

***SOME THINGS BORROWED, SOME THINGS NEW:  
AN OVERVIEW OF JUDICIAL REVIEW OF  
LEGISLATION UNDER THE CHARTER OF HUMAN RIGHTS  
AND RESPONSIBILITIES***

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**A INTRODUCTION**

The Charter of Human Rights and Responsibilities Act 2006 (Vic) ('Charter') commenced, for most part, on 1 January 2007. It is an Act of the Victorian Parliament. It sets out rights, largely based on the International Covenant on Civil and Political Rights,<sup>1</sup> which the Victorian Parliament wishes to protect and promote. It introduces an obligation to assess and justify limitations on those rights. Also introduced is a new rule of statutory interpretation requiring all Victorian legislation to be interpreted compatibly with those rights; if that can not be done, the Charter permits the Supreme Court to issue a declaration to that effect.

This paper explores the scope of judicial review of legislation under the Charter. The focus of this paper is on primary legislation. The label 'judicial review' of legislation is used in this paper to describe: (1) the analysis now required to determine if legislation which limits rights does so in a justified and proportionate way (s 7); (2) the interpretation of legislation to deliver a rights compatible meaning (s 32); and (3) the declaration that may be issued where legislation can not be interpreted consistently with rights (s 36). It may be more appropriate to characterise s 7 as judicial review and ss 32 and 36 as a 'remedy' consequent upon judicial review. For the purposes of this paper, nothing turns on this distinction or how they are categorised; this paper considers how all three sections are likely to operate in delivering rights protection and promotion.

Those three sections are illustrated by reference, where relevant, to comparable provisions in human rights instruments operating in Canada (Charter of Rights and Freedoms 1982), New Zealand (Bill of Rights Act 1990), South Africa (Bill of Rights 1996) and the United Kingdom (Human Rights Act 1998). In the main, they are borrowed from such instruments and adapted to the Victorian context;

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<sup>1</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

there are textual and contextual differences of course which must be respected. While s 7 is central to the Charter's operation, the application of its equivalent is relatively well established in those jurisdictions. The equivalent of ss 32 and 36 are relatively new; moreover, the text and detail of the latter two sections differ from their overseas counterparts. Accordingly, this paper focuses on ss 32 and 36.

As Australia has ratified the ICCPR, its requirements are binding on Australia in international law. Whilst the Australian federal government has not implemented the ICCPR domestically, Victoria has taken the lead by becoming the first State within Australia to give domestic effect to rights under the ICCPR in a relatively comprehensive manner. Section 32 of the Charter explicitly permits consideration of international law in giving effect to its provisions. Accordingly, international human rights law is relevant to a proper understanding and application of the Charter.

The ICCPR recommends a 'judicial role' because it can be a means of effectively protecting and promoting rights. The substantive requirements of a 'judicial role' are not spelled out. Nor are they self-evident. The content can be ascertained by interpreting the relevant ICCPR Articles and from observations of the Human Rights Committee established pursuant to the ICCPR. Exploring the Charter's judicial review framework helps determine whether or not the ICCPR requirements relating to a 'judicial role' are met. Moreover, the inquiry into whether the ICCPR requirements are met may provide a clue as to whether that framework is likely to be effective in protecting and promoting rights. This paper argues that the judicial review framework represents an appropriate start and meets the ICCPR requirements.

## B JUDICIAL REVIEW

From a jurisprudential perspective, it helps to identify a theory or theories of rights based judicial review. There is a large volume of writing dedicated to explaining and debating the legitimacy or otherwise of judicial review, particularly in the context of rights based review.<sup>2</sup> Until relatively recently, most writing centred on the US Bill of Rights. This writing continues to give rise to polarised debate. This paper does no more than endeavour to outline the contours of that debate; this may help to locate where the Charter fits within that debate.

The democratic nature of parliament is sufficient for some to favour its sole custody over rights protection.<sup>3</sup> Consistently with this view, there are objections to

<sup>2</sup> See P Hogg, *Constitutional Law of Canada* (Student Edn Carswell Legal Publications, Toronto 2004) 131; a selection of books is listed in fn15.

<sup>3</sup> See generally J Bentham, *The Collected Works of Jeremy Bentham: An Introduction to the Principles and Morals of Legislation* (Clarendon Press, Oxford 1996). The view that parliament is inherently democratic because representatives are elected may overlook the operation of the party political system, dominance of the executive and the electoral system. Aspects of those features can diminish the choices available to electors. Moreover, legislative action can impair the democratic process (eg denial of vote on grounds of race or criminal record).

‘strong form’ judicial review on the basis that it can be anti-democratic<sup>4</sup> (eg the invalidation of legislation by an unelected judiciary). A nuanced variation of this sees parliament as paramount in the field of rights protection.<sup>5</sup> At the other end of the spectrum, there are those who see rights limitation as immune from the parliamentary political process and requiring protection primarily by the judiciary.<sup>6</sup>

The debate about rights based judicial review extends to matters beyond arguments based on the democratic status of the institutions and the separation of powers. For example, the institutional competence of the judiciary to participate in disputes involving rights is challenged. Some argue that judges are neither well placed nor equipped to deal with matters of public policy which disputes involving rights can involve.<sup>7</sup> Others counter this view by contending that the logic and evidence required to support public policy are capable of curial analysis and are consistent with rule of law ideals.<sup>8</sup>

In relation to ‘third wave’<sup>9</sup> or ‘dialogic’ bills of rights,<sup>10</sup> of which the Charter is one, the polarity visible in the context of the US Bill of Rights is narrower. That is

<sup>4</sup> The force of such an argument depends on how democracy is understood. If the democratic process is defined widely to include the processes of government, then judicial protection of fair procedures and decision making is neither undemocratic nor illegitimate. Further, on one view a democracy which encompasses restraint mechanisms on the majority to respect individual autonomy and protect minorities could be seen as more compassionate than one which did not. If so, judicial power to strike down legislation incompatible with human rights could be said to be consistent with such a democracy.

<sup>5</sup> M Tushnet, ‘Weak-Form Judicial Review and “Core” Civil Liberties’ [2006] 41 HarvCR-CLL Rev 1; cf. J Waldron, *Law and Disagreement* (Clarendon Press, Oxford 1999).

<sup>6</sup> R Dworkin, *Taking Rights Seriously* (Duckworth, London 1977); cf. J Ely, *Democracy and Distrust* (Harvard University Press, London 1980).

<sup>7</sup> L E Weinrib, ‘The Supreme Court of Canada and Section 1 of the Charter’ (1988) 10 Supreme Court LR 469, 486–492.

<sup>8</sup> Dworkin (n 6) 87; D Feldman, ‘Human Rights, Terrorism and Risk: The Roles of Politicians and Judges’ [2006] PL 364, 374, 375.

<sup>9</sup> F Klug, ‘The Human Rights Act—a “third way” or “third wave” Bill of Rights’ [2001] Eur HRL Rev 361. The legislative human rights models are also referred to as a ‘parliamentary rights model’: J L Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 MLR 7.

<sup>10</sup> P Hogg & A Bushell, ‘The Charter Dialogue between Courts and Legislatures’ (1997) 35 Osgoode Hall LJ 75. At first blush, the notion that rights guarantees are characterised by ‘dialogue’ between courts and the other arms of government may appear counter-intuitive and normatively inappropriate to traditional notions of separation of powers and judicial review of legislation (eg where courts should come to their own conclusions about questions of law without reference to the views of the political arms of government): J Webber, ‘Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)’ [2003] AJHR 9. These dialogic instruments have inbuilt in them a joint enterprise in rights protection and promotion. See eg, s 7(2), s 31 and s 36 of the Charter. From a federal constitutional perspective, the doctrine of separation of powers or the particular version of it that applies to the federal constitution: *R v Kirby; Ex Parte Boilermakers’ Society of Australia (Boilermakers’ Case)* (1956) 94 CLR 254 (HCA) does not apply with full force in Victoria: *City of Collingwood v Victoria and Another (No. 2)* [1994] 1 VR 652, 663 (SC Vic). As such, shared functions under the Charter in promoting and protecting rights and dialogue amongst the arms of government within Victoria are unlikely to be constitutionally problematic. Further, dialogue is unlikely to offend such minimal guarantees of judicial independence or judicial power required of State Courts by the *Kable* doctrine: *Kable v DPP of NSW* (1996) 189 CLR 51 (HCA). Cf. n 109.

because features of the US Bill of Rights which have generated most of this polarity<sup>11</sup> are either absent or not prominent in such models. The dialogic models include constitutionally entrenched ones (eg Canada) and legislative ones (eg UK and NZ). They permit, in varying degrees, the judiciary to participate in and contribute to debate about rights promotion and protection.<sup>12</sup> Under these models, rights are not the exclusive province of either parliament or court. However, parliament remains sovereign and can, ultimately, override the courts.

These dialogic models are said to permit 'weak form' judicial review. This is because they typically do not permit the invalidation of legislation (eg UK, NZ) or, if they do, they allow parliament to override the human rights instrument (eg Canada). Yet, new fronts in the debate have opened up amongst supporters and sceptics of dialogic models.<sup>13</sup> Issues arise about whether a robust exercise of the statutory interpretation function, review of the justification of rights limitations, or the range of curial remedies available in respect of incompatible legislation permit the judiciary to dominate the dialogue. Sceptics argue such features allow 'weak form' judicial review to collapse over time into 'strong form' judicial review. Supporters counter by pointing to the relative ease with which the human rights instrument is capable of amendment and to the ability of parliament to override the courts. Further, the discretionary nature of curial remedies coupled with restraint or notions of deference and an explanation of these models by reference to a culture of justification of the use of power (at least in a rights context) make the exercise of such judicial powers acceptable.<sup>14</sup>

In Victoria, the Charter legitimises judicial input into rights discourse and adjudication with a view to better protect and promote them. In respect of legislation, the judicial contribution to rights-oriented dialogue is seen, for example, in requiring the justification of rights limitations, a rights compatible interpretation and the process involving declarations. That the dialogue should be approached in good faith and with mutual respect is a given. It is fitting for the three arms of government to approach dialogue in a way which maximises the opportunity for rights protection. Of course, dialogue must withstand differences of opinion. While there will be many instances of co-operative dialogue, moments of tension will be unavoidable. Rights are contestable. They raise political and philosophical questions to which more than one reasonable response can be given. The particu-

<sup>11</sup> These include the cumulative effects of the Bill of Rights' 'supreme law' status, the high degree of difficulty for parliament (ie Congress) to amend it, the power of judges to invalidate legislation inconsistent with it and the absence of a (general) rights limiting mechanism.

<sup>12</sup> Judicial decision-making can be seen as one input into the parliamentary process of decision-making, and litigants could play a crucial role in judicial decision-making. In this way, the process of litigation can be seen as an avenue of participative decision-making: S Freedman, 'From Deference to Democracy' (2006) 122 LQR 53.

<sup>13</sup> C Gearty, *Principles of Human Rights Adjudication* (OUP, Oxford 2004).

<sup>14</sup> Lord Steyn, 'Deference: a Tangled Story' [2005] PL 346; Hogg (n 2) 131; M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of Due Deference' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, Oxford 2003) ch 13.

lar circumstances of the rights contest are likely to dictate the form, content and intensity of dialogue. It is too much, and perhaps inappropriate, to expect gentle parleying in dulcet tones. The occasional harsh rebuke is inevitable. The purpose of engaging in dialogue is to protect the human rights of individuals; the protocols and proprieties of institutional dialogue should not distract from this basic and important fact.

