PARLIAMENTARY SOVEREIGNTY AND DIALOGUE UNDER THE VICTORIAN *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES:* DRAWING THE LINE BETWEEN JUDICIAL INTERPRETATION AND JUDICIAL LAW-MAKING

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In 2005, the Victorian Government established the Human Rights Consultation Committee to undertake a community consultation about the state of rights in Victoria. The main recommendation of the Committee was the enactment of a domestic rights instrument for Victoria. The Victorian Government accepted the recommendation and, by mid-2006, the Victorian Parliament had enacted the Charter of Human Rights and Responsibilities Act 2006 *(Vic). The Charter is based largely on the British* Human Rights Act 1998 *(UK) ('HRA'). This article explores some of the substantive difficulties with the adoption of the British model given the twin stated aims of the Victorian Government to preserve parliamentary sovereignty and to establish an educative inter-institutional dialogue. In particular, it explores how the mechanisms adopted to preserve parliamentary sovereignty – the s 32 judicial power of rights-compatible interpretation and the s 36 judicial power of declaration – may, in fact, undermine parliamentary sovereignty, threaten the educative dialogue amongst the differently placed, skilled and motivated arms of government, erode the justificatory and accountability aspects of rights instruments, and undermine the protection of rights.*

I INTRODUCTION

In May 2004, the Victorian Attorney-General released a *Justice Statement* which prioritised the need to recognise and protect human rights in Victoria. This included a commitment to consult with the Victorian community on how best to protect and promote human rights. In May 2005, the Victorian Government released a *Statement of Intent* which announced the establishment of the Human Rights Consultation Committee (the 'HRC Committee') that was to undertake the community consultation and outlined the range of issues to be considered. Interestingly, the *Statement of Intent* pre-empted various matters. For instance, it stated that the 'Government is concerned to ensure that the sovereignty of Parliament is preserved in any new approaches that might be adopted to [sic]

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human rights'.[1] It also stated that the Government was 'interested' in models of domestic rights protection that preserve parliamentary sovereignty,[2] such as the British model, rather than constitutional models which empower the judiciary to invalidate legislation, such as the model of the United States of America (the 'United States'). In relation to the role of the courts, the Victorian Government emphasised its preference for 'mechanisms that promote dialogue, education, discussion and good practice rather than litigation'.[3]

After extensive community consultation,[4] the HRC Committee recommended that the Victorian Parliament enact, via ordinary legislation, a *Charter of Human Rights and Responsibilities* to protect and promote civil and political rights,[5] and that the judiciary only be empowered to interpret legislation compatibly with the protected rights, or to issue a non-enforceable declaration of incompatibility where such an interpretation is not possible.[6] On 20 December 2005, the Attorney-General announced the Victorian Government's intention to accept the central recommendations of the HRC Committee.[7] A Bill was introduced into Parliament on 2 May 2006 and, after a relatively easy passage through both Houses of Parliament, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the '*Charter*') received Royal Assent on 25 July 2006.

This is a cautious approach to domestic rights protection, satisfying the desire to retain parliamentary sovereignty. Caution is evidenced by the resistance to entrench rights within the *Victorian Constitution*.[8] The attempt to preserve parliamentary sovereignty is demonstrated by the conferral of powers of judicial interpretation and non-enforceable declaration only, rather than conferring powers of judicial law-making or judicial invalidation. Moreover, the interaction between the arms

1 Government of Victoria, *Statement of Intent*, (2005), [8].

2 Ibid [9].

3 Ibid [12]. The Chair of the Human Rights Consultation Committee ('HRC Committee'), George Williams, recognises that the HRC Committee was designed to 'operate independently of the Attorney-General and of government', but notes that 'upon [the HRC Committee's] appointment', the Statement of Intent was released which 'set out the Government's preferred position on any human rights model for the state': George Williams, 'The Victorian *Charter of Human Rights and Responsibilities:* Origins and Scope' (2007) 30 Melbourne University Law Review 880, 886-87. Williams acknowledges that this attracted criticism, including criticism that the *'Statement of Intent* was too prescriptive and could be seen as prejudging the process', but defends the *Statement of Intent* because of its usefulness during the community consultation and its 'influential [nature] within government when the [HRC] Committee reported in a form that fell within the preferences expressed in it': 887. In relation to the latter, it is difficult to gauge the direction of the influence between the *Statement of Intent* and the HRC Committee's conclusion.

4 The HRC Committee undertook 55 community consultations and 75 consultations with governmental and other bodies, and received 2524 written submissions: HRC Committee, Government, of Victoria *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 5. Indeed, the Committee received 'the highest number of submissions ever received for a process in Australia that has looked at [the] issue': 5.

5 Ibid 6. Economic, social and cultural rights are not protected under the *Charter*: see further below n 14.

6 Ibid 9-10.

7 Office of the Attorney-General, 'Victoria Leads The Way On Human Rights' (Press Release, 20 December 2005).

8 *Constitution Act 1975* (Vic) ('Victorian Constitution').

of government is characterised as a dialogue about rights and their limitations, rather than a judicial monologue under which judges are the final arbiters of rights, with the executive and parliament shaping their policy and laws to fit judicial interpretations of rights – charter-proofing policy and laws, if you like.[9]

Unfortunately, the Victorian model may not secure its purposes. First, the line between proper judicial interpretation and improper judicial law-making is far from clear. At what point does a judicial interpretation that achieves compatibility in truth become a judicial re-writing of legislation? What is presented as judicial interpretation may in substance be judicial law-making, and judicial law-making is an erosion of parliamentary sovereignty. Attempts (legitimate or otherwise) at judicial interpretation under the *Charter* are bound to generate criticism of improper judicial activism.

Second, the power of judicial interpretation can be more potent than judicial declaration, because the judiciary achieves particular legislative outcomes with interpretation which it cannot achieve through declaration.[10] Judicial interpretation will produce judicially-sanctioned outcomes that differ to that legislated by the representatives in the name of rights-compatibility, whereas judicial declaration leaves the judicially-assessed rights-incompatible representative outcome in place. This may influence the judiciary to draw the line between legitimate interpretation and illegitimate legislating in favour of the former – indeed the judicial interpretation power has been described as 'dangerously seductive'[11] – which, again, potentially encroaches on parliamentary sovereignty.

