QUESTION ON NOTICE FROM THE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

'Inquiry into Australia's Human Rights Framework'

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QUESTION ON NOTICE

By way of email from the Secretary to the Parliamentary Joint Committee on Human Rights, dated 30 August 2023, I received the following Question on Notice from Senator Lidia Thorpe:

> Further to questions asked during the hearing, Senator Thorpe has also requested that the following question be put to you:
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> > In developing our legal frameworks, dominant groups have largely overlooked or overridden the human rights of certain groups, thereby causing systematic gendered and racialised marginalisation. How do we address the mass human rights abuses occurring across the country in a way that does not flood courts, provides justice to those who have had their rights contravened. Do we heal, abolish, or reform these systems and has there been any solutions considered that sit outside the traditional legal systems?

My response is below.

RESPONSE TO QUESTION ON NOTICE

My expertise

My expertise is in Australian constitutional law, international and domestic human rights law, and comparative constitutional and human rights law. Accordingly, I cannot comment on 'solutions … that sit outside the traditional legal systems'.

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The majority vs the marginalised

The core of human rights protection is to address the problem identified by Sen. Thorpe – that is, that 'dominant groups have largely overlooked or overridden the human rights of certain groups, thereby causing systematic gendered and racialised marginalisation.' The raison d'être of human rights guarantees is to protect the vulnerable, the unpopular, the marginalised and minorities from the rule of the majority.

At the Federal level, there is currently inadequate protection of the vulnerable, the unpopular, the marginalised and minorities from the might of majoritarian democratic decision making. Although the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) has introduced Statements of (In)Compatibility (SoCs) and the Parliamentary Joint Committee on Human Rights (PJCHR), these rights-assessments proceed from a somewhat narrow viewpoint. As I note in my submission to the Inquiry:

> '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.'[1]

This undermines the protection and promotion of human rights in Australia. Despite Australia's commitment to the main body of international human rights norms, beyond SoCs and the PJCHR, there is no domestic federal requirement to develop policy and enact laws that are consistent with human rights; and, when human rights are considered, the majoritarian-motivated perspectives of the representative arms are not challenged by diverse interests, aspirations or views.

One way to move beyond the effective representative monopoly about human rights is by the adoption of a comprehensive human rights instrument which requires governmental actions to be justified against minimum human rights standards, and gives each arm of government a

[1] Julie Debeljak, 'Inquiry into Australia's Human Rights Framework', a submission to the *Parliamentary Joint Committee on Human Rights*, June 2023, 25 ('2023 Inquiry Submission').

role in the refinement and enforcement of the guaranteed human rights. This brings us to the debate over institutional design.

Human rights and democracy are often characterised as irreconcilable concepts – the protection of the rights of the *minority* (and unpopular, marginalised and vulnerable) is supposedly inconsistent with democratic will formation by the process of *majority* rule. In particular, judicial review of the decisions of the representative arms against human rights standards is often characterised as anti-democratic – allowing the unelected judiciary to review and invalidate the decisions of the elected arms supposedly undermines democracy.

These arguments assume that a judicially enforceable human rights instrument replaces a representative monopoly (or monologue) over human rights with a judicial monopoly (or monologue); or, more simply, that a judicially enforceable human rights instrument replaces parliamentary supremacy with judicial supremacy. This is not the case with more modern rights instruments that create a so-called 'dialogue' about rights between the executive, the parliament and the judiciary. I return to this below.

Flooding the courts

Human rights instruments, whether they are statutory or constitutional, are not designed to flood the courts with litigation. Indeed, the three sub-national human rights instruments have not resulted in the proverbial 'lawyer's picnic'.