The dialogic model is a metaphor for rights discourse, largely within a domestic setting, between the institutions of a State. In my view, the model is capable of accommodating international human rights law exchanges, particularly between judges. Permitting judges to participate in rights discourse helps promote dialogue with their counterparts in foreign and international fora.<sup>15</sup> There will be the benefits of shared experience. Rights jurisprudence is developed. Within Australia, Victoria will be the primary point through which exchanges occur between Australia and fellow member States of the global human rights network. For now, being the only State within Australia to have enacted a Charter, Victorian laws will be guided and may develop differently to those of the federal and State polities within Australia. Further, the universality of international human rights, having regard to the status of the Universal Declaration of Human Rights and the fact of ratification of the main international human rights treaties, can also play a role in informing judges about, and perhaps conferring political and moral legitimacy on, their roles in protecting and promoting rights.

I acknowledge at the outset that whilst rights based judicial review is a useful tool for delivering better human rights protection, it has limitations. This is likely to be true of judicial review under the Charter. From a practical perspective, it is only one method of securing rights protection and promotion. Often it is an expensive method because it involves litigation. There are other means such as scrutiny of rights issues at the stage of developing or complying with policy and legislation. Here, Parliamentary Committees, the Executive, the Ombudsman and the Victorian Equal Opportunities Commission have roles to play. An independent bar, human rights interest groups and others also play a part in this framework. Finally, the political and democratic culture and processes of the jurisdiction will also shape the extent to which rights are protected and promoted. The adequacy of human rights protection and promotion in Victoria generally requires a wider analysis of matters which are beyond the scope of this paper.

<sup>15</sup> See Department for Constitutional Affairs, 'Review of the Implementation of the Human Rights Act' 11 ('Review') (July 2006) <[http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full\\_review.pdf](http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf)> accessed 9 April 2007, for examples given of how the Human Rights Act 1998 'has established dialogue between the English Judges and the European Court of Human Rights'. G Brennan, 'Introduction to Human Rights Law: Seminar—Part II' (2007) 81 *Australian LJ* 248.

## C ICCPR AND STATE OBLIGATIONS

### 1 ICCPR, Australia and Victoria

The ICCPR is an international treaty. The Australian federal government signed it in 1972 and ratified it in 1980,<sup>16</sup> thereby indicating that it accepts the treaty as binding on it under international law.<sup>17</sup> Ratification does not give an international treaty like the ICCPR legal effect within Australia unless domestic legislative measures, usually by way of enacting a statute, are undertaken to implement it.<sup>18</sup>

Responsibility for Australia's treaty making powers lies with the federal government and the federal parliament has power to implement those treaties. While it appears that Victoria, as a State in the federation, does not have power to enter into international treaties binding in international law<sup>19</sup>, it may implement them.<sup>20</sup> At the federal level, the ICCPR is annexed to the Human Rights and Equal Opportunity Act 1986 (Cth); however, that Act does not implement the ICCPR in the sense of creating enforceable rights and obligations in domestic law.<sup>21</sup> In any event, Victoria is not prevented from enacting legislation based on the ICCPR and it has now done so. The rights in the Charter derive from the ICCPR.<sup>22</sup> The Charter is an example of a domestic legislative measure which gives effect to the ICCPR in Victoria.<sup>23</sup>

<sup>16</sup> Ratification of the ICCPR followed a period of consultation with the Australian States: See C Heyns and F Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International, London 1992) 52, 53. The First Optional Protocol was acceded to in 1991. Australia's ratification of the ICCPR is subject to a reservation. That reservation recognises both federal and State responsibility for implementing ICCPR. This is an acknowledgement of the distribution of powers between the federal, State and Territory governments and responsibilities attendant thereto. The reservation recognises implementation will have to accord with the extant domestic system. This is not problematic because judicial review of legislation is a known phenomenon within this system. Further, the reservation does not carve out judicial review of legislation from Australia's ICCPR obligations. Accordingly, the reservation is not relevant to the present inquiry about the scope of judicial review under the Charter.

<sup>17</sup> ICCPR art 50 expressly provides that its provisions extend to all parts of federal jurisdictions. Provisions of domestic law are not permitted to justify a failure to perform or give effect to ICCPR obligations. See art 4 UNCHR 'General Comment No 31' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

<sup>18</sup> *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–287. Although, in that case a majority of the High Court concluded that in certain circumstances ratified treaties may have effects in domestic law (eg an individual may be entitled to a legitimate expectation that the executive will act in accordance with such treaties).

<sup>19</sup> Federal-State Relations Committee, Parliament of Victoria, *Report on International Treaty Making and The Role of States* (1997) [1.11].

<sup>20</sup> S Kaye and R Piotrowicz, *Human Rights in International and Australian Law* (Butterworths, Melbourne 2000) 208.

<sup>21</sup> *Minogue v Williams* [2000] FCA 125 [21], 60 ALD 366; *Minister for Immigration & Multicultural Affairs v Al Masri* [2003] FCAFC 70, [141].

<sup>22</sup> Explanatory Memorandum (Circulation Print) Charter of Human Rights and Responsibilities Bill 2006, Vic ('Ex Mem') 1, 7.

<sup>23</sup> It is unclear if the Charter implements/ incorporates the ICCPR as opposed to being an example of legislation which protects and promotes rights derived from the ICCPR. For present purposes,

## 2 Article 2 ICCPR

The obligations on Australia under the ICCPR are set out in Art 2. Article 2.1 requires a State to ensure the rights guaranteed by the Covenant. Article 2.2 requires a State to take the necessary steps to adopt such *legislative or other measures* as may be necessary to give effect to the rights recognised. Article 2.3(a) obliges a State to provide *effective* domestic remedies for persons whose ICCPR rights are violated. Article 2.3(b) requires a State to develop the possibilities of a judicial remedy. Article 2.3(c) requires such remedies to be enforced. The interpretation of the ICCPR and its Articles is governed by the Vienna Convention on the Law of Treaties.<sup>24</sup>

### (a) Domestic Implementation

A State has an obligation in international law to implement Art 2. However, the terms of Art 2 leave it to a State to determine how to implement its obligations. This is confirmed by the Human Rights Committee's interpretation in General Comment No 31, Art 4 where it recognises that the ICCPR leaves it to States to 'give effect to Covenant rights in accordance with domestic constitutional processes'. However, as Evatt notes, '[a]lthough States can, in principle, choose how to implement the wide-ranging obligations imposed by Article 2, they must perform those obligations in good faith, and they may not use their domestic law as an excuse for not doing so'.<sup>25</sup>

Nevertheless, implementation remains primarily a domestic matter. The nature and extent of domestic protection afforded to rights in the ICCPR will vary with the legal and political system in question. This is a concession to State sovereignty and 'recognition of the superiority of municipal enforcement systems in terms of efficiency, expediency and effectiveness'.<sup>26</sup>

### (b) Effective remedy and judicial role

On one view, for rights protection to be effective, a remedy must end the violations, compensate for its effects and ensure that no further violations occur.<sup>27</sup>

nothing turns on that distinction. That distinction may become relevant if the federal Parliament enacted legislation to implement the ICCPR and cover the field.

<sup>24</sup> Art 31(1) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 provides that a treaty is to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose.'

<sup>25</sup> E Evatt, 'The Impact of International Human Rights on Domestic Law' in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights* (Hart Publishing, Oxford 2002) 281, 286. Moreover, the principle of 'effectiveness' is a fundamental principle of interpretation in international law so that ICCPR provisions must be interpreted and applied so as to make its safeguards 'practical and effective'.

<sup>26</sup> S Joseph and others, *The International Covenant on Civil and Political Rights* (OUP, Oxford 2000) 9.

<sup>27</sup> UNCHR General Comment No 31 (n 17) arts 16, 17, 19.

Details of the means by which that result must be delivered, however, are not specified. Certainly, in providing an effective remedy, a judicial role in the enforcement of rights is strongly encouraged.<sup>28</sup> That is because enforcement involving a curial role is generally critical to ensuring its effectiveness. Nonetheless, the Human Rights Committee accepts that administrative mechanisms may be adequate to protect rights.<sup>29</sup>

Notably, the nature of the judicial role is not specified. There are neither prescribed minima nor requirements of what that role must entail and enable. The Human Rights Committee expressly notes the enjoyment of rights can be 'effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law or the interpretive effect of the Covenant in the application of national law.'<sup>30</sup> This requirement echoes the views of the eminent international law jurist Lauterpacht:

It would thus seem that the manner in which the municipal courts would be called upon to enforce the International Bill of Rights of Man would vary from State to State. In some countries the courts will have power to declare unconstitutional, and, as a result, invalid any legislation held to be inconsistent with the Bill of Rights; in others the courts . . . will have the power either to decline to enforce the statute or to give affirmative relief; in others, still, *while enforcing the offending statute, they will have the right and the duty to make a formal pronouncement declaring it inconsistent with the Bill of Rights.*<sup>31</sup> (emphasis added)

### 3 The Human Rights Committee ('HRC')

The HRC is created under Art 28 of the ICCPR. It is the primary body responsible for monitoring the ICCPR and determining if there has been a violation of the ICCPR. The HRC's functions include:

- (1) making decisions after hearing individual complaints under the First Optional Protocol;<sup>32</sup>
- (2) issuing General Comments which explain the meaning of the ICCPR's articles;<sup>33</sup> and
- (3) issuing Concluding Comments consequent upon dialogue with States and receipt of States reports.<sup>34</sup>

<sup>28</sup> The requirement to develop the possibilities of a judicial remedy, if undertaken in good faith, arguably amounts to an obligation to provide for a judicial role.

<sup>29</sup> The federal government's method of 'implementing' ICCPR obligations is through administrative mechanisms as set out in the Human Rights and Equal Opportunities Commission Act 1986 (Cth). See *Minogue* (n 21), *Al Masri* (n 21).

<sup>30</sup> UNCHR General Comment No 31 (n 17) art 15.

<sup>31</sup> H Lauterpacht, *The International Bill of the Rights of Man* (Columbia University Press, New York 1945) 193.

<sup>32</sup> Joseph (n 26) 13–15; H Steiner and P Alston, *International Human Rights in Context* (OUP, Oxford 2000) 738–44

<sup>33</sup> Joseph (n 26) 12–13; Steiner and Alston (n 32) 731–37.

<sup>34</sup> Joseph (n 26) 11–12; Steiner and Alston (n 32) 714–28.

Accordingly, essential sources of ICCPR jurisprudence are the HRC's First Optional Protocol views, General Comments or Concluding Comments.<sup>35</sup> They are the decisions of an independent body constituted by experts drawn from member states of the United Nations. States, such as Australia, recognise the HRC's competence and submit *voluntarily* to its jurisdiction. Further, failure to comply with a decision leaves a State in violation of international law. As such, the idea of domestic courts having regard to the jurisprudence of the Committee in interpreting and applying Covenant principles is sensible.<sup>36</sup> While the HRC's decisions cannot be enforced, they are persuasive and are viewed as such by Australian courts.<sup>37</sup>

The HRC has commented on the dialogic models. It has been critical of the lack of a strong judicial role in respect of the legislative human rights models (eg NZ, UK). The HRC has encouraged implementing stronger judicial review mechanisms and recommended giving the statutory enactment a status higher than 'ordinary' law. For example, in response to the Bill of Rights Act 1990 (NZ), the HRC recommended that the Act be given 'overriding status in the legal system' and the courts have power to invalidate or not apply legislation inconsistent with that Act.<sup>38</sup> Some commentators argue that an 'effective remedy' requires more of the judicial role than an assessment of the justification of laws and interpretation of laws compatibly with human rights and issuing a non-binding declaratory remedy.<sup>39</sup> A stronger judicial role may be desirable for other reasons, as may non-judicial mechanisms, to ensure an effective remedy. Arguably, however, such a stronger judicial role is not a binding obligation under international human rights law.