Third, if the aim is to develop a dialogue about rights between the arms of government, one must be very careful about where and – more particularly – how the line between judicial interpretation and judicial law-making is drawn. How and where the line is drawn, whether deference becomes the tool of delineation, and the principles of deference to be applied, will have a great influence over the type of dialogue that occurs between the arms of government. The Victorian Government's aim to create a dialogue may be undermined, with the consequent loss of an educative exchange about rights between the arms of government, the loss of the envisaged rights accountability, and the undermining of rights protection.

These issues will be explored in this article. It will begin with a focus on institutional dialogue. Analysis will include an examination of how dialogue models secure parliamentary sovereignty – a discussion of the development of dialogue under the *Canadian Charter* and its expected operation in Victoria. With these perspectives in mind, the mechanisms for securing parliamentary sovereignty will be explored. In particular, the line between interpretation and declaration will be discussed, the need for and theories of judicial deference will be examined and challenged, and the risks of under-use of declarations will be considered. Throughout, the article

9 Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (2002) 224.

10 Jeremy Croft, *Whitehall and the Human Rights Act 1998: The First Year* (2002) 48.

11 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 61 (Lord Millett) ('Ghaidan'). This was acknowledged by the Victorian Opposition in debate: Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 2000 (Robert Clark).

will assess whether the *Charter* will meet the Victorian Government's objectives: the preservation of parliamentary sovereignty and the creation of an educative dialogue about rights.

This article is not intended as a criticism of the decision of the Victorian Government to enact a *Charter*. On the contrary, the author is very supportive of domestic rights instruments that establish educative dialogues about rights between the arms of government.[12] Rather, the purpose of the article is to foreshadow some of the difficulties associated with interpretative rights instruments, such as the *HRA*, and to discourage timid approaches to institutional dialogue.

II INSTITUTIONAL DIALOGUE AND THE *CHARTER*

In this section, a brief overview of the operation of the *Charter* is undertaken. Focus then turns to the way in which institutional dialogue models of rights protection operate to secure parliamentary sovereignty and how, in particular, the Canadian and Victorian models do so.

A *A Brief Overview of the* Charter

The *Charter* is largely based on the British model and, despite the Victorian Government's failure to so acknowledge, the Canadian model. The similarities will be highlighted throughout.[13]

The *Charter* confers statutory protection of civil and political rights, based primarily on the rights contained in the *International Covenant on Civil and*

12 Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26 *Melbourne University Law Review* 285; Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 135; Julie Debeljak, 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection' (2003) *Australian Journal for Human Rights* 9,183; Julie Debeljak, 'The Human Rights Act 2004 (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights' (2004) 15 *Public Law Review* 169, 169-176 ('The *Human Rights Act 2004* (ACT)').

13 The Australian Capital Territory also has an interpretative rights instrument, based on the British model: *Human Rights Act 2004* (ACT) (the '*ACT HRA*'). Like the *Charter*, it confers statutory protection of civil and political rights and contains a general limitations clause. However, unlike the *Charter*, it impacts only on legislation, requiring Ministerial statements of compatibility and parliamentary committee reports, imposing interpretative obligations, conferring the power to issue declarations of incompatibility, requiring formal responses to declarations by the Attorney-General, and the like (although, it does not include an override provision). Unlike the *HRA* and *Charter*, the *ACT HRA* does not contain any obligations on public authorities. The *ACT HRA* is not considered in depth in this article because the activity and jurisprudence under this model is not as developed as other comparative jurisdictions. See further Debeljak 'The *Human Rights Act 2004* (ACT)', above n 12.

Political Rights (1966) ('ICCPR').[14] The rights are found in ss 8 to 27.[15] The essence of each right reflects its *ICCPR* equivalent, subject to linguistic refinements and the omission of some rights because of the jurisdictional competence of Victoria.[16] The *Charter*, however, recognises that rights are not absolute, adopting two mechanisms enabling rights to be limited. First, s 7(2) contains a general limitations clause, which provides that the protected rights may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. Resolution of such conflicts comes down to a balancing act, with s 7(2) specifying an inclusive list of relevant factors. Second, some individual rights contain qualification and limitation powers.

The protected rights impact on the Victorian system of government in two ways, both being modelled on the *HRA*. The first impact relates to legislation – the focus of this article. Section 32 imposes an interpretative obligation on the judiciary, which requires all statutory provisions to be interpreted in a way that is compatible with protected rights, so far as it is possible to do so consistently with the statutory purpose.[17] This provision gives rise to a strong rebuttable presumption in favour of rights-consistent interpretations of legislation,[18] which is avoided only by clear legislative words or intention to the contrary. This differs to the current common law rule in that legislative ambiguity is *not* a prerequisite to a rights-compatible interpretation of legislation.[19]

Where legislation cannot be read compatibly, the judiciary is *not* empowered to invalidate it. Rather, the Supreme Court of Victoria (the 'SCV') or Victorian Court of Appeal ('VCA') may issue an unenforceable 'declaration of inconsistent application' under s 36.[20] A declaration is an alarm bell of sorts, allowing the judiciary to warn the executive and parliament that legislation is inconsistent with the *judiciary's understanding* of the protected rights.[21] It prompts the executive

14 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). Because the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') only covers civil and political rights, excluding economic, social and cultural rights, the author considers it inappropriate to refer to the rights within the *Charter* as 'human rights'. Throughout the article, the rights will be referred to as 'rights' or 'protected rights'.

15 Section 7(1) states that the Parliament seeks to protect and promote the rights listed in ss 8-27.

16 Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 8. For example, the prohibition on the expulsion of non-nationals and rights relating to marriage were not included.

17 See *Human Rights Act 1998* (UK) c 42, s 3 ('*HRA*'). The *Charter* is based on s 3, but adds the reference to 'consistently with their purpose'.

18 See, eg, *Ghaidan* [2004] 2 AC 557, [50] (Lord Steyn).

19 Under the common law, where legislation is ambiguous, an interpretation consistent with international human rights obligations should be preferred to one that is inconsistent: *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38. See Sir Anthony Mason, 'The Role of the Judiciary in Developing Human Rights in Australian Law', in David Kinley (ed), *Human Rights in Australian Law* (1998) 29, 43; Kate Eastman and Chris Ronalds, 'Using Human Rights Laws in Litigation: A Practitioner's Perspective', in David Kinley (ed), *Human Rights in Australian Law* (1998) 319, 325.