Moreover, the 'main game' under human rights instruments is not the courts. As per my earlier writings, with my co-author, Laura Grenfell:

> 'Even if the judiciary was given a (or a stronger) role in assessing rights-compatibility of legislation in all Australian jurisdictions, most legislation is never challenged before the courts. Only a fraction of legislation enacted will be subject to challenge and thus a rights-compatibility assessment by the judiciary. The executive-driven and parliamentary-enacted legislation *usually* represents the final choice on how societal interests, values and pursuits are balanced against human rights. As Janet Hiebert states, "whether and how [rights] constrain[] or influence[] the use of state power depends heavily on how those who develop, propose, and assess policy initiatives view their responsibility" to uphold rights.'[2]

Human rights instruments are most relevant and most effective outside of the courts. First, the primary focus should be on policy development and law making that considers and accounts for human rights guarantees. The goal is human rights-respecting policy and law that does not unreasonably and/or unjustifiably limits human rights, such that there is no need to challenge and test the policy and law in the courts. This 'upstream' consideration of human rights is discussed in my submission to the Inquiry (see pp ii – iii, and 11 – 24).

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[2] 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, 4 (citations omitted).

Secondly, most people experience threats to and violations of their human rights when interacting with government, through the vast array of public authorities that deliver services in the modern state. Human rights instruments impose obligations on public authorities to (a) properly consider human rights when making decisions and (b) decide matters in a manner consistent with rights. The main game here is to educate and train decision makers within public authorities on how to achieve these two obligations, and to develop a culture within those organisations where human rights are routinely considered, of influence and respected in all actions and decisions. Human rights reasoning and decision making must become part of the fabric of sound public administration. Indeed, human rights reasoning and decision making can contribute to sound public administration.

Thirdly, it is only when policy and law are human rights-deficient, and public authorities behave in ways that are not rights-respecting, that individuals need to seek solutions in the courts. If the proactive and protective rights mechanisms are working, the reactive and defensive judicial mechanism ought not be needed.

Constitutional vs Statutory

In terms of 'heal[ing], abolish[ing], or reform[ing] these systems' and 'solutions … that sit outside the traditional legal systems', the *better alternative* to a statutory human rights instrument as proposed by the Australian Human Rights Commission[3] is a constitutional human rights instrument based on the dialogue model. Constitutional instruments are better designed to uphold the rights of the unpopular, the vulnerable, the marginalised and the minority than statutory instruments.

Focusing on the difference between constitutional dialogue as distinct from statutory dialogue models, I will compare the *Canadian Charter of Rights and Freedoms 1982* (Can) ('*Canadian Charter*')[4] to the *Human Rights Act 1998* (UK) ('*UKHRA*'):[5] noting that the *Victorian Charter*,[6] the ACT *Human Rights Act*[7] and the Queensland *Human Rights Act*[8] are all statutory instruments based on the latter.[9] It is necessary to briefly outline the main

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3 Australian Human Rights Commission ('AHRC'), Free & Equal – Position Paper: A Human Rights Act for Australia, 2022 ('AHRC Position Paper').

4 *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*').

5 *Human Rights Act 1998* (UK) c 42 ('*UKHRA*').

6 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*').

7 *Human Rights Act 2004* (ACT) ('*ACTHRA*').

8 *Human Rights Act 2019* (Qld) ('*QHRA'*).

9 There is a spectrum on which rights interact with the arms of government: at one end you have a judicial monologue/monopoly over rights; at the other end the representative arms of government (the Executive and the Parliament) has a monologue/monopoly over rights; and somewhere in the middle you have dialogue models. See further, Julie Debeljak, '2023 Inquiry Submission', above n 1, 24 – 26; and Julie Debeljak, 'Submission to the National Consultation on Human Rights', submitted to the *National Consultation on Human Rights Committee*, 15 June 2009, 22-25 ('2008-09 National Consultation Submission').

features of the *Canadian Charter* and the *UKHRA* before fully exploring the notion of an inter-institutional dialogue.

The *Canadian Charter* is contained within the *Canadian Constitution*.[10] Section 1 guarantees a variety of essentially civil and political rights;[11] however, under s 1, limits that are reasonable and demonstrably justifiable may be imposed on the protected rights. The judiciary is empowered to invalidate legislation that violates a *Canadian Charter* right and which cannot be justified under s 1.[12] The *Canadian Charter* also contains an 'override clause'. Section 33(1) allows the parliament to enact legislation notwithstanding the provisions of the *Canadian Charter*. Thus, if the judiciary invalidate a law, parliament can respond by re-enacting the law notwithstanding the *Canadian Charter*.