The HRC has also commented in a similar way on Australia's position in circumstances where there is no national human rights instrument. It has recommended that Australia implement 'constitutional' protection of rights and take measures to give effect to the ICCPR by ensuring that rights violations result in an effective remedy.<sup>40</sup> It is submitted, however, that the comments by the HRC to provide 'supreme law' status or constitutional protection are merely recommendations.

<sup>35</sup> Joseph (n 26) 15.

<sup>36</sup> Evatt (n 25) 288.

<sup>37</sup> *Al Masri* (n 21) [149].

<sup>38</sup> UNHCR 'Concluding Observations on the Third Report of New Zealand' (3 October 1995) CCPR/C/79/Add.47 [176], [185]. Cf. UNHCR 'Concluding Observations on the Fourth Report of New Zealand' (7 August 2002) CCPR/CO/75/NZL, where the Human Rights Committee is less forthright in articulating what is required to redress rights violations. Eg, there is no reference to judicial power to invalidate or disapply inconsistent legislation. Similarly, UNHCR 'Concluding Observations on the Fifth Report of the United Kingdom' (6 December 2001) CCPR/CO/73/UK, which post-dates the Human Rights Act 1998 (UK) makes no express references to the 'ordinary status' of that Act or the lack of judicial power to invalidate or disapply inconsistent legislation. Instead, the HRC views the Act as merely an 'important step' towards ensuring compliance with ICCPR rights. If indeed these are lapses by the HRC, it may be partially explained by a lack of time, money or staff in reviewing and responding to States' reports. Steiner and Alston (n 32) 730.

<sup>39</sup> A Butler, 'Judicial Review, Human Rights and Democracy' in Huscroft and Rishworth (n 25) 47.

<sup>40</sup> Concluding Observations of the Human Rights Committee: Australia (24 July 2000) A/55/40, s 3.

#### 4 Conclusion

The text of the ICCPR does not explicitly require the judicial review of legislation by reference to human rights criteria. While a judicial role in rights protection is implied, and that role has been clarified by the HRC, it presently remains a relatively low threshold to meet. That role is satisfied by judges having the power to review legislation by reference to rights based criteria, interpret legislation consistently with human rights and make non-binding declarations identifying rights violations. At all events, in my view, judicial powers to invalidate legislation or operate within a 'supreme law' model are not presently binding obligations imposed by international human rights law.<sup>41</sup>

### D LIMITS ON RIGHTS, JUSTIFICATION AND PROPORTIONALITY

Section 7 is central to the Charter's operation.<sup>42</sup> Section 7(1) declares that Parliament protects and promotes Charter rights. Section 7(2) sets out the framework for how and when a right may be limited. Section 7(3) confirms that a right cannot be limited to a greater extent than allowed and, in any event, does not permit a right to be destroyed.

#### 1 Section 7(2)

Section 7(2) requires a review of legislation to determine if rights have been limited and, if so, whether it can be justified having regard to the various factors set out therein. It appears to bind all those to whom the Charter has application.<sup>43</sup>

In relation to legislation, it will be the government which will usually first assess if it (ie a Bill to be introduced in Parliament) satisfies s 7(2). If legislation is chal-

<sup>41</sup> G Huscroft, 'Rights, Bills of Rights and the Role of Courts and Legislatures' in Huscroft and Rishworth (n 25) 1.

<sup>42</sup> Ex Mem (n 22) p 8 cl 7; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls) ('Second Reading Speech') where Mr Hulls says 'It will assist courts and government in deciding when a limitation arising under the law is reasonable and demonstrably justified in a free and democratic society'. S 7 provides as follows:

- (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
  - (a) the nature of the right; and
  - (b) the importance of the purpose of the limitation; and
  - (c) the nature and extent of the limitation; and
  - (d) the relationship between the limitation and its purpose; and
  - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

- (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

<sup>43</sup> S 6.

lenged on the basis that it does not meet the s 7(2) standard, it is the court which will have to determine that question.<sup>44</sup> The court will have to decide whether the legislation infringes a right and, if so, whether it does so in conformity with the section. Unlike the Canadian and South African models (which permit legislation infringing a right to be invalidated), but like the NZ and UK legislation, the Charter itself does not set out a power for the courts to invalidate legislation infringing a right. Instead, the Charter provides in s 32 for interpreting legislation compatibly with rights and preserves the validity of that legislation.

Section 7(2) is borrowed from the Canadian, NZ and South African human rights instruments.<sup>45</sup> The comparable provisions are central to the rights instruments in Canada (s 1 Canadian Charter), NZ (s 5 BORA) and South Africa (s 36 Bill of Rights); they have been clarified by case law in those jurisdictions.<sup>46</sup> In turn, proportionality was borrowed from European Court of Human Rights jurisprudence through which it became a central feature of UK jurisprudence.<sup>47</sup> The European Convention on Human Rights and the ICCPR do not have a general limitation clause applicable to all rights but enumerate permissible limitations in respect of specific rights.<sup>48</sup>

<sup>44</sup> S 6(2) and s 6(3) confirm that the Charter has application to courts and tribunals. Arguably, determining whether a law meets a legislatively prescribed standard is likely to be a power of the court (eg s 75 of the Constitution Act 1975 (Vic)) in any event. Moreover, from 1 January 2008, when s 32 becomes operative and is applied to interpret s 7(2), it could be given such a meaning. The role being discussed here is different to the questions raised about there being an enforceable duty generated by the Pt 2 rights themselves as raised in *R v Carl Williams* [2007] VSC 2 (Unreported, King J, 20 December 2006) [53].

<sup>45</sup> Ex Mem (n 22) cl 7 confirms it is based on NZ and more particularly the South African provisions. The NZ section is in turn based on the Canadian provision: Paul Rishworth, 'Two Comments on the *Ministry of Transport v Noorf* [1992] NZ Recent L Rev 189; Michael Taggart, 'Administrative Law' [2003] NZL Rev 99, 114–115. For the purposes of establishing a proportionality based standard of review, the fact that the South African/Canadian equivalents are constitutionally entrenched, and the Victorian/NZ are not, is not material; likewise, the textual differences between the respective provisions. Structurally while such a provision may appear to sit uneasily with a statutory model, judicial review of legislation is an established feature under such models (eg BORA and Canada's statutory Bills of Rights); for instance, legislation claimed to breach rights must be evaluated against the standard set out and an interpretive solution found if possible: P Rishworth, 'Human Rights' [2005] NZL Rev 87, 102. The foregoing observations may go some way to explain the curiosity expressed or meet criticisms (eg by Brennan (n 15) 251 and J Allan, 'The Victorian Charter of Human Rights and Responsibilities, Exegesis and Criticism' [2006] MULR 906, 917–918) about importing the Canadian equivalent into the statutory models in NZ and Victoria.

<sup>46</sup> See for example: *R v Oakes* [1986] 1 SCR 103 (SC Can); *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9, 16–17 (NZ Court of Appeal).

<sup>47</sup> *R (Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, 3 All ER 433 [25]–[28]; M Taggart, 'Administrative Law' (n 45) 115. P Craig, 'The Courts, The Human Rights Act and Judicial Review' (2001) LQR 589, 590: a notion of deference is implied in an application of the proportionality test. It remains to be seen whether and how Victorian Courts adapt or develop the concept of deference: see n 109.

<sup>48</sup> Huscroft (n 41) 9. The fact that the ICCPR (or international law generally) does not permit some rights to be limited may be accommodated under the Charter by requiring a more intrusive application and stringent level of justification under s 7(2) such that some rights may be incapable of limitation (eg torture).

The comparable provisions on which s 7(2) is modelled are known as and operate as a proportionality test. The text of s 7(2) does not use the word proportionality; it may, at first blush, distract by including references to 'reasonable'. In this respect, the equivalent provisions in the Canadian, NZ and South African instruments are the same. It is submitted that neither the absence of a reference to proportionality nor the presence of references to 'reasonable' prevent s 7(2) operating as a proportionality test. Significantly, the Second Reading Speech by the Attorney-General confirms that the section 'embodies what is known as the proportionality test'; similarly, the Human Rights Consultation Committee refers to the equivalent clause in the draft Charter as embodying 'what is known as a "proportionality" test'.<sup>49</sup> The Committee explains why that is so by reference to the *Oakes* decision<sup>50</sup> and explains how the Canadian equivalent of s 7(2), s 1 of the Canadian Charter, operates:

The Canadian Supreme Court has stated that in order for a limitation on a right to be reasonable and demonstrably justified, two key conditions must be met:

- The objective that the rights-limiting law is trying to fulfil must be of 'sufficient importance to warrant overriding a constitutionally protected right or freedom.' The objective must 'relate to concerns which are pressing and substantial.'
- The means chosen to achieve the objective must be reasonable and demonstrably justified. This involves considering whether the means adopted are 'designed to meet the objective in question', whether they impair rights or freedoms as little as possible and whether there is *proportionality* between the effects of the measures and the objective which the rights-limiting law is seeking to achieve.<sup>51</sup> (emphasis added)

(a) Overseas experience

The case law from jurisdictions with similar provisions are likely to reveal the way s 7(2) will operate as a test of proportionality. For instance, legislation relating to matters such as: marriage being available to opposite sex couples only;<sup>52</sup> prohibi-

<sup>49</sup> See respectively: Second Reading Speech (n 42) 1291 and Human Rights Consultative Committee, *Rights, Responsibilities and Respect, The Report of the Human Rights Consultation Committee* (Vic 2006) ('Report') 46–47. The Charter is based largely on the draft Charter set out in that report; at all events, in relation to the standard of review, there is no material difference between the Committee's cl 6 of the draft Charter (at p 8 of draft Charter) and s 7(2). See Ex Mem (n 22) cl 7 which confirms that s 7(2) is derived from Canada and South Africa, where equivalents operate as a proportionality test. Further, s 32 permits Charter provisions to be interpreted having regard to international law; limitations on rights under the ICCPR are subjected to a proportionality test: Joseph (n 26). Accordingly, the ICCPR provenance of the Charter allows notions of proportionality to be worked into s 7(2). Further, there is nothing in the Charter or the extrinsic aids to prevent this outcome. Even if I am wrong about s 7(2) requiring a proportionality test or approach, it still represents a new and sophisticated standard for scrutinising law and conduct referable to law.

<sup>50</sup> *Oakes* (n 46).

<sup>51</sup> Report (n 49) 47; on proportionality and rights-based review see n 70.

<sup>52</sup> *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

tion on availability of private health insurance;<sup>53</sup> reverse burden of proof on defendants in criminal cases;<sup>54</sup> Sunday closing of businesses;<sup>55</sup> flag burning;<sup>56</sup> ban on tobacco advertising;<sup>57</sup> and birching<sup>58</sup> have been found to be outside the equivalent s 7(2) test. Legislation relating to matters such as criminal law of obscenity<sup>59</sup> and prohibition on advertising directed at children<sup>60</sup> have been held to fall within the equivalent s 7(2) test.

