacted: (a) an obligation on the Commonwealth Attorney-General to monitor all judicial proceedings that arise under the federal human rights instrument; (b) an obligation imposed on the Commonwealth Attorney-General to bring any judicially assessed rights-incompatible legislation to the attention of the relevant Minister and Parliament; (c) an obligation on the relevant Minister to consider whether the legislation needs to be amended; and (d) an obligation on the relevant Minister to report their assessment to the PJCHR and Parliament. This is consistent with the AHRC Position Paper.**

3.4 MECHANISM 2: MECHANISM CONCERNING THE OBLIGAITONS ON PUBLIC AUTHORITIES

The second mechanism contained in many statutory human rights instruments relates to the obligations imposed on public authorities. Under the *ACTHRA*, *Victorian Charter*, and *QHRA*, public authorities have the obligation to act and to decide compatibly with the guaranteed human rights. For ease of discussion, I will refer here to the provision sunder the *Victorian Charter*.

3.4.1 Human Rights Obligations on Public Authorities

Under the *Victorian Charter*, s 38(1) states that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.' This imposes two obligations on public authorities: (a) an obligation to act compatibly with the substance of the human rights, which is referred to as the substantive obligation; and (b) a procedural obligation, which ensures that the human rights are a relevant part of the decision-making process.

The *Victorian Charter* then provides for a number of exceptions to s 38(1) unlawfulness. First, under s 38(2), there is an exception where the law dictates the unlawfulness. That is, there is an exception to the substantive and procedural obligations on a public authority

[222] Gageler SC and Burmester QC, above n 2, [20] and [21].

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 rights-*incompatible* legislation.[223]

From a parliamentary sovereignty perspective, this exception is necessary: if parliament retains the power to enact rights-*incompatible* legislation, public authorities should not be considered to be behaving unlawfully for implementing that rights-*incompatible* legislation.

From a human rights perspective, where a public authority seeks to rely on a rights-*incompatible* interpretation of legislation to justify a substantive decision or a decision-making process that is incompatible with human rights, an individual can challenge the interpretation of the legislation by seeking a rights-*compatible* interpretation under the first enforcement mechanism. If it is possible to interpret the law in a rights-compatible manner, the potential violation of human rights will be avoided and the rights-compatible interpretation becomes the remedy: the law is re-interpreted to be rights-compatible, the public authority has substantive and procedural obligations under s 38(1), and the s 38(2) exception to unlawfulness does not apply. On balance, this exception is a workable compromise between the retention of parliamentary sovereignty and the promotion of human rights, where the political imperative is to retain the sovereignty of parliament.

Secondly, s 38(3) of the *Victorian Charter* states that the obligations under s 38(1) do not apply to an act or decision of a private nature. This exception is necessary to ensure that the private actions of hybrid/functional public authorities (see below) are not subject to the s 38(1) obligations, and is reasonable. The justification for extending human rights obligations to hybrid/functional public authorities is linked to the exercise by those entities of functions of a public nature, so it is appropriate to impose those obligations only when those entities are engaging in their "public nature" activities, not their "private nature" activities.[224]

In contrast, all activities of a core/wholly public authority are caught by the s 38(1) obligations. This is because such public authorities are considered to be not capable of doing anything of a private nature; that because they are core/wholly public authorities, everything they do is of a public, not private, nature.[225]

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223 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.

224 See further Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 3-4, 6; Human Rights Consultation Committee, *Rights Responsibilities and Respect*, above n 123, 56.

225 This is supported by both the Explanatory Memorandum and the Victorian Consultation Committee report. The Explanatory Memorandum to the *Victorian Charter* states that '[t]his definition encompasses two types of public authorities: core public authorities, who are bound by the *Charter* generally, and functional public authorities, who are only bound when they are exercising functions of a public nature on behalf of the State or a public authority': Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 3-4. The Victorian Consultation Committee report notes that core/wholly public authorise 'must meet human rights standards both as institutions and as service providers' (i.e. they have obligations in all that they do), whereas hybrid/functional public

Thirdly, ss 38(4) and (5) provide an exception for religious bodies. Under s 38(4), public authorities are not required to act or decide in a way that impedes or prevents a religious body from acting in conformity with the religious doctrines, beliefs or principles, in accordance with which the religious body operates. A "religious body" is given quite a broad definition under s 38(5), including those bodies established for religious purposes; or educational and charitable religious bodies. Consideration will have to be given to whether such an exception is appropriate at the federal level.