20 See *HRA 1998* (UK) c 42, s 4. The nomenclature in the British legislation is 'declaration of incompatibility'. It is unclear why the Victorian Government insisted on altering this to 'declaration of inconsistent application', as s 36 of the *Charter* is intended to operate in an identical fashion to s 4. See further, discussion under section III.A.1

21 See *Charter* 2006 (Vic) ss 36(6),(7).

and legislature to review their rights assessment of the legislation, but does not dictate the content of the response.[22] Throughout, parliamentary sovereignty is retained – the judiciary cannot invalidate legislation enacted by the representative arms, and the latter decide whether or not to amend the impugned legislation.

Three further provisions affect legislation. First, s 28 states that a member of Parliament introducing legislation into Parliament must make a statement assessing its compatibility with the protected rights. Such statements do not bind the judiciary.[23] Secondly, the parliamentary committee, the Scrutiny of Acts and Regulations Committee (the 'SARC'), must consider all proposed legislation and report to Parliament on its compatibility with the protected rights.[24] Finally, Parliament can override the operation of protected rights via ordinary legislation. Section 31(1) allows Parliament to expressly declare that an Act of Parliament will operate despite being incompatible with a protected right or despite the *Charter*, in which case the *Charter* has no effect on the legislation.[25]

The second impact of the *Charter* relates to the behaviour of 'public authorities'. Although not the focus of the article, a brief outline of this aspect is warranted. Section 38 provides that it is unlawful for a public authority to act incompatibly with, or to fail to give proper consideration to, a human right. An exception to this duty is where the public authority could not reasonably have acted differently or made a different decision because of the law, such as, where the public authority is simply giving effect to incompatible legislation.[26] Section 39 outlines the legal consequences of unlawfulness. No new cause of action is created under the *Charter*.[27] Rather, a person can only seek redress if they have pre-existing relief or remedy in respect to the act of the public authority, in which case that relief or remedy may also be granted for Charter unlawfulness. Sections 3 and 4 contain a definition of 'public authority', which includes core governmental bodies, as well as hybrid (i.e. part-public and part-private) bodies. Parliament, and courts and tribunals, are excluded from the definition.[28]

22 *Charter 2006* (Vic) s 37.

23 *Charter 2006* (Vic) s 28(4). These provisions are modeled on the New Zealand and British models: *Bill of Rights Act 1990* (NZ), s 33, and *Human Rights Act 1998* (UK) c 42, s 19. Similar provisions have been enacted in Canada: *Department of Justice Act,* RSC 1985, c J-2, s 4; *Statutory Instruments Act,* RSC 1985 c S-22.

24 *Charter* 2006 (Vic) s 30.

25 Section 31(1) is further discussed in section II.D.2 below.

26 See the notes to *Charter 2006* (Vic) s 38.

27 This is in contrast to the British model. Under the *HRA*, where a public authority acts unlawfully, a victim can bring a proceeding for breach of statutory duty (with the *HRA* itself being the statute) or a victim can rely on the unlawfulness in any legal proceedings, whether as a defence to proceedings brought by public authorities, or as the basis for an appeal against a decision of a court or tribunal: *HRA 1998* (UK) c 42, s 7(1).

28 *Charter 2006* (Vic), ss 4(1)(i) and (j). The exclusion of Parliament is aimed at preserving parliamentary sovereignty. Parliament, as sovereign law maker, is able to act in a manner that is incompatible with the protected rights and such acts are not unlawful. The exclusion of the courts and tribunals is aimed at ensuring the courts are not obliged to develop the common law in a manner that is compatible with the *Charter*. This is linked to the fact that Australia has a unified common law.

B *Parliamentary Sovereignty and Institutional Dialogue*

From the outset, the Victorian Government indicated that any formalisation of rights protection was subject to the preservation of parliamentary sovereignty. This was explicit in the Statement of Intent,[29] underpinned the entire community consultation and the report of the HRC Committee,[30] was reiterated in the media release of the Attorney-General launching the report,[31] was referred to in parliamentary debate on the bill,[32] and is reflected in the institutional arrangements and processes enacted in the *Charter.*

The concern about retaining parliamentary sovereignty is linked to traditional rights instruments, such as the United States model, which allow the judiciary to invalidate legislation that is inconsistent with guaranteed rights. Indeed, the government, the HRC Committee and Parliament were at pains to distance themselves from that model.[33] In short, it is often asserted that democracy requires parliamentary sovereignty. If the judiciary is empowered to review and invalidate legislative and executive actions under a rights instrument as happens under the *United States Constitution*, so the argument goes, we would have a system of judicial sovereignty. Given that the judiciary is not elected, judicial sovereignty is undemocratic. Therefore, to preserve democracy, the representative arms must retain sovereign power over rights.[34] In order to ameliorate this anti-democratic tendency, various theories and approaches to judicial review have been developed

29 Victoria Government, above n 1, [8], [9], and [11].

30 HRC Committee, above n 4, 15, 20-2.

31 Office of the Attorney-General, above n 7, [15].

32 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290, 1292, 1293 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 1984 (Lily D'Ambrosio); Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 1993 (Richard Wynne); Victoria, *Parliamentary Debates*, Legislative Assembly, 15 June 2006, 2196 (Joanne Duncan); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554, 2556, 2557 (Justin Madden, Minister for Sport and Recreation); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2643 (Geoff Hilton).

33 Victoria Government, above n 1, [11]; HRC Committee, above n 4, 15, 20-21; Office of the Attorney-General, above n 7, [10]; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates,* Legislative Assembly, 15 June 2006, 2196 (Joanne Duncan); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554 (Mr Madden, Minister for Sport and Recreation); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2646 (Johan Scheffer).