In particular, the Canadian experience suggests that it is the 'least restrictive means' criterion in s 7(2)(e) which is likely to be key to the s 7(2) assessment. Canadian cases have approached the Canadian equivalent of the 'least restrictive means' criterion as requiring laws to impair as little as possible the right in question. The idea is that the law should impair the right no more than is necessary to accomplish the desired objective. Hogg provides several examples of cases which have failed this test.<sup>61</sup> As always, however, due consideration should be given to textual and contextual differences.

#### (b) Purposes

The centrality of s 7(2) to the Charter's operation can be seen by the range of purposes it is designed to serve. While they are not all specific to judicial review of legislation, they help illuminate facets of the judicial role. The purposes include the following:

- (1) It clarifies that the rights in the Charter are capable of limitation.<sup>62</sup> This reflects the consideration that, when the context requires it, an individual's rights have to be balanced, amongst other things, against another person's rights and by reference to the interests of society.<sup>63</sup> Such limitations are implicit in the Charter's recognition that rights come with responsibilities. This is consistent with an individual's responsibilities to respect the community and the rights of others, a sentiment reflected in the ICCPR preamble that an individual has 'duties to other individuals and to the community to which he belongs.'

<sup>53</sup> *Chaoulli v Quebec (Attorney General)* [2005] SCC 35 (SC Can).

<sup>54</sup> *R v Oakes* [1986] 1 SCR 103 (SC Can).

<sup>55</sup> *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 (SC Can) cf. *R v Edwards Books and Art* [1986] 2 SCR 713 (SC Can).

<sup>56</sup> *Hopkinson v Police* [2004] 3 NZLR 704 (Wellington HC).

<sup>57</sup> *RJR-MacDonald v AG of Canada* [1995] 3 LCR 653 (SC Can).

<sup>58</sup> *Tyrer v United Kingdom* (App no 5856/72) (1978) 2 EHRR 1.

<sup>59</sup> *R v Butler* (1992) 89 DLR (4d) 449 (SC Can).

<sup>60</sup> *Irwin Toy v Quebec* [1989] 1 SCR 927 (SC Can).

<sup>61</sup> Hogg (n 2) Ch 35.

<sup>62</sup> Ex mem (n 22) 7; Report (n 49) 46–48. The rights are absolute until limited by law in a given context and remain limited to that extent only.

<sup>63</sup> Ex mem (n 22) cl 7.

- (2) It requires and will generate a culture of justification<sup>64</sup> for laws which limit rights. Moreover, it will make transparent the evaluation of that limitation. The justification and transparency will be required not just from the Executive in developing policy and legislative proposals; it will be required from Parliament in enacting and scrutinising legislation and from the courts in adjudicating rights disputes.<sup>65</sup> Justification is an example of the dialogue between the arms of government required under the Charter. It serves an important function in identifying, particularly to Parliament or the public, how, when and why rights are limited or their breach permitted. This can be valuable, at least politically and morally, particularly when a right is limited disproportionately or without justification.
- (3) It suggests the burden of proof in respect of justification and proportionality lies on the party arguing that the limitation is justified and proportionate.<sup>66</sup> As such, this burden will often, but not invariably, lie on the State.
- (4) It provides a standard to be met by Parliament in enacting and scrutinising legislation.<sup>67</sup> Similarly, it provides a standard to be met by the Executive in exercising powers, formulating policy and developing legislative proposals and in making statements of compatibility under s 28 when introducing Bills in Parliament.<sup>68</sup> Further, when read together with s 38, s 7(2) will play a significant role in determining if the obligation on public authorities (as defined in s 4) to act and make decisions compatibly with Charter rights is discharged.<sup>69</sup> In this way, it has the capacity to energise laws governing Executive conduct and, in particular, the fields of constitutional and administrative law. Moreover, it is submitted that the s 7(2) standard is one based on proportionality,<sup>70</sup> which, for Victoria, is a relatively new and high standard for subjecting and scrutinising such conduct.
- (5) It sets out a mechanism through which the Charter and common law can interact; although, nothing in the Charter, including s 7(2), *obliges* a court or tribunal to *develop* the common law, whether by reference to the Charter or otherwise. The interaction is likely to be complex. One aspect of that interaction can be seen in that s 7(2) provides a legislative standard which from 1 January 2007 the common law must meet: the words ‘under law’ in s 7(2)

<sup>64</sup> This justification requirement is now enshrined in the Charter. The ‘culture of justification’ points to broader requirements about the justification of the use of public power: Hunt (n 14) ch 13; D Dyzenhaus, ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ (1998) 14 SAJHR 11.

<sup>65</sup> *International Transport GMBH Roth v Home Secretary* [2002] EWCA Civ 158, [2003] QB 728 [54]; *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 (SC Can).

<sup>66</sup> Hogg (n 2) 795–796.

<sup>67</sup> S 6 confirms the Charter applies to Parliament.

<sup>68</sup> S 6 confirms the Charter applies to the Crown and ‘public authorities’ as defined in s 4.

<sup>69</sup> *R v Head Teacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; Multani (n 65).

<sup>70</sup> Proportionality is considered to be a higher standard than that of reasonableness: Daly (n 47); Craig (n 47); J Rivers, ‘Proportionality and Variable Intensity of Review’ [2006] CLJ 174.

include a reference to common law and statute.<sup>71</sup> Accordingly, if the common law does not meet the legislative standard set out in s 7(2), it is submitted that it is open for the offending common law rule not to be applied.<sup>72</sup> Section 7 does not expressly set out what a court must do in such circumstances. The curial response is, as it should be, discretionary. As the common law is a creation of the courts, it is capable of being developed by them. Any development of the common law, however, must be consistent with Australian common law principles.<sup>73</sup> Section 7(2) creates the potential for offending common law to be replaced by rules which are Charter specific and driven. In some cases, a court may recommend to parliament that it consider and implement reform. This is something that is done presently in other contexts where parliament is considered to be the more appropriate forum. Another aspect of the interaction with the Charter is likely to be realised through the accommodation of Charter rights, rights limitations and rights breaches by common law rules, discretions and remedies.

### (c) Relationship with s 32

Together with s 32, s 7 will have a role to play in legislative interpretation. The two sections can operate in concert in interpreting legislation; indeed, s 32 can be applied to interpret s 7 itself. There is probably no definitive and comprehensive approach governing the sequence in which ss 7 and 32 are to operate. Of course,

<sup>71</sup> Ex Mem (n 22), cl 7 confirms that a human right may only be subject under law (whether statutory or common law) to the limit set out in s 7. The Second Reading Speech (n 42) 1291 states that, in this context, law includes common law. How common law, or other forms of non-statutory law (if any), might be measured against s 7, or how Charter rights can be applied or accommodated by common law rules, discretions and remedies are not explored in this paper. Further, it is submitted a Pt 2 right can have application and effect beyond the (vertical) relationship between individual and State; the scope for and extent of the Charter's (horizontal) application, whether under statute or at common law, and effect on legal relationships and disputes between private individuals are not explored in this paper. Cf. Allan (n 45) 921.

<sup>72</sup> There are many examples where the common law has offended a human rights instrument. For an example from the UK see *Douglas and Zeta-Jones v Hello* [2005] EWCA Civ 595, [2006] QB 125 [47]–[53]; from NZ, see *Chamberlains v Lai* [2006] NZSC 70 [94]. Under the South African equivalent of s 7, the South African Court has held that if a common law provision is inconsistent with the Bill of Rights, then it will not be applied; for instance, the Court abolished the common law crime of sodomy for being inconsistent with the South African Bill of Rights: see n 52. Similarly, in *Hosking v Simon Runtig* [2004] NZCA 34 (NZ SC), Gault P of the NZ Supreme Court concluded that the common law infringed s 14 of the Bill of Rights Act 1990 (NZ) (BORA). The High Court of Australia has recognised the common law has failed to meet specific standards in a variety of contexts; in such circumstances, to accommodate the relevant standard, the Court either developed or did not apply the common law rule: *David Russell Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49 (HCA); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (HCA).

<sup>73</sup> *Lipohar v The Queen* (1999) 200 CLR 485 (HCA); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (HCA). To the extent there is common law which can not be altered by Parliament alone (eg because they are sourced to or required by the federal constitution) such rules are obviously beyond the power of a Parliament, State or Federal, to alter. However, most common law would not fall into that category.

as set out above, s 7 serves purposes which are separate from s 32.<sup>74</sup> Similarly, in respect of legislation, s 32 serves purposes which are independent of s 7.<sup>75</sup>

## 2 Conclusion

This paper does not explore the details of the operation of each of the components of s 7(2). Their equivalents have been subjected to curial analysis in a wide range of circumstances.<sup>76</sup> Their application in other jurisdictions reveals their potential and suggests that the test can operate as a versatile tool. They show us that arguments about justification of limits and proportionality tend to be the focus of most rights contests. Moreover, although the end point in Victoria will not necessarily be invalidity, the potential benefits for remedying rights violations and promoting rights discourse can be significant.

For the first time, Victorian courts will be required to assess whether legislation complies with a range of rights and, where legislation limits those rights, the justification for and proportionality of that limitation. Section 7(2) requires a significant change from assessing legislation by reference to procedural criteria, such as compliance with ‘manner and form’ provisions. It invites and legitimises a judicial role in the assessment of the compliance of laws by reference to rights based standards. This assessment will often be undertaken in circumstances where another arm of Government has had or may have a strong or particular input or interest. It remains to be seen if Victorian courts accord Parliament some margin or latitude as they presently do in other contexts and courts elsewhere do.<sup>77</sup>

In this way, the judicial engagement with s 7 will reveal how public policy matters, often involving competing social, political and economic objectives are addressed. If the courts are to meaningfully participate in rights dialogue, their functions under s 7 must be discharged robustly.

<sup>74</sup> Further, s 7 is located in Pt 2 and comes into operation on 1 January 2007; s 32 is located in Pt 3 and comes into operation on 1 January 2008. This suggests s 7 is intended to and can operate prior (including in time) to and independently of s 32. The staggered commencement dates of these two provisions is designed to permit, amongst other things, Charter related education and training and a review of pre-Charter laws to ensure Charter compliance: Ex Mem (n 22) cl 2. As such, while after 1 January 2007, infringing laws are open to challenge under s 7, it may be that a court or tribunal is unlikely to exercise its powers to accede to such challenges until after 1 January 2008, at least in respect of legislation. This is consistent with the scheme of the Charter whereby, after 1 January 2008 legislation must be given an interpretation consistent with s 32; after that date, this transitional issue will not pose difficulties because, amongst other things, ss 32 and 36 become operational.

<sup>75</sup> See Pt E of this paper below.

<sup>76</sup> Hogg (n 2) ch 35.

<sup>77</sup> For an application of a margin in the context of implied rights in the Commonwealth Constitution see *Levy v The State of Victoria* (1997) 189 CLR 579 (HCA). See Hunt (n 14) 337–370. The relevance, meaning and application of deference or similar concepts are issues which await resolution by Victorian Courts: see n 110, below.

## E INTERPRETATION OF LEGISLATION

Section 32(1) is another of the Charter's central sections. It sets out an obligation to interpret all Victorian statutory provisions (including the Charter)<sup>78</sup> compatibly with the rights in the Charter.<sup>79</sup> This obligation extends to statutory provisions whenever enacted: s 49(1).