Recommendations 32 to 35:

32) Substantive and procedural human rights obligations should be imposed on public authorities, with s 38(1) of the *Victorian Charter* being an appropriate model provision. This is consistent with the AHRC Position Paper.

33) An exception to the substantive and procedural human rights obligations on public authorities should be provided where a statutory provision or law dictates the unlawfulness, with s 38(2) of the *Victorian Charter* being an appropriate model provision. This is consistent with the AHRC Position Paper.

34) The private activities of 'hybrid/functional' public authorities should be excluded from the substantive and procedural human rights obligations imposed on public authorities, with s 38(3) of the *Victorian Charter* being an appropriate model provision. This is consistent with the AHRC Position Paper.

35) Consideration should be given to *not* extending an exception to the substantive and procedural obligations on public authorities that are religious bodies, contrary to ss 38(4) and (5) of the *Victorian Charter*.

3.4.2 Definition of a 'Public Authority'?

The realities of modern government mean that any definition of 'public authority' must go beyond 'core/wholly' public authorities under a federal human rights instrument, and also include 'hybrid/functional' public authorities.

3.4.2(a) Hybrid/Functional public authorities

Hybrid/functional public authorities are those part-private and part-public bodies whose functions include functions of a public nature. The category of hybrid/functional public authorities only captures those entities that operate in the public sphere, and only when they are operating in the public sphere; that is, hybrid/functional public authorities do *not* have human rights obligations when acting in their private capacity. This category of public

authorities: 'they are bound … only when performing 'functions of a public nature': Human Rights Consultation Committee, *Rights Responsibilities and Respect*, above n 123, 58.

authority is included under the *UKHRA*, with the sub-jurisdictions in Australia – the *Victorian Charter*, *ACTHRA* and *QHRA* – following suit.[226]

Indeed, including hybrid/functional public authorities within a federal human rights instrument will be key to the effectiveness of this mechanism. Public services are delivered by modern-day government in a variety of modes, including the 'contracting out' of the delivery of government and public services to private enterprises. To not include such private enterprises within the reach of a federal human rights instrument would enable core/wholly public authorities to avoid their human rights obligations by choosing a particular vehicle for the delivery of public services (say, outsourcing) which, if delivered by the core/wholly public authority, would be subject to human rights obligations. This is not an acceptable outcome given the workings of modern-day government. It is the substance of what is being delivered, not the vehicle chosen for the delivery, which should regulate which entities have human rights obligations under any federal human rights instrument.

3.4.2(b) Courts and Tribunals as 'Public Authorities'

In the United Kingdom, courts and tribunals are core public authorities. This means that courts and tribunals have a positive obligation to interpret and develop the common law in a manner that is compatible with human rights. The major impact of this to date in the United Kingdom has been with the development of a right to privacy.[227]

This contrasts with the sub-jurisdictional instruments in Australia. For example, under the *Victorian Charter*, courts and tribunals are excluded from the definition of public authority. The Victorian Human Rights Consultation Committee report explained that the exclusion of courts from the definition of 'public authority' 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.[228] If it was otherwise, the High Court may strike down that part of the *Victorian Charter*.

The position under the *UK HRA* is to be preferred to that under the *Victorian Charter*. Given that courts and tribunals will have human rights obligations in relation to rights-compatible interpretation of statutory law under a federal human rights instrument, it is odd and incomplete not impose similar obligations on courts and tribunals in the development of the common law. Accordingly, it is much more preferable to include courts and tribunals in the definition of public authorities.

Recommendations 36 to 38:

36) Both 'core/wholly' public authorities and 'hybrid/functional' public authorities should be subject to substantive and procedural human rights obligations under a federal human rights instrument. This is consistent with the AHRC Position Paper.

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226 See, for example, *UKHRA 1997* (UK), ss 6(3)(b) and (5), and *Victorian Charter 2006* (Vic) ss 4(1)(c), (2), (4) and (5).

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

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

37) I support the recommendation in the AHRC Position Paper to include a list of functions that are to be considered 'functions of a public nature' in a federal human rights instrument. This replicates similar inclusive lists of such functions under the *ACTHRA* and the *QHRA* (and which is an improvement on the *Victorian Charter*). This is consistent with the AHRC Position Paper.

38) Subject to constitutional considerations, courts and tribunals should be included in the definition of 'public authorities'.