34 See, eg, Martin Loughlin, 'Rights, Democracy, and Law' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Human Rights Act 1998: Sceptical Essays* (2001) 41, 47-9; Dennis Davis, Matthew Chaskalson and Johan de Waal, 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in David van Wyk, John Dugard, Bertus de Villiers and Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1995) 1, 6-8; Burt Neuborne, 'The Origin of Rights: Constitutionalism, the Stork and the Democratic Dilemma' in Shimon Shetreet (ed), *The Role of Courts in Society* (1988) 187, 188-190; Peter H Russell, 'The Paradox of Judicial Power'[1987] 12 *Queen's Law Journal* 421, 428-9.

to make judicial review more democratically palatable.[35] One such theory is the dialogue theory.[36]

More modern rights instruments address this supposed anti-democratic tension by ensuring that the judiciary does not have the final say about rights. Modern rights instruments use various mechanisms – open-textured statements of rights, the non-absoluteness of rights, the powers conferred to the judiciary, and the representative response mechanisms – to protect against judicial supremacy, while simultaneously ensuring enhanced rights accountability of the representative arms. Two such models are the *Canadian Charter* and the *HRA*. Institutional dialogue theories are being developed to explain, in hindsight, how the *Canadian Charter* operates, whilst the *HRA*[37] and the *Charter* were enacted on the institutional dialogue premise. With respect to the *Charter*, this is evident in the Statement of Intent,[38] the report of the HRC Committee,[39] the parliamentary debate on the bill[40] and the structure of the *Charter*.[41]

Given this, discussion will now focus on institutional dialogue models. The precise meaning of 'dialogue' must be identified. Discussion will first focus on the development of the institutional dialogue theory with respect to modern rights instruments, and then outline the potential for the *Charter* to establish a dialogue. 'Dialogue' is at risk of becoming an empty, meaningless buzzword used to assure everyone that encroachments are *not* being made on democracy, parliamentary sovereignty or rights. This is a big ask and, unfortunately but not surprisingly, some forms of dialogue do in fact encroach on democracy, parliamentary sovereignty and/or rights. Much of the problem stems from using judicial deference as a tool to unnecessarily protect parliamentary sovereignty.

35 For a summary, see: Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (1996) 89-103 ('*Limiting Rights*'); Jeremy Waldron, 'Judicial Review and the Conditions of Democracy' (1998) 6 *Journal of Political Philosophy* 335.

36 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, 1986).

37 United Kingdom, *Parliamentary Debates*, House of Commons, 24 June 1998, col 1141 (Jack Straw MP, Secretary of State for the Home Department).

38 Victoria Government, above n 1, [12] – [13].

39 HRC Committee, above n 4, ch 4, especially 66-68, 85-86.

40 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290, 1293, 1295 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 15 June 2006, 2199 (Rosy Buchanan); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554, 2556-8 (Justin Madden, Minister for Sport and Recreation); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2657 (Geoff Hilton); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554 (Johan Scheffer).

41 There is only one express reference to dialogue in the Explanatory Memorandum, where 'the [Victorian Equal Opportunity and Human Rights] Commission's annual report is expected to focus on key aspects of the Charter's operation as a conduit for institutional dialogue': Explanatory Memorandum, above n 16, 30.

C *Development of Institutional Dialogue Models*

1 *The Canadian Experience*

Our discussion of dialogue begins with the study of Hogg and Bushell on situations of institutional dialogue in Canada.[42] This study has produced significant constructive and critical comment which, due to constraints of length, cannot be exhaustively addressed in this article.[43] This remains a seminal work, however, because it initiated the debate about dialogue theories in the context of modern rights instruments, and its message is fundamentally relevant to Victoria because of the Victorian Government's stated commitment to dialogue.

Hogg and Bushell define dialogue as 'those cases in which a judicial decision striking down a law on [*Canadian*] *Charter* grounds is followed by some action by the competent legislative body'.[44] Any so-called legislative sequel to a judicial decision is 'dialogue' because 'legislative action is a conscious response from the competent legislative body to the words spoken by the courts'.[45]

> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which [*Canadian*] *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the [*Canadian*] *Charter* values ... identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.[46]

During the period of 1982-97, there were 65 decisions striking down legislation for an unjustified limitation of *Canadian Charter* rights.[47] Of the 65 decisions, Hogg and Bushell assess that 52 (80 per cent) generated legislative sequels.[48] Of

42 Peter W Hogg and Allison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal*.

43 For further discussion, see Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* (PhD Thesis, Monash University, 2004), ch 4.3. See especially Christopher P Manfredi and James B Kelly, 'Six Degrees of Dialogue: A Response to Hogg and Bushell' (1999) 37 *Osgoode Hall Law Journal* 513; Peter W Hogg and Allison A Thornton (Bushell), 'Reply to "Six Degrees of Dialogue"' (1999) 37 *Osgoode Hall Law Journal* 529 ('Reply'); Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed, 2001) 176-181; Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritian Difficulty' (1995) 94 *Michigan Law Review* 245, 250; F L Morton and Rainer Knopff, *The Charter Revolution and the Court Party* 162.

44 Hogg and Bushell, above n 42, 82.

45 Ibid 98. 'In all of these cases, there must have been consideration of the judicial decision by government, and a decision must have been made as to how to react to it': 82.

46 Ibid 79–80.

47 Ibid 80.

48 Of the 13 cases without legislative sequels, two have been the subject of proposed legislation, and three were decided only within the last two years: Ibid 97.

the legislative sequels, in 44 of the 52 cases (85 per cent) the legislature amended the impugned law.[49] In most cases the requisite change was *minor* and did *not* forfeit the objective of the legislation. The language contained in the legislative responses highlighted the legislature's consideration and evaluation of the judicial decisions.[50]

These statistics indicate that the *Canadian Charter* may prompt a dialogue between the courts and the legislature, 'but it rarely raises an absolute barrier to the wishes of the democratic institutions'.[51] Hogg and Bushell conclude that judicial review, as an exercise in dialogue, is democratically legitimate: 'Judicial review is not "a veto over the politics of the nation," but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the [*Canadian*] *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole'.[52]