The *UKHRA* incorporates the rights contained in the *European Convention on Human Rights* (1951) ('*ECHR'*)[13] into the domestic law of Britain. It is an ordinary Act of Parliament. Relevantly, s 3 imposes an interpretative obligation on the judiciary. The judiciary must interpret primary legislation, so far as it is possible to do so, in a way that is compatible with the incorporated Convention rights.[14] However, under s 4, the judiciary is *not* empowered to invalidate legislation that cannot be read compatibly with Convention rights. Rather, primary *incompatible* legislation stands and must be enforced. All the judiciary can do is issue a 'declaration of incompatibility'. A declaration acts as a warning bell to parliament and the executive that something is wrong. It is up to the parliament or executive to then act.[15]

The key relevant difference for the treatment of the vulnerable, the unpopular, the marginalised and minorities is the difference in remedies between the constitutional *Canadian Charter* and the statutory *UKHRA*. I reproduce relevant sections from my submission to the 2008-09 National Consultation:

> 'Under the *Canadian Charter*, judges are empowered to invalidate legislation that they consider unjustifiably limit rights guaranteed under the *Canadian Charter*.[16] This reflects the constitutional nature of the *Canadian Charter*. However, unlike in Australia and the US, this is not the end of the story. The representative arms of

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10 *Canadian Charter*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

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

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

13 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), commonly known as the 'European Convention on Human Rights' ('*ECHR'*).

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

15 For a detailed discussion on how these two instruments establish inter-institutional dialogues about rights, see Julie Debeljak, '2008-09 National Consultation Submission', above n 9, 27 – 45.

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

government have numerous response mechanisms. The *first* response is inaction, such that the legislation remains invalid. This means that the judicial invalidation remains in place presumably because the legislature on reflection agrees with the judiciary, or there is no political will to respond.

Secondly, the legislature may attempt to secure its legislative objective by a different legislative means. This will occur where the judiciary invalidated legislation because it failed the proportionality test. The legislature may still attempt to achieve its legislative objectives, but by more proportionate legislative means. This usually requires the legislature to focus on minimally impairing the affected rights, but may also require the legislature to focus on the rationality of the link between the legislative objective and the legislative means chosen to achieve those objects, or the proportionality between the violation of the right and the importance of the rights-limiting legislative objective.

Thirdly, the legislature can re-enact the invalidated legislation *notwithstanding* the *Canadian Charter* under s 33. The legislature can override the operation of the *Canadian Charter* in relation to that legislation for a period of 5 years. The judicial decision remains as a point of principle during the period of the override and revives at the expiration of the 5 years. Legislative use of the override indicates that the legislature disagrees with the judicial interpretation of the *Canadian Charter* or simply finds it unacceptable according to majoritarian sensibilities.

Use of the override provision is only *needed* when the judiciary takes issue with the legislative objectives pursued. Under the *Canadian Charter*, from 1982-97, this has happened in only 3% of *Charter* cases.[17] Of course, the override may also be used to secure a legislative objective by a particular legislative means found to be an unjustified limitation on rights (i.e. in the situation where the legislative means have failed the proportionality test). Presumably this would only occur when parliament was particularly wedded to the legislative means, because the less confrontational way around proportionality issues is to tweak the legislative means under the second response mechanism.

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

…

Under the *UK HRA*, the remedial powers of the judiciary have been limited. Rather than empowering the judiciary to invalidate laws that are incompatible with Convention rights, the judiciary can only make declarations of incompatibility.[18] A

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

18 *UKHRA* (UK) c 42, s 4.

declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision to which the declaration applies, nor is the declaration binding on the parties to the proceeding in which it is made. In other words, the judge must apply the incompatible law in the case at hand.

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

Secondly, the legislature may decide to pass ordinary legislation in response to a s 4 declaration of incompatibility or s 3 judicial interpretation. Parliament may take this course in response to a s 4 declaration of incompatibility for many reasons. Parliament may reassess the legislation in light of the non-majoritarian, expert view of the judiciary. This is a legitimate interaction between parliament and the judiciary, recognising that both institutional perspectives can influence the accepted limits of law-making and respect for human rights.[19] Parliament may also change its views in response to public pressure arising from the declaration. If the judiciary's reasoning is accepted by the represented, it is quite correct for their representatives to implement this change. Finally, the threat of resort to the European Court could be the motivation for change.