3.4.3 The Cause of Action and Remedies

Although the *Victorian Charter* does make it unlawful for public authorities to act incompatibly with human rights and to fail to give proper consideration to human rights when acting under s 38(1), it does *not* create a freestanding cause of action or provide a freestanding remedy for individuals when public authorities act unlawfully (s 39(1) and (2)); *nor* does it entitle any person to an award of damages because of a breach of the *Victorian Charter* (s 39(3) and (4)). 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 *Victorian Charter*. Rather, s 39 requires a victim to "piggy-back" *Victorian Charter*-unlawfulness onto a pre-existing claim to relief or remedy, including any pre-existing claim to damages.

To highlight the complexity of the remedial provisions where a public authority fails to act lawfully, I reproduce s 39 of the *Victorian Charter*:

> (1) 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 ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.
>
> (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right—
>
> (a) to seek judicial review under the *Administrative Law Act 1978* or under Order 56 of Chapter I of the Rules of the Supreme Court; and
>
> (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.
>
> (3) A person is not entitled to be awarded any damages because of a breach of this Charter.
>
> (4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

I do *not* recommend remedial provisions for s 38(1) unlawfulness be modelled on s 39 of the *Victorian Charter* for numerous reasons.

First, the drafting of the provision is problematic. It has been noted that s 39 'is drafted in terms that are convoluted and extraordinarily difficult to follow'.[229] This undermines the right of victims to vindicate their rights. To add such unnecessary complexity to the vindication of human rights claims against public authorities adds to the cost of *Charter* litigation, creating a disincentive for victims to pursue their human rights claims.[230]

Second, because of the drafting complexity, the meaning and scope of s 39 is yet to clarified by the courts, so the extent of the obligations and the precise nature and extent of the available remedies is not known. Two examples suffice. The meaning of the need for the availability of 'relief or remedy' independent of the *Victorian Charter*-unlawfulness is still not settled – that is, there is still no judicial clarification about whether s 39(1) 'requires that the plaintiff in fact has and relies upon a non-*Charter* ground for seeking judicial review' or 'requires only that the act or decision in question is amenable to judicial review in the abstract'.[231] Moreover, there is uncertainty about the requirements associated with 'may seek' under s 39(1). The jurisprudence indicates that an applicant does not have to succeed in obtaining their non-*Victorian Charter* relief or remedy to gain relief or remedy for *Victorian Charter*-unlawfulness.[232] However, it is not clear whether the 'non-*Charter* ground of unlawfulness must meet some minimum threshold of merit or viability', with speculation that 'the non-*Charter* ground must only be of sufficient merit to survive a strike-out application or that it must at least be "non-colourable"'.[233] The difficulties associated with interpreting s 39(1) equally apply to interpreting s 39(4), which allows a person to seek damages if they have a pre-existing right to damages.

Thirdly, s 39 undermines the enforcement of human rights. To force a victim of a violation of rights to "piggy-back" a *Victorian Charter* claim onto a pre-existing relief or remedy may result in under-enforcement of rights. Victims of rights violations may not receive a remedy in a situation where a "piggy-back" pre-existing relief or remedy is not available.

Fourthly, the complexity of the drafting, the failure of the courts to clarify s 39, and the fact that by definition a victim must have another cause of action to pursue, have had a combined chilling effect on litigation against public authorities for s 38(1) unlawfulness.

Fifthly, the provision of an effective remedy when rights are violated is itself a human right. Article 2(3) of the *ICCPR* requires State Parties '[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy'. A remedy based

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229 Ibid [214] (Weinberg JA).

230 See further, Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act* 2006, Victorian, September 2015, 119 – 122 ('*2015 Charter Review*').

231 Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (2nd ed, Lawbook Co, 2019) [CHR.39.400] citing, *inter alia*, Mark Moshinsky, 'Bringing Legal Proceedings Against Public Authorities for breach of the Charter of Human Rights and Responsibilities' (2014) 2 *Judicial College of Victoria Online Journal* 91 at 96.

232 See for example *Certain Children v Minister for Families and Children* (No 2) (2017) 52 VR 441, esp [549].

233 Pound and Evans, above n 231, [CHR.39.80].

on s 39 of the *Victorian Charter* cannot be described as an effective remedy, leaving the federal government exposed to claims of a violation of art 2(3) of the *ICCPR*.

To address the problems associated with a s 39-style provision, and bring a federal human rights instrument into line with comparable jurisdictions,[234] a federal human rights instrument must include a freestanding cause of action supported by a freestanding remedy where public authorities fail to meet their substantive and procedural human rights obligations.