Section 32(2) permits having regard to international law and judgments of foreign and international courts and tribunals. International law *includes* international conventions and customary law; foreign and international courts and tribunals include the International Court of Justice, the European Court of Justice, the Human Rights Committee; court decisions *including* those from Canada, NZ, South Africa and the UK can be relevant.<sup>80</sup> This statutory instruction confirms the legitimacy of considering international sources. It facilitates the prospect of rights in the ICCPR being given consistent interpretations.

A statute is the expression of the will of Parliament.<sup>81</sup> Statutory interpretation gives effect to that will by stating what the words of the statute mean consistently with the purpose of the statute.<sup>82</sup> Section 32 is not directed solely at any one person, body or entity but is seemingly an instruction to all those to whom the Charter has application. Admittedly, it is the court's interpretation that will ultimately be authoritative and provide guidance. The court's interpretation becomes part of the statute and thus part of Victorian law.

### 1 Section 32(1)

Section 32(1) states that 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.

<sup>78</sup> A 'statutory provision' is defined to include the Charter: s 3.

<sup>79</sup> Interpreting statutory provisions consistently with rights is known to Australian common law. Presently, an interpretation of a statute which accords with international law is preferred: *Polites v Commonwealth* (1945) 70 CLR 60 (HCA); *AMS v AIF* (1999) 163 ALR 501, 575 (HCA), particularly where it accords with customary international law or it gives effect to Australia's treaty obligations: *Teoh* (n 18) 273. However, it remains unclear whether this common law approach applies only to legislation enacted after the ICCPR was ratified and to ambiguous statutory provisions. Further, a statute will generally be interpreted consistently with common law rights: *Coco v The Queen* (1994) 179 CLR 427, 435–438 (HCA); *Plaintiff S157 v Commonwealth of Australia* (2003) 211 CLR 476 (HCA). However, common law rights and their parameters are not readily identifiable. Thus, s 32 goes some way beyond cementing the current common law rules of statutory interpretation. Of course, the common law continues to develop consistently with international law: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA). Moreover, common law rights and rules are not necessarily irrelevant: s 5. This is helpful, particularly in respect of rights not included in the Charter (eg rights set out in other international treaties which Australia has ratified) or for statutory interpretation in circumstances where the Charter was 'overridden' pursuant to s 31.

<sup>80</sup> Ex mem (n 22) 23.

<sup>81</sup> *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 [15] (HCA).

<sup>82</sup> Interpretation of Legislation Act 1984 (Vic).

For convenience of analysis, s 32(1) can be broken down into two components. The first component focuses on ‘so far as it is possible to do so consistently with their purpose’. This component requires the purpose of the relevant statutory provision to be identified.<sup>83</sup> Statutory purpose is understood to reveal Parliament’s intent.<sup>84</sup> However, the statutory purpose is often not self-evident, despite the practice of setting out one or more purpose(s) in modern statutes. In lengthy and complex statutes, several and sometimes conflicting purposes may be expressed or implied.<sup>85</sup> Further, the specificity, precision or degree with which a purpose is abstracted provides scope to widen or narrow the range of meanings that can be given to the words being interpreted. Indeed, Tom Campbell argues that interpretation, as it operates in the context of human rights legislation, makes most things ‘possible’. He contends that possibility/ impossibility is a multi-faceted concept, the meaning of which can vary from tight logical sense to more everyday meanings (eg likely/ unlikely or feasible/ not-feasible).<sup>86</sup> Moreover, the interpretation needs merely to be *consistent* with that purpose.

Section 32(1) directs our attention to the words requiring interpretation; the ordinary meaning of words is understood to reveal the will of Parliament. Those words will now be required to be given a rights oriented meaning to accommodate also the will of Parliament under the Charter.<sup>87</sup> While giving a purposive construction to statutes is already a requirement of Victorian law<sup>88</sup> when coupled with the muscle of a rights oriented approach, there is substantial scope for departing from the ordinary or settled meaning of the words, provided that can be done consistently with the statute’s purpose. Indeed, the purpose of the statutory provision itself may tolerate or permit going beyond the ordinary or settled meaning of the words.

<sup>83</sup> This seems consistent with the direction given by the Interpretation of Legislation Act 1984 (Vic) to adopt a purposive approach to interpretation. To the extent of any inconsistency between the two Acts, the doctrine of implied repeal suggests the later Act (ie the Charter) prevails. Contrast s 30 of the Australian Capital Territory Human Rights Act 2004 (ACT) which expressly subjects the interpretive function under that Act to the generally applicable interpretation of legislation provision.

<sup>84</sup> However, as Thomas J notes in *R v Poumako* [2000] 2 NZLR 695 [80]: ‘It is, of course, well established that the notion of “Parliament’s intent” is frequently a fiction. Often Parliament has not addressed the question in issue at all or, if it has, it has not made its meaning clear. Language is inherently equivocal.’ As Andrew Butler states in ‘Strengthening the Bill of Rights’ (2000) 31 VUWLR 129, 133, s 6 operates on the principle of the ‘malleability of language’ and encourages the Courts to exploit that feature’.

<sup>85</sup> See for example *Al Masri* (n 21) [121] where the court identifies two purposes relevant to one section and gives precedence to the one which is consistent with rights.

<sup>86</sup> See *Campbell* (n 130) 96; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [27]–[30] (Lord Nicholls), [44] (Lord Steyn). As such, the everyday meaning of ‘possible’ can enlarge the reach of s 32.

<sup>87</sup> See *Ghaidan* (n 86) [30] where Lord Nicholls notes the change in the United Kingdom in the following terms: ‘In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the Court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation’. In *Hansen* (n 98) [14] (Elias CJ) a similar point is made about the NZ equivalent that s 6 BORA may require a meaning to be given to a provision which was not envisaged at the time of its enactment.

<sup>88</sup> Interpretation of Legislation Act 1984 (Vic).

The second component of s 32(1) focuses on interpreting a provision compatibly with rights. This requires an assessment of whether a right is engaged and an identification of its scope. There is room for flexibility because the meaning of a right is neither precise nor static. The orthodox view is that a right should be given wide scope and restrictions should be narrowly construed.<sup>89</sup> This is consistent with interpretive principles set out in s 32 and the Vienna Convention on the Law of Treaties as applicable to the rights and restriction of rights in the ICCPR.<sup>90</sup> Similarly, common law rules of statutory interpretation require that rights be interpreted liberally with corresponding restrictions to be construed strictly.<sup>91</sup>

Section 3(1) defines 'human rights' as the rights set out in Pt 2 of the Charter. Critically, the s 7(2) limitation mechanism is separate from and does not form part of that definition. This is relevant because 'compatible with a right' may deliver very different meanings depending on whether a right compatible or a *right as limited* compatible meaning is the focus. A textual reading suggests that a provision must be interpreted compatibly with a right<sup>92</sup> rather than compatible with a *right as limited* under s 7(2). This does not mean that limitations, where relevant, cannot be accommodated as part of the interpretive process. It means that even where limitations are in play, the phrase 'compatible with a right' does not change to 'compatible with a right as limited'.

As set out in Pt D of this paper, the Charter contemplates that limitations (whether because of s 7(2) or rights with internal qualifications) can have a legitimate role to play. Measuring a provision against s 7(2) can provide an indication of both a limitation and the nature and extent of that limitation. The degree of limitation could span from (theoretically) no or negligible limitation, proportionate and justified limitation, disproportionate and unjustified limitation to (theoretically) near destruction.

<sup>89</sup> There are arguments to the contrary which suggest giving rights a wide scope and restrictions a narrow scope may in fact diminish the value of rights: A Butler, 'Limiting Rights' (2002) 33 Victoria U of Wellington L Rev 537; Huscroft (n 41) 9; Hogg (n 2) 732-734.

<sup>90</sup> See also UNCHR 'General Comment No 10: Art 19 (Humane Treatment of Persons Deprived of their Liberty)' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (12 May 2004) UN Doc HRI/GEN/1/Rev.7.

<sup>91</sup> See ECOSOC 'The Siracusa Principles on Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights' Annex, UN Doc E/CN.4/1984/4.

<sup>92</sup> Rights should mean rights; if Parliament wished the phrase 'compatible with human rights' to mean or be understood, where relevant, as 'compatible with human rights as limited' it would have said so. Other instances where the expression 'compatible with a human right' is used in the Charter support this view. In the context of making Statements of Compatibility under s 28, a Minister is given the option of providing an opinion that a Bill is either compatible with a right or incompatible with a right. Similarly, under s 38 a public authority must act and make a decision compatibly with a right; if it does not, it may endeavour to avail itself of any defences which permit acting or making decisions incompatibly with a right. Thus, S 28 and s 38 can accommodate a right being limited by s 7(2) without requiring the phrase 'compatibly with a right' to mean or be understood as 'compatibly with a right as limited'. 'Compatible with a right' in s 32 should be approached similarly; moreover, where relevant, limitations can be worked into the interpretive process.

Relating and reconciling limitation under s 7(2) with compatibility/incompatibility as part of the interpretive function can raise complex issues.<sup>93</sup> In providing an overview, this paper is not concerned with exploring these issues in detail. One issue is the methodology and sequence in which to apply ss 7(2) and 32. The short answer, as noted previously, is that there is unlikely to be a definitive and comprehensive one. The permutations and combinations of rights, limitations, ordinary meanings, statutory purpose(s), rules of statutory interpretation and varied factual contexts are too many to produce one methodology and sequence.

A second cluster of issues concerns whether a provision *within* s 7(2) (ie justified and proportionate) is synonymous with compatibility and a provision *outside* s 7(2) (ie not justified and disproportionate) is synonymous with incompatibility. In practice, the absence of any limitation at all could be an indicator of compatibility; a limitation *outside* s 7 could be a useful indicator of incompatibility. It could, however, be too simplistic for all purposes to conflate the separate but overlapping notion of limitation with that of compatibility/ incompatibility. For one thing, s 7(2) does not use the language of compatibility/ incompatibility. Further, on one view, *any* limitation of a right could be an indicator of incompatibility; similarly, it may be that a limitation *within* s 7(2) is not necessarily an indicator of compatibility. Moreover, such indications of compatibility/ incompatibility could be apparent or *prima facie* because whether a provision is compatible or not will usually be confirmed by applying s 32. In other words, it is only when an application of s 32 confirms a provision as having a compatible meaning or not, that s 32 has done its work and is spent, and the matter of compatibility or incompatibility is conclusively determined.

A third issue is whether it is only an 'incompatible' provision, howsoever determined (eg by reference to s 7(2)), that should be subjected to s 32. If so, determining what constitutes 'incompatible' becomes particularly significant (see paragraph above) because only such provisions can be subjected to s 32. On the one hand, binary and simple logic—a s 32 interpretation is mandatory, and potentially useful, if a provision is 'incompatible' but not if it is 'compatible'—suggests s 32 is restricted to 'incompatible' provisions. Why, especially in practice, would legislation which did not infringe a right need any curing or improvement by s 32? On the other hand, no such restriction is apparent in the text of s 32; s 32 is a rule of statutory interpretation which is not restricted solely to provisions which infringe rights.

<sup>93</sup> A similar issue confronted NZ Courts in trying to reconcile ss 4, 5 and 6 BORA and led to differing views by members of the Court: see *Ministry of Transport v Noort* [1992] 3 NZLR 260 (NZ Court of Appeal); for the practical consequences flowing from the differing views see Butler (n 89) and Rishworth (n 45). For an explanation of the textual difficulties and a pragmatic resolution for NZ, see: P Rishworth, 'Judicial Review and the New Zealand Bill of Rights' (2004) PLR 103, 108–114. The issue continues to divide the court: *Hansen* (n 98). Significantly, the equivalent of s 4 BORA, its constraining effect on s 5 BORA and impact on s 6 BORA are not replicated in the Charter. This may help Victoria to avoid or minimise some of the difficulties confronting NZ in having to reconcile ss 4, 5 and 6 BORA. Cf. Allan (n 45) 919.