This study focuses on the *Canadian Charter* which differs from the *Charter* in two ways: the former is constitutional and empowers the judiciary to invalidate legislation. These differences, however, do not render the study irrelevant in Victoria for two reasons. First, the key to dialogue is legislative sequels to judicial decisions. In Victoria, the legislature is able to reverse or modify s 32 judicial interpretations by ordinary legislation, reverse or modify legislation in response to s 36 declarations, ignore s 36 declarations altogether, or override the operation of ss 32 and 36 altogether with respect to legislation. These options are, in Hogg and Bushell terminology, legislative sequels. Secondly, the study is relevant because the main features of the *Canadian Charter* that are identified as facilitating the dialogue are adopted by the *Charter* – those being, the general limitations power under s 1 of the *Canadian Charter*[53] and the adoption of mechanisms which allow parliament to respond to judicial decisions and thereby preserve parliamentary sovereignty. Indeed, the Victorian model[54] preserves parliamentary sovereignty more than the Canadian model by adopting the British mechanisms for preserving parliamentary sovereignty (the limited judicial powers of interpretation and declaration) in addition to the Canadian s 33 override power.[55]

Hogg and Bushell argue that the general limitations power makes the most significant contribution to the institutional dialogue, so will be our focus. Like s 7 of the *Charter*, s 1 of the *Canadian Charter* states that a limitation must be

49 Ibid 80-1, 97, Table I.

50 Ibid 101.

51 Ibid 81.

52 Ibid 105 (citation omitted).

53 See *Charter 2006* (Vic), s 7. Hogg and Bushell also include the internal limits placed on some Charter rights as a dialogue feature: Hogg and Bushell, above n 42, 88.

54 See *Charter 2006* (Vic), s 31, 32 and 36. Another feature of the *Canadian Charter* that facilitates dialogue is s 15 dealing with rights to equality: Hogg and Bushell, above n 42, 90-1.

55 *Charter* 2006 (Vic), s 31.

reasonable and demonstrably justified in a free and democratic society.[56] The judgment of Dickson CJ, in the leading case of *R v Oakes*,[57] laid down a two step test for s 1. The *first* step is to ensure the reasonableness of the limitation, in that the object of the rights-limiting legislation must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'.[58] According to statistical analysis of the *Oakes* test from 1982 to 1997, of legislation that has violated *Canadian Charter* rights, 97 per cent has been held to be reasonable by the Supreme Court of Canada (the 'SCC').[59] The SCC has rarely interfered with the representative arms' assessment of the legislative objectives to be pursued.[60] The retention of freedom to choose policy and legislative objectives is vital to democracy and parliamentary sovereignty.

The *second* step is to demonstrate that the limit is justified in a free and democratic society, which Dickson CJ held to be best verified by a three-pronged proportionality test. The first component is a rationality test. The rights limiting 'measures adopted must be carefully designed to achieve the objective in question'.[61] Statistically, a significant majority of limitations on rights were found to possess a rational connection to the legislative objective, with 86 per cent of invalidated legislation satisfying the first component of the proportionality test.[62]

The second component is the minimum impairment test. The rights-limiting legislative means chosen by the legislature must 'impair "as little as possible" the right or freedom in question'.[63] It is this second component which most invalidated legislation failed. Of the 50 (out of 87) limitations of *Canadian Charter* rights that have failed the *Oakes* test, 86 per cent (43 out of 50 infringements) failed the minimum impairment test.[64] All legislation that passed the minimum impairment test passed the *Oakes* test. Minimum impairment is 'the heart and soul of s 1 justification'.[65] The third component requires that there to be proportionality

56 A limitation must also be prescribed by law. For a limit to be prescribed by law, there must be 'some positive legal measure imposing a discernible standard sufficient to guide with reasonable clarity the individual whose rights are limited and the State officials responsible for enforcement': Robert Sharpe, 'The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights:Comparative Perspectives* (1999) 431, 445. This test is relatively straight-forward, uncontroversial and of little consequence to this debate.

57 *R v Oakes* [1986] 1 SCR 103 ('*Oakes*').

58 *Oakes* [1986] 1 SCR 103, 138. At a minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

59 Leon E Trakman, William Cole-Hamilton and Sean Gatien, '*R v Oakes* 1986 – 1997: Back to the Drawing Board' (1998) 36 *Osgoode Hall Law Journal* 83, 95. Note that 1986 was the year of *Oakes* [1986] 1 SCR 103. Examples where the objectives were found not to be reasonable include *R v Big M Drug Mart* [1985] 1 SCR 295, *Somerville v A-G (Canada)* (1996) 136 DLR (4th) 205; *A-G (Quebec) v Quebec Association Protestant School Boards* [1984] 2 SCR 66; *R v Zundel* [1992] 2 SCR 731.

60 Sharpe, above n 56, 446. See also David Beatty, 'The Canadian Charter of Rights: Lessons and Laments' in Gavin W Anderson (ed), *Rights and Democracy:Essays in UK-Canadian Constitutionalism* (1999) 3, 10.

61 *Oakes* [1986] 1 SCR 103, 139.

62 Hogg and Bushell, above n 42, 98.

63 *Oakes* [1986] 1 SCR 103, 139.

64 Hogg and Bushell, above n 42, 100.

65 Trakman, Cole-Hamilton and Gatien, above n 59.

between the deleterious effects of the rights-limiting legislative means and the legislative objective identified as being of sufficient importance, and 'proportionality between the deleterious and the salutary effects of the measures'.[66] Statistically, this component was of no consequence.[67]

According to Hogg and Bushell, reliance on the minimum impairment test facilitates dialogue. If, according to the judiciary, the impugned legislation was not the least rights-restrictive means of achieving the otherwise legitimate objective, the executive and legislature have room to manoeuvre. There are three options. First, the legislature can achieve a valid legislative objective by a different legislative means. This comes down to a refinement of the application of a s 1 limitation: 'it will usually be possible for the policymakers to devise a less restrictive alternative' which still achieves the objective and 'that is practicable'.[68] The heavy reliance on minimum impairment means that the judiciary does *not* permanently preclude the pursuit of valid legislative objectives.[69] Secondly, the legislature may decide to do nothing, leaving the judicial invalidation in place.[70] This, by far, has *not* been the characteristic response in Canada.[71] Thirdly, in the 3 per cent of cases where the legislation is invalidated because the legislative objective fails the reasonableness test, the legislature must resort to the s 33 override power, allowing parliament to legislate notwithstanding the *Canadian Charter* for a five-year, renewable period.[72] Resort to an override of the protected rights does not permanently stifle debate.

66 *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835, 889 (emphasis omitted).