Under the *UKHRA*, it is unlawful for a public authority to exercise its powers under rights-compatible legislation in a manner that is incompatible with rights (ss 6 to 9). There are three courses of redress for such unlawful action: (a) a freestanding cause for breach of statutory duty, with the *UKHRA* itself being the statute breached; (b) a new ground of illegality under administrative law;[235] and (c) the unlawful act can be relied upon in any legal proceeding. Note the freestanding cause of action.

In addition, the *UKHRA* also creates a freestanding remedy. Under s 8, 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.[236] The concept of 'just satisfaction' comes from the *ECHR* – art 41 provides that where the Convention is violated, 'the Court shall, if necessary, afford just satisfaction to the injured party'. The concepts of just satisfaction may include compensation, but payments of compensation under the *ECHR* have always been modest,[237] and this has filtered down to compensation payments in the United Kingdom. Given that a federal human rights instrument is likely to contain a provision allowing for international and comparative jurisprudence to inform the interpretation of the federal instrument, we could expect to avoid unduly high compensation payments were a power to award compensation included in a federal instrument. If the size of compensation payments is a concern, the federal human rights instrument could replicate the 'just satisfaction' concept or simply legislate a cap on damages awards.

The *ACTHRA* is a combination of the *Victorian Charter* and the *UKHRA*. It recently replicated s 38 of the *Victorian Charter* and thereby imposed substantive and procedural

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234 Section 24 of the *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 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. See further, Brett Young, *2015 Charter Review*, above n 230, 125 – 126.

235 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.

236 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].

237 It would be rare for a victim of a human rights violation to be awarded an amount in excess of GBP 20,000.

human rights obligations on public authorities.[238] However, it replicated the *UKHRA* by allowing a freestanding cause of action against a public authority in its Supreme Court, in addition to allowing a person to rely on unlawfulness under the *ACTHRA* in any other legal proceeding as per s 39 of the *Victorian Charter*.[239] However, in a nod to the *Victorian Charter* and a snub of the *UKHRA*, the *ACTHRA* excludes awards of damages for unlawfulness by public authorities.[240]

The dangers of a federal human rights instrument not adequately addressing an effective remedy are clear from the *NZBORA*. The *NZBORA* does not expressly provide for remedies, and this gap has been filled by the judiciary. Two remedies for rights violations have been created by the judiciary under its inherent jurisdiction: (a) a judicial discretion to exclude evidence obtained in violation of rights; and (b) a right to compensation if rights are violated.[241] Similar remedies may be crafted by the federal judiciary under its inherent jurisdiction. Surely it is better for parliament to decide upon suitable and effective remedies under a federal human rights instrument, rather than leave this to the judiciary.[242]

Recommendations 39 to 41:

39) A federal human rights instrument must include a freestanding cause of action where a public authority fails to meet its substantive and procedural human rights obligations. This is consistent with the AHRC Position Paper.

40) A federal human rights instrument must include a freestanding remedy where a public authority fails to meet its substantive and procedural human rights obligations. This is consistent with the AHRC Position Paper.

238 *ACTHRA 2004*, s 40B.

239 *ACTHRA 2004* (ACT), s 40C(2).

240 *ACTHRA 2004* (ACT), s 40C(4) and (5). Note that the inclusion of s 40C has not led to a proliferation of claims in the ACT courts: Brett Young, *2015 Charter Review*, above n 230, 126, 127.

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

242 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).

41) The freestanding cause of action and freestanding remedy should be based on provisions similar to the *UKHRA* and *ACTHRA* (except the limitation on damages), and suggested wording is:[243]

> **(1) This section applies if a person—**
> **(a) claims that a public authority has acted in contravention of [equivalent to s 38 of the *Victorian Charter*]; and**
> **(b) alleges that the person is or would be a victim of the contravention.**
> **(2) The person may—**
> **(a) commence a proceeding in a federal court against the public authority; or**
> **(b) rely on the person's rights under this Act in other legal proceedings.**
> **(3) A federal court may, in a proceeding under subsection (2), grant the relief it considers just and appropriate.**
> **(4) This section does not affect a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority.**

This is not inconsistent with the AHRC Position Paper.

[243] See Debeljak and Penovic, above n 3.

Dr Julie Debeljak
Submission: PJCHR Inquiry on
Australia's HR Framework

APPENDIX

The following articles and book chapters are relevant to the current Human Rights Inquiry. Except for the starred (*) book chapter, the full-text of all of the articles can be found at: http://ssrn.com/author=865908.