One way of approaching these issues might be to conceptualise ‘compatibility with human rights’ along a continuum. At one end of this continuum is the maximally compatible meaning. At the other end is the maximally incompatible meaning. Incompatibility crosses into compatibility somewhere along that continuum. In applying section 32, the gravitational effect of compatibility pulls provisions towards the compatible end, while the friction created say by limitations or statutory purpose can properly resist that effect.

Along that continuum, there is a range of compatible meanings (eg moderately compatible, marginally compatible) and a similar range of incompatible meanings. This range reflects the reality that more than one compatible and incompatible meaning is likely to exist and that a s 32 application will have to choose the best fit having regard to text, purpose and context. Approached in this way, s 32 still delivers a compatible meaning (failing which a s 36 Declaration avails) but it may be simplistic to view s 32 as applying only in respect of ‘incompatible’ provisions.

Admittedly, where a provision is compatible or its purpose is concerned with enhancing rights or not limiting rights at all, applying s 32 could be superfluous. It may be that the ordinary meaning of the provision is rights compatible. Equally, it may be that several compatible meanings exist or that a more compatible meaning could be found. A s 32 interpretation could transform a marginally compatible meaning into say a maximally compatible one. If that is consistent with the purpose, there appears to be no reason why s 32 should not be used in this way.<sup>94</sup> Similarly, where a qualification internal to a right is in play (eg s 15—freedom of expression), the ordinary meaning could be marginally compatible. On an application of s 32, the qualification may prevent the provision from being given a meaning that is maximally compatible. The resultant meaning could be moderately compatible. Additionally, it would be *more* compatible with a right than if s 32 had not been applied.

If a provision is marginally or moderately incompatible, s 32 may, with little friction, yield a compatible meaning, even if it is only marginally so. This is because an application of s 32 can deliver a compatible meaning consistent with the statutory purpose and mindful of the ordinary meaning of the provision. Parliament’s intention in limiting the provision can be accommodated. The weaker the limitation the more likely the purpose or ordinary meaning of the provision will permit s 32 to deliver a compatible meaning. The stronger the limitation the less likely that will be possible and the option of issuing a s 36 Declaration

<sup>94</sup> For example, see *R v Governor of Belmarsh Prison* [2002] EWHC 1965 (Admin), [2003] 4 All ER 309 [39]–[40] where the words ‘legal adviser’ in a rights compatible statutory provision were interpreted to include ‘an advocate from Italy.’ Reading the Prison rule compatibly with s 3 HRA, a prisoner’s legal adviser, defined in s 2(1) as ‘his counsel or solicitor, and includes a clerk acting on behalf of his solicitor . . .’ must embrace any lawyer who (a) is chosen by the prisoner, and (b) is entitled to represent the prisoner in criminal proceedings to which the prisoner is a defendant and therefore includes an Italian ‘avvocato’ who falls within the definition of ‘EEC lawyer’ in the European Communities (Services of Lawyers) Order 1978 (SI 1978/1910): See Table B of Appendix to Opinion of Lord Steyn: *Ghaidan* (n 86) (Lord Steyn).

is enlivened. As such, statutory purpose and the provision's ordinary meaning form a soft link between s 32 and limitations; inbuilt into s 32 then is a soft means of reflecting limitations where they are in play. This does not mean a s 7(2) analysis is not required or is surplus; the s 7(2) analysis is critical to revealing the nature and extent of the limitation. It helps form part of the context. The degree of limitation will influence where along the compatibility/ incompatibility continuum the resultant meaning properly lies.

Undoubtedly, where the statutory purpose or provision is concerned with limiting a right *without justification* or *disproportionately* (ie outside s 7 and a strong indicator of incompatibility), it could sometimes be challenging to find a compatible meaning. However, s 32 requires that the attempt be made.<sup>95</sup> Section 32 may not always be sufficiently kinetic to force the meaning along the continuum to deliver a compatible meaning; it may, however, deliver a marginally incompatible meaning. While a marginally incompatible meaning is still incompatible, it may be less so than prior to a s 32 application. It is unclear, however, if the foregoing is a legitimate use of s 32. At all events, if such a provision cannot be interpreted compatibly with a right or the statutory purpose does not make that possible, issuing a s 36 declaration becomes available as an option.

## 2 Comparative approaches to rights oriented statutory interpretation

The UK and NZ have human rights instruments with interpretive provisions similar to s 32. Case law from those jurisdictions provides an insight into how the interpretive function is likely to operate. There are, however, differences between the interpretation provisions in the UK and NZ. The UK section invites and has been found to mandate a more robust rights compatible interpretation. It is submitted that s 32 is substantially similar to the UK provision.

The interpretive function in s 3(1) of the Human Rights Act 1998 (UK) ('HRA') provides in relevant part that so far as it is possible to do so . . . legislation must be read and given effect in a way which is compatible with the Convention rights.

While there are textual differences between the UK and Victorian sections, it seems the differences between s 3(1) HRA and s 32 are slight. As explained in *Ghaidan*, an interpretation 'consistent with the thrust of the legislation', is recognised by UK judges as a requirement of the UK section.<sup>96</sup> That is accommodated

<sup>95</sup> See for example *Ghaidan* (n 86) [32] where Lord Nicholls makes plain that rights inconsistent language in a statute does not of itself make a rights compliant interpretation impossible, because a court can read in words to change the meaning of the legislation so as to make it rights compliant; *R v Lambert* [2002] 2 AC 545 (HL).

<sup>96</sup> *Ghaidan* (n 86) [33] (Lord Nicholls), [121] (Lord Rodger). This point (and the preference for the UK approach as exemplified by *Ghaidan*) was expressly considered and its implications for interpretation were approved by the Human Rights Consultation Committee in its report in recommending the draft Charter for Victoria in which form the Charter was largely enacted. Accordingly, it is submitted that s 32 of the Charter permits a generous interpretation: see Report (n 49) 82–83. G Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope'

in Victoria by the words ‘consistently with their purpose’. Those words are not found in s 3(1) HRA and may do more than ensure an interpretation ‘consistent with the thrust of the legislation’. Equally, their presence in s 32 is not necessarily constraining. Whether in any given case those words expand or restrict the scope of s 32 will be influenced by the particular statutory purpose. Similarly, it is submitted, nothing material turns on the difference between the use of the words ‘interpret’ in Victoria and ‘read and give effect’ in the UK. Statutory interpretation involves trying to ascertain the meaning of the words (ie read) and applying that meaning (ie give effect).<sup>97</sup>

In contrast, the interpretive function in s 6 of the Bill of Rights Act 1990 (NZ) (‘BORA’) provides: Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The NZ courts have stated that a BORA consistent meaning can only be given to statutory provisions, *if it is a reasonable meaning of those words*.<sup>98</sup> Plainly, there is no reference to the word ‘reasonable’ in s 6 BORA. It is inserted in NZ by way of judicial gloss. This is not to suggest that s 6 BORA is in anyway deficient in delivering rights compatible interpretations, but that Victoria has not followed the NZ formulation. As it turns out, however, the difference between the UK and NZ provisions is not merely semantic. While the difference may be one of degree, the respective sections appear to have led to different judicial approaches and, in some instances, outcomes; similar cases have produced different results, as the cases discussed below reveal.

Judges and commentators agree that s 3 HRA demands a more aggressive approach to interpretation than s 6 BORA. A selection of these views is listed:

[2006] MULR 880, 892. The approach in *Ghaidan* received the approval of the Court of Appeal of the ACT where an interpretive rule similar to s 3(1) HRA operates pursuant to s 30(1), Human Rights Act 2004: *Kingsley Chicken Pty Ltd v Queensland Investment Corporation* [2006] ACTCA 9 (Unreported, 2 June 2006) [52]. Cf. Hon JJ Spiegelman AC ‘Blackstone, Burke, Bentham and the Human Rights Act 2004’ (2005) 26 Aust Bar Rev 1, 9 where his Honour, writing extra-judicially, suggests in the context of the ACT instrument that the presence of the ‘subject to statutory purpose’ requirement may not permit the generous interpretive approach taken in *Ghaidan* and the UK generally; the NZ approach is commended. The correctness of that view must be doubted in light of the ACT case law cited in this paragraph. Whatever the merits are of His Honour’s view for the ACT, for the reasons set out in the paras above and this n, they are of limited relevance to the Victorian context.

<sup>97</sup> *Ghaidan* (n 86) [66] (Lord Millett) states that ‘section 3 requires the court to read legislation in a way which is compatible with the Convention only ‘so far as it is possible to do so’. It must, therefore, be possible, by a process of interpretation alone, to read the offending statute in a way which is compatible with the Convention.’ The phrase ‘read and give effect’ is used interchangeably with ‘interpret.’ See also *Collector of Customs v Agfa-Gevaert Lid* (1996) 186 CLR 389 (HCA) for an Australian example: the High Court of Australia states that statutory interpretation or construction involves finding and giving effect to the meaning of the words of a statute.

<sup>98</sup> *Noort* (n 92) 272. See also *Hansen v The Queen* [2007] NZSC 7 (20 February 2007 Unreported) [158] (Tipping J), [290] (Anderson J) where a meaning which is reasonable continues to govern the statutory ‘can’ in s 6 BORA.

‘The United Kingdom subsection, read as a whole, conveys, I think, a rather more powerful message’ (than the NZ section);<sup>99</sup>

‘The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights’;<sup>100</sup>

‘The approach of the United Kingdom courts appears to be more “adventurous” than that in New Zealand.’<sup>101</sup>

(a) Examples of similar cases with different outcomes

In *Hansen*<sup>102</sup>, the NZ Supreme Court was required to interpret the phrase ‘unless the contrary is proved’ in a criminal law statute which reversed the burden of proof. It held those words could not be interpreted to mean ‘unless sufficient evidence is given to the contrary’. The court reasoned, as ordinarily understood, that an evidential burden is not a burden of proof and was unwilling to give the words in the statute that meaning.

In contrast, a similar provision which cast the burden of proof on the defendant was interpreted by the House of Lords to mean an ‘evidential burden’. In *Lambert*, Lord Slynn stated that:

Even if the most obvious way to read section 28(2) is that it imposes a legal burden of proof I have no doubt that it is ‘possible’, without doing violence to the language or to the objective of that section, to read the words as imposing only the evidential burden of proof.<sup>103</sup>

<sup>99</sup> *R v DPP, ex parte Kebilene* [1999] UKHL 43, [1999] 3 WLR 972, 987 (Lord Cooke).

<sup>100</sup> *R v A (No 2)* [2001] UKHL 25, [2001] 2 WLR 1546 [44] (Lord Steyn). Writing extra-judicially, Sir Gerard Brennan appears to conflate the approach taken by the UK Courts in *R v A* with *Ghaidan* (n 86) and notes that as the settled approach in the UK, he is critical of it and recommends caution in following the UK approach: Brennan (n 15) 254. With respect, there are difficulties with His Honour’s analysis because that conflation does not appear to represent the settled approach in the UK. While the approach in *R v A* is correctly recognised as representing a high watermark, the same can not necessarily be said of the approach in *Ghaidan*: S Evans and C Evans, ‘Legal redress under the Victorian Charter of Human Rights and Responsibilities’ (2006) 17 PLR 264, fn 28 at 268; moreover, *Ghaidan* is critical of the way in which s 32(1) is designed to operate: n 96. That said, whether contextual differences between the HRA (eg to give effect to the European Convention on Human Rights) and the Charter (eg with its ICCPR provenance) are sufficient to justify a different judicial approach towards the scope of the interpretive function remains to be seen.