67 The third component – the proportionality requirement – seems 'redundant' because whenever the impugned legislation met the minimal impairment test it was also considered to be proportionate, and whenever it failed the minimum impairment test it either failed the proportionality test or was not even considered: Trakman, Cole-Hamilton and Gatien, above n 59, 103. For criticism of this treatment of the third component, see 102-105.

68 Hogg and Bushell, above n 42, 85.

69 Hogg and Thornton (Bushell), above n 43, 534.

70 See *Morgentaler v R* [1988] 1 SCR 30 *('Morgentaler')*, where the SCC invalidated the restriction on abortion under the Criminal Code as an unjustified limitation on women's rights of liberty and security of the person under s 7. The legislative objective was not impugned, allowing the legislature to achieve its objective by a different legislative means. Far from precluding dialogue, Hogg and Bushell argue that 'the *Charter* decision forces a difficult issue into the public arena that might otherwise have remained dormant, and compels Parliament ... to address old laws that had probably lost much of their original public support': Hogg and Bushell, above n 42, 96. The lack of legislative response is considered more a failing of democratic governance, than of the *Canadian Charter* or the judicial decision: Hogg and Bushell, above n 42, 96; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001), 204.

71 Janet L Hiebert, 'Wrestling With Rights: Judges, Parliaments and the Making of Social Policy' (1999) 5(3) *Choices* 1, 25. Other cases which could be expected to be avoided by the representative arms have generated responses, such as the response to the tobacco regulation litigation of *RJR-MacDonald Inc v A-G (Canada))* [1995] 3 SCR 199, 10-15.

72 Refining s 1 limits is not an option because of the impugned legislative objective. The s 33 override is available for legislation which has reasonable legislative objects but whose legislative means fail the proportionality test *if* the legislative means are *that* important to the legislature – although s 1 refinement is available (the first option). There is a fourth small category of cases where s 1 and s 33 are not available. If legislation is invalidated because of an unreasonable legislative objective, s 33 is not available for democratic (ss 3-5), mobility (s 6) and language rights (ss 16-23). The only representative response available in this scenario is constitutional amendment. This fourth scenario is *not* relevant to Victoria as no categories of rights are excluded under the s 31 override power. A case example of the fourth category in Canada is *Somerville v A-G (Canada)* (1996) 184 DLR (4th) 205, see further: Hogg and Bushell, above n 42, 94-5.

Dialogue at this point continues between the legislature and the electorate,[73] with the electorate benefiting from the judicial assessment that the legislature plans to circumscribe rights on their behalf. Moreover, this is a temporary measure – after five years, the issue is on the table again and all viewpoints must be re-considered.

Beyond this statistical analysis, many commentators agree that s 1 reinforces democracy, via establishing an institutional dialogue about rights.[74] According to David Beatty, 'constitutional review [can] be likened to a dialogue or debate between citizens and the State about the reasonableness of each law'.[75] Beatty considers the proportionality test to be at the centre of the dialogue and to be 'highly supportive of ... democratic values and aims'.[76] The predominance of minimum impairment 'allows the elected branches of Government virtually unfettered freedom in deciding what their agendas will be',[77] whilst inquiring whether other less-rights restrictive legislative means could achieve that agenda as effectively.

According to Kent Roach, s 1 'is the true engine of dialogue under the [*Canadian*] *Charter*'[78] and produces 'an expanding and constructive conversation that avoids the extremes of either legislative or judicial supremacy'.[79] The dialogue under s 1 proceeds according to an appropriate 'institutional division of labour'.[80] The representative arms contribute explanations about the need to restrict rights in particular contexts and the alternative measures considered but rejected, which are based on their institutional roles and expertise. The judiciary contributes dialogue reminders 'about rights that are liable to be neglected in the legislative

73 Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritian Difficulty', in Vicki Jackson and Mark Tushnet (eds), *Comparative Constitutional Law* (1999) 415, 418: 'Section 33 ... might actually invigorate majoritarian politics by providing the people and their representatives with a way of engaging in direct discussion of constitutional values in the ordinary course of legislation.'

74 See, eg, Martha Jackman, 'Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the *Charter*', (1996) 34 *Osgoode Hall Law Journal* 661, 662-3, 680; Jeremy Webber, 'Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)' (2003) 9 *Australian Journal of Human Rights* 135. Janet L Hiebert was an early supporter of dialogue theories: see Janet L Hiebert, 'Policy Making in a Different Venue: Judicial Discretion, Normative Preferences and Uncertainty Masquerading as Principled, Objective Criteria' (Paper presented at the Centre for Public Policy Workshop on The Changing Role of the Judiciary, University of Melbourne, Melbourne, 7 June 1996); Hiebert, above n 35. In her more recent work, she acknowledges the dialogic potential of the *Canadian Charter*, although she is sceptical about its realisation to date in practice in Canada. Consequently, Hiebert distances her analysis from dialogic approaches toward relational approaches: see Hiebert, above n 9. However, her relational approach is not significantly different to the preferred dialogue approach that emphasises the distinct, yet complementary, roles played by the institutional contributors to the debate discussed in section II.E below. Further, see Debeljak, *Human Rights and Institutional Dialogue*, above n 43, ch 3.

75 David Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (1990) 25. Beatty's comments are confined to the dialogue which occurs in the courtroom, as distinct from the institutional dialogue established under the *Canadian Charter* as a whole.

76 Ibid 116.

77 Ibid.

78 Roach, above n 70, 156.

79 Ibid 293.

80 Ibid.

and administrative processes',[81] based on its institutional role and expertise. When this dialogue produces a judicial invalidation of legislation, in all but rare cases the representative arms can utilise response mechanisms under the *Canadian Charter* which validly allow them to depart from the judicial assessment. When this occurs, '[d]emocracy is enhanced ... by requiring legislatures to clearly articulate, justify, and be held accountable for their decisions to limit or depart from the constitutional ... principles articulated by the Court'.[82]

2 *Critiques of the Canadian Experience*

The characterisation that the *Canadian Charter* creates an institutional dialogue, and particularly the type of dialogue proposed by Hogg and Bushell, is disputed by some commentators. The essence of the critique is the judicial-centricity of the theory.[83] There are two aspects to the criticism. First, some commentators, including Manfredi and Kelly, argue that dialogue models assume that judicial interpretation is the *only* legitimate interpretation of the protected rights, such that dialogue is more like a judicial monologue, whereby the representative arms are subject not to the *Canadian Charter*, but to judicial interpretations of the *Canadian Charter*.[84] Moreover, Morton and Knopff warn against underestimating the 'staying power of a new, judicially created policy status quo',[85] which may make legislative sequels to judicial nullifications of legislation politically difficult or impossible, such that the judicial interpretation of the *Canadian Charter* gains an unwarranted ascendancy.