Book Chapters

- * Julie Debeljak and Tania Penovic, 'Re-Charting the Victorian Charter of Human Rights: Advancing Enforcement in Human Rights legislation', with Tania Penovic, in Becky Batagol, Heli Askola, Jamie Walvisch, Kate Seear, and Janice Richardson (eds), *Feminist Legislation: Australia* (Routledge, 2023, forthcoming)

- Julie Debeljak, 'The Fragile Foundations of the Human Rights Landscape: Why Australia needs a Human Rights Instrument' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia: Volume 1* (Thomson Reuters, Australia, 2021) 39-78 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3946769]

- Julie Debeljak and Laura Grenfell, 'Diverse Australian Landscapes of Law Making and Human Rights', with Laura Grenfell, in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 1-28 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665795]

- Julie Debeljak, 'Rights Dialogue where there is Disagreement under the Victorian *Charter*', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 267 – 322 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665788]

- Laura Grenfell and Julie Debeljak, 'Future Directions for Engaging with Human Rights in Law-Making: Is a Culture of Justification Emerging Across Australian Jurisdictions' with Laura Grenfell, in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 789 - 819 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665858]

- Julie Debeljak, 'Legislating Statutory Interpretation under the Victorian *Charter*: An Unusual Tale of Judicial Disengagement with Rights-Compatible Interpretation' in Micah Rankin, Lorne Neudorf and Christopher Hunt (eds), *Legislating Statutory Interpretation: Perspectives from the Common Law World* (2018, Thomson Reuters Canada, Toronto), 183-234 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337233]

- Julie Debeljak, 'Rights Dialogue under the Victorian *Charter*: the Potential and the Pitfalls' in Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017, ANU Press), ch 38, 407-417 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337240]

- Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', a chapter in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.)**,** *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) 135-57 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356724]

Refereed Articles

- Julie Debeljak, 'Of Parole and Public Emergencies: Why the Victorian Charter Override Provision Should be Repealed' (2022) 45(2) *University of New South Wales Law Journal* 1-47 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900233]

- Julie Debeljak, 'The Rights of Prisoners under the Victorian *Charter*: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38 *University of New South Wales Law Journal* 1332-85 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2699005]

- 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 *Monash University Law Review* 218-70 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698544]

- 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 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603929]

- Melissa Castan and Julie Debeljak, 'Indigenous Peoples' Human Rights and the Victorian C*harter*: a Framework for Reorienting Recordkeeping and Archival Practice' (2012) 12 *Archival Science* 213-234 (Published online, December 2011, DOI 10.1007/s10502-011-9164-z)) [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239435]

- 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 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239445]

- 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 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1498885]

- 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 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344839]

- Julie Debeljak, 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection', (2003) 9 *Australian Journal for Human Rights* 183-235 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240017]

- 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 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239447]

The following submissions pertaining to the *Victorian Charter* are relevant to the current Human Rights Inquiry.

- Julie Debeljak, 'Eight-year Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', a Submission to the Independent Reviewer of the *Charter*, June 2015, pp 1- 49.

- 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, pp 1-30.

- Julie Debeljak, 'How Best to Protect and Promote Human Rights in Victoria', submitted to the *Human Rights Consultative Committee of the Victorian Government*, August 2005, pp 1-27.

The following submissions pertaining to the *ACTHRA*, *QHRA* and the 2008-09 National Human Rights Consultation are also relevant to the current Human Rights Inquiry

- Julie Debeljak, 'Submission to the Queensland Parliamentary Inquiry on the Human Rights Bill 2018', Legal Affairs and Community Safety Committee, Queensland Legislative Assembly, 19 November 2018

- Julie Debeljak, 'Human Rights Inquiry', a Submission to the Queensland Parliament's Legal Affairs and Community Safety Committee, April 2016, pp 1-30

- Julie Debeljak, 'Economic, Social and Cultural Rights – A Good Idea for Inclusion in the ACT *Human Rights Act 2004*?', A submission to the *ACT Government*

Department of Justice and Community Safety Consultation, July – August 2011, with Adam Fletcher and Sarah Joseph

- Julie Debeljak, 'Submission on the Human Rights (Parliamentary Scrutiny) Bill 2010', submitted to the Commonwealth Senate *Standing Committee on Legal and Constitutional Affairs*, 9 July 2010, pp 1-11 (re-submitted in October 2010).

- Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, pp 1-88
  [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652503]