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

Thirdly, … the government may derogate from the *ECHR*, such that the right temporarily no longer applies in Britain. This is the most extreme response, and can be equated to using s 33 of the *Canadian Charter* (although it contains much greater safeguards, is consistent with international human rights law, and is accordingly the

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

preferred model for override/derogation provisions). From an international perspective, derogation is necessary to alter Britain's international legal obligations, and may be necessary to ensure that domestic grievances do not succeed before the European Court of Human Rights.

From a domestic perspective, derogation will never be *necessary* because judicially assessed incompatible legislation cannot be judicially invalidated. However, the representative arms may *choose* to derogate to secure compliance with the *UK HRA* (as opposed to the Convention rights guaranteed therein). Domestically, derogation may be used to resolve an incompatibility based on the judicially assessed illegitimacy of a legislative *objective*. Moreover, where the judiciary considers the legislative *means* to be incompatible, derogation allows the representative arms to re-assert *their* understanding of the interaction of Convention rights and any conflicting non-protected values, as reflected in *their* chosen legislative means.[20]

…

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

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

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

Moreover, dialogic models have the distinct advantage of forcing the executive and the legislature to take more responsibility for the human rights consequences of their actions. Rather than being powerless recipients of judicial wisdom, the executive and legislature have an active and engaged role in the human rights project. This is extremely important for a number of reasons. First, it is extremely important because by far most legislation will never be the subject of human rights based litigation; we

[20] A disagreement over legislative means may be resolved by the other response mechanisms if the impugned legislative means are not vital to the representative institutions' legislative platform.

> really rely on the executive and legislature to defend and uphold our human rights. Secondly, it is the vital first step to mainstreaming human rights. Mainstreaming envisages public decision making which has human rights concerns at its core. And, of course, mainstreaming rights in our public institutions is an important step toward a broader cultural change.'[21]

In my submission to the 2008-09 National Consultation, I explain that there are two reasons to prefer the constitutional *Canadian Charter* model over the statutory *UKHRA* model: (a) as a response to the under-enforcement of human rights in Australia; and (b) to address the perception that the judiciary is too activist or illegitimately law-making when it contributes to the protection of human rights. Only the former is relevant here.[22]

The problem of under-enforcement of rights – which is the essence of what Sen. Thorpe is asking about – is *better* addressed under the constitutional *Canadian Charter* than a statutory instrument: that is, the *UKHRA* does not as effectively guard against the under-enforcement of rights. As per my submission to the 2008-09 National Consultation:

> 'The biggest problem with the *UK HRA* is its potential tendency to under-enforce human rights due to the effects of legislative inertia.[23] Under the *Canadian Charter*, when the judiciary assesses legislation as unjustifiably violating *Canadian Charter* rights, the individual victim gets the benefit of legislative inertia; the law is invalidated and the representative arms must take a *positive* step to re-instate the law – either by using s 1 if they wish to re-enact the same legislative objective using a different rights-limiting legislative means, or by using s 33 if they wish to re-enact an impugned legislative objective or the impugned legislative means.
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> Conversely, under the *UK HRA*, the representative arms enjoy the benefits of legislative inertia: if the judiciary issues a declaration of incompatibility, the judicially-assessed Convention-incompatible law remains valid, operative and effective, such that the representative arms need not do anything positive to maintain the status quo. However, the representative arms must pass remedial legislation if they prefer to ensure rights-compatibility of the law, and this is where legislative inertia may set in.[24] Legislative inertia may occur for many reasons, including the timing of an election, the unpopularity of a decision to amend the law to be rights-compatible, or an already full legislative program.
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> Accordingly, relying on the representative arms to undertake a positive step to secure rights-compatibility is a weaker form of representative accountability for the human

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21 Julie Debeljak, '2008-09 National Consultation Submission', above n 9. 38 – 44.

22 For a discussion of the latter problem, see Julie Debeljak, '2008-09 National Consultation Submission', above n 9, 47 – 51.

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

24 The remedial order procedure under the *UK HRA* (the third response mechanism) only alleviates some causes of legislative inertia and is not a mandatory response to a declaration of incompatibility, so does not fully answer the criticism.