Hogg and Bushell deny this contention. They re-iterate that their thesis asserts 'that the decisions of courts, *whether right or wrong*, rarely preclude a legislative sequel and usually get one'.[86] Hogg and Bushell do not regard the judiciary as the legitimate interpreters of the *Canadian Charter*; rather, they emphasise the s 1 limit and s 33 override mechanisms that allow the legislature and executive to advocate their own understandings of the *Canadian Charter* rights, guarding against judicial-centricity. Whether at the initial policy-making and law-making

81 Ibid.

82 Ibid 294.

83 The overarching criticism is that '[w]hat Hogg and [Bushell] describe as dialogue is usually a monologue, with judges doing most of the talking and legislatures most of the listening': Morton and Knopff, above n 43, 166. For a critique of this perspective, see Roach, above n 70, 75-6, 79-81; Robin Elliot, '"The *Charter* Revolution and the Court Party": Sound Critical Analysis or Blinkered Political Polemic?' (2002) 35 *University of British Columbia Law Review* 271, 325-6.

84 According to Manfredi and Kelly, legislatures, in effect, 'are never subordinating themselves to the *Charter per se*, but to the Court's interpretation of the *Charter's* language': Manfredi and Kelly, above n 43, 523. See also Manfredi, above n 43, 179-81; Rainer Knopff and F L Morton, *Charter Politics* (1992) 179-193, especially 179.

85 Morton and Knopff, above n 43, 162. They illustrate the point by discussing the judicial decisions and legislative responses to *Morgentaler* [1988] 1 SCR 30 and *Vriend v Alberta* [1998] 1 SCR 493: at 162-5. For a critique of this claim, see Elliot, above n 83, 319-20, 325-6. Elliot notes that Hogg 'notes on the basis of data showing that on 45 of 64 occasions on which a law had been struck down, a new law had been enacted, that "the 'staying power of the judicially-created policy status quo' is not very strong at all"': 323 (citations omitted).

86 Hogg and Thornton (Bushell), above n 43, 535.

stage, or after a judicial ruling, ss 1 and 33 ensure that judicial interpretations are not final determinative interpretations. If advantage is not taken of ss 1 and 33, 'the fault seems to lie more in the public's acceptance of the infallibility of judicial declarations of rights or the government's lack of will than in the structure of the [*Canadian*] *Charter* or the Court'.[87]

Moreover, the understandings of dialogue proffered to remedy the perceived defects create other problems. For example, Manfredi and Kelly sanction a co-ordinate construction approach to interpretation. They envisage that 'a judicial decision [be] just one particular interpretation of the constitution, and not entitled to any more respect than a rival interpretation made by the executive or the legislat[ure]'.[88] The problems with this type of dialogue will be discussed further in section III.B.1; in essence, however, co-ordinate construction sanctions a legislative monologue, which forfeits the benefits of educative exchanges with the judicial arm and undermines the rights-accountability element of rights instruments. Furthermore, explicit in their analysis is a purely majoritarian concept of democracy and the non-absorption by the representative arms of judicial understandings of protected rights.[89] Implicit in this analysis is the assumption that the judiciary respect majoritarian choices and accept legislative interpretations of rights. Dialogue is thus about judicial accountability to majoritarian concerns, rather than a robust educative exchange between differently skilled, motivated and tooled institutions. The problems with this type of dialogue – dialogue as judicial accountability – will be discussed further in section III.B.1.

Secondly, some commentators argue that insufficient attention is given to the policy distortion caused by judicial interpretations of the *Canadian Charter*. The representative arms' legislative objectives and the legislative means chosen to pursue them are distorted, so they argue, by judicial-centric views of the *Canadian Charter*. They claim that excessive deference of the representative arms to judicial interpretations results in a hierarchical institutional relationship, which more closely resembles judicial supremacy rather than legislative supremacy or a genuine relationship between equals.[90] Examples of distortion are when the legislature adopts a judicial interpretation of rights despite its own conflicting views, when the legislature does not pursue a policy because it mistakenly believes the policy is outside the judicially-sanctioned range of *Canadian Charter* options, or when a judicial ruling forces an issue onto the political agenda thereby challenging the status quo.

In reply, Hogg and Bushell re-iterate the costs and benefits of rights protection: when legislatures adopt 'judicial interpretations of the *Canadian Charter* ... no

87 Roach, above n 70, 78.

88 Ibid 242.

89 Manfredi and Kelly, above n 43, 525: 'While negative legislative sequels are independent actions on the part of democratic actors, they ensure a hierarchical relationship between judges and legislators because legislative compliance through legislative sequels allows the judiciary's interpretation of the *Charter* to go unchallenged.'

90 Ibid 520-21, 522; Manfredi, above n 43, 178-9; Mark Tushnet, above n 43, 250; Morton and Knopff, above n 43, 165. For a critique of this claim, see Elliot, above n 83, 319-26.

major democratic objective is defeated at the same time that civil libertarian value is respected'.[91] Judicial review under the *Canadian Charter* is supposed to force the legislature to pay more regard to rights than it otherwise necessarily would. Any consequential potential to distort policy is part of the design of human rights instruments. In any event, policy distortion is minimal according to their study, which demonstrates that legislative policy is seldom overridden by judicially-imposed constitutional norms – the constitutional norms 'generally operate at the margins of legislative policy, affecting issues of process, enforcement, and standards, all of which can accommodate most legislative objectives'.[92]

Moreover, the *Canadian Charter* and dialogue theories do *not* require the representative arms to manipulate their own behaviour to accommodate judicially-sanctioned visions of rights. On the contrary, dialogue is predicated on critical assessment of alternative understandings of the rights and robust exchanges between the dialogue partners. Under the *Canadian Charter*, if a legitimate legislative objective is that important, it can be pursued by different legislative means; and if impugned legislative means are an imperative part of a policy or if the legislative objective itself was impugned, the representative arms can 'reassert the status quo as the will of the majority if it [is] willing to do so in a clear and transparent manner' using s 33'.[93] The capacity of the representative arms to place reasonable limits on rights or to override rights should not be underestimated. If the representative arms succumb to a judicial-centric approach, that can only be blamed on the timidity of the representative arms. Such a judicial-centric approach is not dictated by the *Canadian Charter*, the dialogue approach, or the judiciary.