<sup>101</sup> *Hansen* (n 98) [156] (Tipping J). The Supreme Court of NZ recently doubted whether the textual differences between s 6 BORA and s 3(1) HRA are material. Instead, their Honours prefer to see any difference as one of context (eg the influence of European jurisprudence) and judicial approach (eg occasional latitude with statutory interpretation): (n 98) [13] (Elias CJ), [273]–[277] (McGrath J). Whether the foregoing explains all of the different outcomes in similar cases is doubtful. Further, and with respect, such an explanation does not address the constraining impact in NZ of ‘reasonable’ meanings: n 98 and n 105.

<sup>102</sup> *Hansen* (n 98).

<sup>103</sup> *Lambert* (n 95) [17].

Similarly, Lord Steyn stated that the words ‘to prove’ in a reverse onus provision may be read as placing an evidential burden.<sup>104</sup> This is an example of ‘reading down’ words in a statute. Arguably, s 32 of the Charter is capable of delivering a similar result, given that such an interpretation can accommodate the statutory purpose and be mindful of the provision’s ordinary meaning.

The potency of the interpretive section can be seen in UK cases where the court has ‘read in’ words into a statute<sup>105</sup> to make it rights compatible and overturned the settled meaning of those words.<sup>106</sup> In *Ghaidan*, the House of Lords held that the word ‘spouse’ in tenancy legislation, which granted succession rights to a surviving ‘spouse’ of a deceased tenant, could be interpreted to include a person in a same sex relationship.<sup>107</sup> This is despite a reference to the relationship of husband and wife in the Rent Act 1977 (UK). Prior to the *Ghaidan* decision, the benefit was available to a spouse of the tenant who could be treated ‘as his or her husband or wife’. In *Ghaidan*, their Lordships applied s 3 HRA to that Act and ‘read in’ words (in italics) so that if a spouse of a tenant could be treated ‘as *if they were* his husband or wife’ they would benefit.<sup>108</sup> As noted above, *Ghaidan* was explicitly considered and approved in framing s 32.

In contrast, in *Quilter*,<sup>109</sup> the NZ Court of Appeal held that a same sex relationship was not a ‘marriage’ within the Marriage Act 1955 (NZ). Marriage was not defined to be a relationship between a man and a woman in that Act. Nonetheless the court found the terms of the Act would not permit such a relationship to be a marriage.

<sup>104</sup> *Lambert* (n 95) [17] (Lord Slynn), [42] (Lord Steyn).

<sup>105</sup> Reading down and severing words is known to Australian law both at common law and by force of statute: see *Cunliffe v Commonwealth of Australia* (1994) 182 CLR 272 (HCA) (Deane J); *Gould v Brown* (1998) 193 CLR 346 [71]–[87] (HCA); *Coleman v Power* (2005) 220 CLR 1 [109]–[110] (HCA). See also s 15A Acts Interpretation Act 1901 (Cth) and s 6 Interpretation of Legislation Act 1984 (Vic).

<sup>106</sup> *Ghaidan* (n 86) [67] Lord Millett (who dissents on the facts) agrees with the majority that the interpretive function means only ‘that the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can *read in* and *read down*; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point.’ (emphasis added) Also contrast Lord Millett’s position towards unreasonable meanings with the NZ approach which requires a reasonable meaning: see text accompanying n 98, above.

<sup>107</sup> *Ghaidan* (n 86) [1]. This is despite the fact that until *Ghaidan* was decided, a ‘spouse’ in the Rent Act 1977 (UK) had been interpreted not to include persons in a same sex relationship. Indeed, it is unlikely that in enacting that Act in 1977, Parliament of nearly three decades ago intended a same sex partner to obtain the benefit provided by that legislation. Greater emphasis or priority, it seems, is given by their Lordships to the Parliamentary intent of the Human Rights Act 1998.

<sup>108</sup> *Ghaidan* (n 86) [121] where Lord Rodger explains that ‘when the Court spells out the words that are to be implied, it may look as if it is “amending” the legislation, but that is not the case. If the Court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others.’

<sup>109</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523.

## 2 Conclusion

Judicial interpretation of legislation to give meaning to legislative intent is accepted as being within the judicial function.<sup>110</sup> For a long time, legislation was interpreted literally and, more recently, purposively. Interpreting legislation by reference to human rights criteria represents an expansion of that function. The power to interpret statutes by such criteria (and indeed the necessity of doing so before a statute can be applied) is a significant means by which judges reconcile parliamentary sovereignty with substantive rule of law ideals including rights.<sup>111</sup> It provides an effective mechanism to inject rights-friendly meanings into such provisions. If Parliament disagrees with a particular interpretation, it may choose to legislate to overturn that interpretation; admittedly, that approach carries with it political and other risks.

On a textual reading alone, s 32 has the potential to protect rights effectively. It empowers courts to view all statutory provisions, including the Charter itself, through a Charter prism. It involves stretching the meaning of words and taking a generous approach to Parliamentary intent and purpose with a view to deliver rights protection.<sup>112</sup> That is what Parliament requires in protecting and promoting rights. In this way, s 32 helps meet the relevant ICCPR standards.

Nonetheless, the requirement relating to 'statutory purpose' can act as a brake. Further, the ordinary words used in a statute cannot be ignored; they too are capable of operating as a boundary.<sup>113</sup> While the line between judicial interpretation and judicial legislation is often a bright line (in theory) with hazy edges (in practice), it exists. Courts in the UK and NZ have shown care in respecting the institutional and constitutional roles assigned to each arm of Government. Rare displays of judicial zeal aside, interpretation should not and is unlikely to cross into the territory of judicial legislating.

<sup>110</sup> *Kartinyeri* (n 81) [89]; *Vani v R* (1997) 149 ALR 1, 16–17; *A v Home Department* [2005] 2 AC 68 (HL) [42]. This may make it difficult, at least within Australia, for the North American concepts of judicial deference to the Executive in the context of statutory interpretation or questions of law to take hold: *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA page [38]–[52], [2000] 199 CLR 135 (HCA); *Mulholland v AEC* [2004] HCA 41 [237], 209 ALR 582 (HCA) (Kirby J); contrast *Chevron USA v National Resources Defence Council* 467 US 837 (1984), 104 S.Ct. 2778 and *Baker v Canada* [1999] 2 SCR 817, [1999] CarswellNat 1125 (SC Can). In Victoria, whether a concept of deference or latitude or margin of discretion can be adapted and/or applied, whether or not in contexts involving interpretations of law, Executive conduct or otherwise remain to be seen.

<sup>111</sup> T Blackshield and G Williams, *Australian Constitutional Law and Theory* (4th edn The Federation Press, Sydney 2006) 117.

<sup>112</sup> *Ghaidan* (n 86) [32] Lord Nicholls makes plain that rights inconsistent language in a statute does not of itself make a rights compliant interpretation impossible, because a court can read in words to change the meaning of the legislation so as to make it rights compliant.

<sup>113</sup> In *Ghaidan* (n 86) [110] Lord Rodger notes that the interpretive function does not allow the courts to change the substance of a provision completely. Eg changing a provision from one where x is to happen into one where x is not to happen. Or at [71] as Lord Millett puts it in more colourful terms: "red, blue or green" cannot be read as meaning "red, blue, green or yellow"; the specification of three only of the four primary colours indicates a deliberate omission of the fourth (unless, of course, this can be shown to be an error). Section 3 cannot be used to supply the missing colour, for this would be not to interpret the statutory language but to contradict it."

## F DECLARATION OF INCONSISTENT INTERPRETATION

If a statutory provision cannot be interpreted consistently with a human right,<sup>114</sup> s 36 sets out a curial remedy and a process for addressing rights violations. A superior court may issue a Declaration of Interpretation Inconsistency ('DOII') to that effect: s 36(2). The DOII is not legally enforceable.<sup>115</sup>

Section 36 marks one of the boundaries of judicial review. Once a DOII is issued, Parliament and the Executive are formally alerted to a human rights inconsistency. Section 36(5) makes clear the statutory provision which is the subject of a DOII remains valid, effective and operational; a DOII does not give rise to a legal right or civil cause of action. The response to that inconsistency then becomes a political decision for government. Section 36 signals that any dialogue relating to a DOII should involve the superior courts.<sup>116</sup> Given its interactive aspects and indeed the novelty of the Charter, the involvement of the superior courts should ensure a more consistent application of that 'remedy' than were all courts and tribunals able to make them.<sup>117</sup>

### 1 What's in a name?

The DOII nomenclature represents a departure from that used in NZ and the UK, namely a Declaration of Incompatibility ('DOI'). The draft Charter proposed for Victoria by the Consultation Committee used the language of DOI.<sup>118</sup> It is not immediately obvious whether the varied nomenclature in the Charter is intended to signal a substantive difference. Both a DOI and DOII are no more (and yet no less) than a curial statement of interpretive inconsistency. Both leave room for Parliament to argue that other interpretations may still be possible.<sup>119</sup> In both cases, a court must have reasoned and/or concluded that the legislation cannot be cured by a rights compatible interpretation, before it issues a declaration.

<sup>114</sup> S 36(2) relevantly provides that if the Court is of the opinion 'that a statutory provision cannot be interpreted consistently with a human right', it may make a declaration to that effect. There appears to be a lack of strict congruence between s 32 and s 36(2). The trigger for making a s 36(2) declaration is the unavailability of an interpretation consistently with a human right. However, s 32 is cast in terms of interpreting compatibly with a human right. Also, an interpretation must be consistent with statutory purpose; the latter is not expressly picked up in s 36.

<sup>115</sup> s 36(5).

<sup>116</sup> *Report* (n 49) 85–86.

<sup>117</sup> There are relatively simple mechanisms by which lower courts and tribunals could refer Charter related matters to the Supreme Court: s 33. There will, however, be time and cost consequences in making such referrals; their effect may be adverse to the referral of such matters.

<sup>118</sup> *Report* (n 49) 85–88 and see ch 37 of the draft Charter.

<sup>119</sup> Even allowing for a concept of deference to the legislature, the primacy, at least in Australia, of the court's role in statutory interpretation is likely in the usual case not to confer credibility on non-curial interpretations: n 110. For opinions about the significance of the different nomenclature see *Evans and Evans* (n 100) 271; *G Williams* (n 96) 903; *Allan* (n 45) 913.

The main difference *appears* to be that a DOI may resonate more strongly than a DOII; the ingenuity (if any) may lie in a *perception* that a DOI signals a positive and substantive finding of incompatibility whereas a DOII signals a passive and technical opinion about statutory interpretation. It is speculative to suggest, however, that the DOII nomenclature has its genesis in such considerations.

## 2 Discretionary remedy

The use of the word ‘may’ implies the use of the DOII is discretionary.<sup>120</sup> The court may choose not to issue a DOII.<sup>121</sup> This raises questions about how that discretion may be guided, whether conditions may be attached and what (if any) other remedies may be available.