> rights implications of governmental actions, and has a tendency to weaken the promotion and protection of human rights.
>
> The legislative inertia scenario under the *UK HRA* model will also play out differently in Britain compared with Australia, making it an even less desirable model in Australia. Given Britain's retention of the right of individuals to petition the European Court of Human Rights, and the obligation on Britain to implement decisions of the European Court of Human Rights,[25] legislative inertia may not prove too problematic in Britain. However, legislative inertia remains a problem in Australia, given the lack of enforceability of the views of the human rights treaty-monitoring bodies and the distancing of Australia from the international human rights regime under the Howard era.[26]
>
> The difficulty of legislative inertia is not an insurmountable bar to Australia adopting the British model. Rather, legislative inertia is an issue to be aware of and improve upon if Australia adopts an instrument based on the *UK HRA*. One answer to this problem in Australia would be to include an obligation on the legislature to respond within six months to any judicial declaration of incompatibility issued.[27] Another solution would be to adopt the preferred model – the *Canadian Charter*.'[28]

In addition to the legislative inertia argument, which benefits the vulnerable, the unpopular, the marginalised and minorities, is the matter of the preservation of parliamentary sovereignty via the override mechanism. It is true that the override and its exercise is the ultimate demonstration of the power of the majority (democracy) over the powerlessness of the minority (human rights). However, an invocation of the override is only a temporary détente (or accommodation or compromise). The point of rights disputation returns to the political stage within five years, and the underlying judicial opinion on the rights-deficiencies of the relevant law remains. The polity is forced to confront what the representative arms of government (the majority) is doing in its name every five years.

Although it is not ideal to suspend the operation of a human rights instrument for five years, this is a *better* outcome than under a statutory instrument. Under a statutory instrument, a law that is *incompatible* with the rights of the vulnerable, the unpopular, the marginalised and minorities remains valid, operative and effective, and it endures – it does not need to be

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[25] *ECHR*, opened for signature 4 November 1950, 213 UNTS 221, art 46 (entered into force 3 September 1953). Under art 46, a State party must respond to an adverse decision of the European Court of Human Rights by fixing the human rights violation. The judgments impose obligations of results: the State Party must achieve the result (fixing the human rights violation), but the State Party can choose the method for achieving the result.

[26] See David Kinley and Penny Martin, 'International Human Rights Law at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466; Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal,* 297; Sarah Joseph, "The Howard Government's Record of Engagement with the International Human Rights System" (2008) 27 *Australian Yearbook of International Law* 45

[27] See *Victorian Charter* (2006), s 37; *ACT HRA* (2004), s 33; ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act*, 2003, [4.36] – [4.38]

[28] Julie Debeljak, '2008-09 National Consultation Submission', above n 9, 45-47 (citations retained).

revisited on a five-yearly regular timetable. Rights *incompatible* laws are enacted in a 'set and forget' framework.

The combination of (a) the benefits of legislative inertia for the vulnerable, the unpopular, the marginalised and minorities vis-à-vis the remedies under a constitutional instrument, and (b) the five-year limit on the enactment of legislation that is incompatible with rights, makes a constitutional instrument a *better* tool for protecting and promoting the rights of the vulnerable, the unpopular, the marginalised and minorities.

Strengthening of the SoC and PJCHR

The final point in terms of 'heal[ing], abolish[ing], or reform[ing] these systems' and 'solutions … that sit outside the traditional legal systems' relates to the 'upstream' consideration of human rights. Whether this Inquiry results in no human rights instrument, a statutory human rights instrument or a constitutional human rights instrument, reform of the 'upstream' mechanisms involving Statements of (in)Compatibility and the PJCHR are necessary. Although the executive (SoC/SoIC) and parliament (PJCHR) are part of 'the traditional legal systems', fully accounting for and respecting rights as policy is developed and laws are drafted will be key to 'reform[ing] these systems' for the betterment of the treatment of the vulnerable, the unpopular, the marginalised and minorities. Please refer to relevant reforms as discussed in my submission to the Inquiry (see pp ii – iii, and 11 – 24).

Dr Julie Debeljak
14 September 2023