The DOII mechanism serves many benefits.<sup>122</sup> It permits a citizen to seek a judicial remedy for a rights inconsistency. Butler identifies many practical benefits<sup>123</sup> such as the availability of legal aid to bring such actions. In litigation, it may be that the State is likely to seek or promote an interpretation consistent with rights in the Charter rather than have a DOII registered against it; that could sometimes be a better outcome for the litigant. A DOII is also likely to draw the attention of parliament and public to a fundamental rights violation.

A DOII offers the chance of securing a remedy to end rights violations. From the perspective of political theory, it gives the citizen another opportunity to participate in the political decision-making process, this time by writ rather than ballot. From the perspective of pragmatism, if we accept that courts enjoy a preferred position in respect of the public’s trust or that acceptance of the court’s decision is likely<sup>124</sup> there is a good chance that DOIIs will be honoured and rights violations remedied.

## 3 Overseas experience: positive response to declarations

The UK’s experience to date confirms this. The experience shows that all three arms of government are responding co-operatively: for example, government by implementing rights favourable solutions and the judiciary in not being timid to

<sup>120</sup> Interpretation of Legislation Act 1984 (Vic) s 45.

<sup>121</sup> This is accepted in the UK and ACT. In *Bellinger v Bellinger* [2003] 2 AC 467 (HL) [55] Lord Nicholls says ‘If a provision of primary legislation is shown to be incompatible with a Convention right the Court, in the exercise of its discretion, may make a declaration of incompatibility under section 4 of the Human Rights Act 1998. In exercising this discretion the Court will have regard to all the circumstances.’ *Yani Pappas v Victor Noble* [2006] ACTSC 29 (Supreme Court of the ACT) [17], [2006] WL 1150923 where Master Harper stated the instant case was not an appropriate one to issue a Declaration because it involved a question of Commonwealth legislation, notwithstanding an inconsistency of an ACT statutory provision with the Human Rights Act 2004 (ACT).

<sup>122</sup> See *Poumako* (n 84) [93]–[107] where Thomas J lists several purposes.

<sup>123</sup> *Andrew Butler* (n 84) 138.

<sup>124</sup> Even after years of rights-based public policy litigation in Canada and NZ respect for the courts have not diminished: Huscroft (n 41) 14–15.

issue declarations.<sup>125</sup> The context of declarations has ranged from the rights of alleged terrorists<sup>126</sup> to transsexuals.<sup>127</sup> This provides evidence that the declaration framework can be effective.<sup>128</sup>

If the UK Parliament did not remedy the rights violation, the potential to petition the European Court of Human Rights exists. The legal and political risks associated with an adverse ruling by the European Court may in part contribute to the positive response seen to date in the UK. While Victoria is not subject to the supervision of a similar court, complaints which violate the ICCPR can nevertheless be made to the Human Rights Committee. While the Committee's rulings are not binding, they can exert moral and political pressure. The desire to avoid an adverse ruling by that Committee or put Australia (ie the federal government) in breach of its international law obligations may and perhaps, should, have a similar effect on how Victoria's Parliament responds.

#### 4 Interpretation v Declaration

Even in the context of weak form judicial review, there are differences of opinion about the appropriateness of using the interpretive and declaratory functions. Some view the interpretive function as primary and call for it to be given wide scope;<sup>129</sup> others support the wide use of the non-binding declaration.<sup>130</sup> Some commentators wish to limit the scope of the interpretive function because of what they perceive as the potential for illegitimate interpretation. Moreover, the potency of interpretation is that it applies straightaway and has legal effect. It takes a statute to reverse the new interpretation.

Thus, some view the scope of the interpretive function more as a threat to electoral based democracy than the positive response of parliament to declarations.<sup>131</sup> This is because the right of judges to interpret the law is entrenched and accepted as the prerogative of the courts. It becomes not only politically difficult but also constitutionally questionable to reject a court's particular interpretation. Judicial

<sup>125</sup> The Review notes that as at July 2006 'all of the declarations of incompatibility made since the coming into force of the HRA have been remedied (or are still under consideration with a view to being remedied)'. *Review* (n 15) 17.

<sup>126</sup> *A v Home Secretary* (n 110).

<sup>127</sup> *Bellinger* (n 121).

<sup>128</sup> In fact, even in Canada, the Supreme Court has identified to Parliament ways in which new legislation could remedy the problem. Hogg notes that in most cases, Parliament enacts new legislation taking notice of the court's advice, sometimes preferring solutions found in dissenting judicial opinions: Hogg (n 2) 720–3. Cf. scepticism is voiced about the reality and extent of dialogue: see eg JL Hiebert, 'Why must a Bill of Rights be a Contest of Political and Judicial Wills' (1999) PLR 22.

<sup>129</sup> Lord Lester of Herne Hill QC, 'The Art of the Possible: Interpreting Statutes Under the Human Rights Act' (1998) EHRLR 665.

<sup>130</sup> Conor Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 LQR 248, 250; Tom Campbell 'Incorporation Through Interpretation' in Tom Campbell et al (eds), *Sceptical Essays on Human Rights* (OUP, Oxford 2000) 79, 99.

<sup>131</sup> *Campbell* (n 130) 87.

power built on interpretation may not be as vulnerable to democratic pressures as participating in the declaration process.

Equally, others view the declaration as a measure of last resort.<sup>132</sup> This does not necessarily imply an inappropriate use of the interpretive function. It implies that the interpretive function will be calibrated to carry the greater burden in securing rights compliance. The benefit of that may well be more judicially delivered rights-compliant legislation. Moreover, any view that it is the court which oversteps the interpretive function does not completely accord with those instances where the State requests the court to do so and the court has resisted.<sup>133</sup>

As a matter of logic and sequence, it is true that the power under s 32 must be exercised prior to s 36. Section 36 is available where application of s 32 fails to deliver a rights compatible interpretation. Other things equal, it would be remarkable if most instances of contested statutory interpretation in Victoria resulted in the making of a DOII; the public (and even government) would expect the judiciary to give robust effect to s 32. Equally, over a period of time, it would be remarkable if a DOII were not issued. Admittedly, the better view is there is no *a priori* reason about which section will be used more frequently *in practice*. As Klug argues<sup>134</sup> that will depend on the nature of the cases that arise and whether the offending provision can be interpreted without straining language and undoing the very purpose of the statutory provision in question.

## 5 Conclusion

The DOII can be a significant aid. If so, some argue the power to invalidate legislation is not strictly necessary. As Lord Hoffmann observes,<sup>135</sup> the distinction between the power to invalidate a statute and a Declaration may be technical because of the political pressure to bring the law into line with the Declaration. This is consistent with arguments that ‘weak forms’ of judicial review can collapse into ‘strong forms’ of judicial review even in the context of statutory human rights instruments.<sup>136</sup> These arguments have greater force when analysed from the perspective of the relationship between the arms of government. However, they lose much of their force when viewed from the perspective of the individual.

<sup>132</sup> *Review* (n 15) 16–17.

<sup>133</sup> Eg see *Roth* (n 65) [66] where the State requested an interpretation which the Court declined to give because it would amount to usurpation of the legislative function. See also *Ghaidan* (n 86) [70] and *R (Hammond) v Home Secretary* [2005] UKHL 69, [2006] HRLR 5 where the State did not resist the robust interpretations being advanced. Requests or concessions by the Executive do not justify the judiciary exceeding the interpretive function.

<sup>134</sup> F Klug and K Starmer, ‘Standing Back From The Human Rights Act: How Effective Is It Five Years On?’ (2005) PL 716, 722. As of July 2006, it appears that s 3 HRA has been used on 12 occasions and s 4 HRA declarations were issued on 15 occasions: *Review* (n 15) 17. It is unclear if these statistics are limited to the application of these sections in the Superior Courts.

<sup>135</sup> Lord Hoffmann, ‘Human Rights and the House of Lords’ (1999) 62 MLR 159, 160.

<sup>136</sup> See *Tushnet* (n 5) 20–21.

From the point of view of an individual whose rights are violated, the difference between invalidating a statute and identifying an inconsistency makes all the difference.<sup>137</sup> A DOI may be of limited value because it is not legally binding on government and cannot guarantee a favourable outcome. Even if a legislative response remedies the violation, it may not extend to the particular litigant; it may not apply retrospectively to benefit others whose rights have been violated. As a result, individuals may be deterred from litigating rights violations if the only remedy is a DOI; to secure a DOI may be a pyrrhic victory. In addition, legal costs associated with bringing legal proceedings in the Supreme Court can be substantial. That is likely to deter litigants, even if a court is minded to award costs to a successful individual litigant or, except in the most frivolous of cases, not to penalise an unsuccessful individual litigant.

Notwithstanding these constraints, from the point of view of delivering an effective remedy, it is arguable that the DOI meets ICCPR standards. This may be, in large part, because those standards are not particularly stringent. The DOI alerts parliament, a body responsible for making the law which violates a right and which has the power to remedy that violation, of an inconsistency. An expectation is built in, to the detailed and prescriptive process set out in the Charter for responding to a DOI, that rights violations will be properly addressed. If that is not done the co-operative enterprise of promoting and protecting rights is likely to ring hollow.

## G CONCLUSION

The ICCPR requirements relating to an 'effective remedy' and 'judicial role' are presently relatively minimal in content. Weak forms of judicial review suffice. This paper has suggested that the judicial review framework in the Charter meets the ICCPR standards. Further, Victoria's judges will now be able to contribute to human rights dialogue, domestically and internationally, and help promote human rights. As a former Chief Justice notes, the Victorian judiciary have a considerable responsibility to 'craft the jurisprudence of human rights in Australia.'<sup>138</sup> The ways in which judicial review of legislation can protect and promote rights under the Charter are many and layered. There is the requirement to assess legislation by reference to a rights based set of criteria and by applying a proportionality test. This requirement carries an important feature of requiring rights limitations to be justified. Legislation must be interpreted in a rights oriented framework. A non-binding declaration framework is introduced which has the potential to operate successfully by putting pressure on the political arms of government to secure rights protection.

<sup>137</sup> If legislation is invalidated, the prospect of obtaining a binding remedy which benefits the litigant is substantially increased.

<sup>138</sup> Brennan (n 15) 248.

The Charter borrows from models operating in Canada, NZ, the UK and South Africa. Victoria has added refinements of her own. That it is an Act of Parliament with interpretive and declaratory mechanisms has its inspiration in the UK and NZ. The comparatively modest NZ interpretive model has been avoided in favour of one which accords more with the robust UK version. Victoria has even broken ranks by describing the declaration in a different way, although in its substantive operation there is unlikely to be any difference.

That the Charter requires legislation which limits rights to be subjected to justification and a proportionality analysis borrows heavily from Canada and South Africa; these features are also found in the NZ and UK models. These features provide a vehicle for driving a change towards a culture of justification. The experiences in these jurisdictions show that the measures empowering the judiciary to review legislation play an important role in protecting and promoting rights. Despite the differences in the status and details amongst the various rights instruments and the remedies they enliven, the judicial review mechanisms explored in this paper appear to be capable of playing their part in achieving that role. So there are good reasons to expect that the framework for judicial review of legislation under the Charter will operate effectively in protecting and promoting rights. To that end, the extra-judicial statements of Victoria's Chief Justice that 'there will be no escaping the Human Rights Charter' and of the President of the Court of Appeal that human rights 'should be seen as informing almost everything lawyers and courts do' are encouraging.<sup>139</sup>

<sup>139</sup> Both quotations are taken from the extra-judicial writing of Victoria's CJ: Marilyn Warren AC, 'Introduction to Human Rights Law: Seminar—Part 1' (2007) 81 Australian LJ 245, 246.