Furthermore, and again, the solution proffered creates other problems. Manfredi and Kelly regard the subordination of the legislature's view of the correct balance between rights and other values as illegitimate. They implicitly sanction an interpretative approach that allows the legislature to ignore judicial interpretations in favour of its own interpretation – a co-ordinate construction approach to dialogue.[94] Furthermore, a logical conclusion to draw from the supposed illegitimacy of subordinating the legislature's views of rights is that dialogue should be based on judicial accountability. That the legislature's views should not be subordinated implies the judiciary should strive for interpretations that reflect majoritarian sentiment.

A valid concern of these commentators is that the *Canadian Charter* creates a judicial monologue, rather than a dialogue. Dialogue as a theory is not rejected outright; rather, dialogue in practice reflects a judicial monologue. Although dialogue based on judicial ascendancy is flawed, so too are the alternative types of dialogue proffered – dialogue as co-ordinate construction and as a mechanism

91 Hogg and Thornton (Bushell), above n 43, 534. Hogg and Bushell also dismiss this argument as an extremist's position: 'the dialogue characterisation will not sway those that reject *any* judicial influence over the legislature as illegitimate' (at 534).

92 Ibid.

93 Roach, above n 70, 221.

94 Ibid 241-3; Kent Roach, Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures' (2001) 80 *Canadian Bar Review* 481, 490-3.

for judicial accountability. If the representative arms too readily defer to judicial interpretations of rights and justifiable limits, in truth there will be a judicial monologue. Similarly, if the judiciary is unduly deferential to the representative arms, in truth there will be a majoritarian monologue. A type of dialogue that guards against both judicial-centricity and representative ascendancy is required, the contours of which will be discussed in sections II.D and II.E.[95]

3 *Conclusion*

The validity or otherwise of the Hogg and Bushell critiques are less pressing in the Victorian context because the Victorian Government has explicitly attempted to establish a dialogue model irrespective of whether commentators think the *Canadian Charter* in fact establishes a dialogue model. Moreover, the Victorian model is unique, incorporating aspects from the British (ss 32 and 36) and Canadian (ss 7(2) and 31) models, such that the debates surrounding Hogg and Bushell's precise claims about the *Canadian Charter* do not have as much traction with the unique model adopted in Victoria. Furthermore, dialogue theories are less controversial in non-constitutional domestic rights instruments, such as the Victorian model, compared to constitutional domestic rights instruments, such as the Canadian model. For the purposes of this article, the Hogg and Bushell discussion serves a general purpose – to illustrate the basic claims and operation of dialogue models – and a specific purpose – to illustrate how the limits and override mechanisms adopted in Victoria can contribute to dialogue.

D *Institutional Dialogue under the Victorian* Charter

Whether or not one agrees that the *Canadian Charter* has the theoretical potential to create an institutional dialogue and that the potential is being realised in practice, the notion of institutional dialogue as a means for preserving parliamentary sovereignty was one driver behind the *HRA* model adopted in the United Kingdom. Moreover, building on the Canadian theory and borrowing from the *Canadian Charter* and the *HRA*, the *Charter* is designed to establish an institutional dialogue. The *HRA* and the *Charter* employ four mechanisms to establish a dialogue between the arms of government about protected rights.[96] They are: (a) the open-textured statements of rights; (b) the non-absoluteness of rights; (c) the judicial remedies available in situations of judicially-assessed violation; and (d) the mechanisms available to the representative arms to respond to judicial assessments. The first two mechanisms focus on 'rights issues', whilst the second two mechanisms focus on '*HRA/Charter* issues'. These mechanisms will be considered in turn.[97]

95 That is, a dialogue that models embrace the distinct, yet complementary, role of each institution of government: Roach, above n 70, 246-50.

96 The *Canadian Charter* adopts mechanism one, two and four.

97 The HRC Committee discusses the dialogue model and aspects of the dialogue in its report: HRC Committee, above n 4, ch 4, especially 66-67, 85, and Figs 4.1 – 4.4.

1 *Mechanism 1 and 2: Open-Textured and Non-Absolute Rights*

The *first institutional dialogue mechanism* relates to the articulation of rights. Modern human rights instruments articulate the protected rights in broad and open-textured terms. This is deliberate. It accommodates the uncertainty associated with unforeseeable future situations and needs, and manages the diversity and disagreement within pluralistic communities. Things that cannot be known and/or agreed upon in any verifiable manner are 'left undefined and allowed to remain "sufficiently obscure to allow them to retain an approximate appearance of internal coherence and clarity, while at the same time accommodating several potentially conflicting and quite unresolved points of issue"'.[98] This lack of specificity is required because of the features associated with 'grand narratives' such as rights[99] – rights are indeterminate, the subject of irreducible disagreement, continuously evolving and, as tools to critique governmental actions, rights are intended to orient discussion rather than prescribe institutional arrangements, processes and outcomes.[100]

The protected rights, however, must be applied in concrete situations. This requires the refinement of the open-textured rights. Institutional dialogue is about securing the most broad and diverse input into the process of refinement. There is no single true meaning of rights; nor can we expect an ideal consensus to emerge within pluralistic, diverse polities; nor can we expect our understanding of rights to remain static. These 'truths' are best acknowledged and accommodated by ensuring the inclusion of a diverse range of views based on distinct, yet complementary, motivations, methods of reasoning, and institutional strengths in the process of refinement.[101] This should produce better answers concerning the meaning of rights.[102]

The *second institutional dialogue mechanism* is the non-absoluteness of rights. Under the *Charter*, rights are balanced against and limited by other protected rights, as well as other non-protected values and communal needs. This capacity to limit rights is imperative given the features of rights – those being the indeterminate, irreducibly debateable and evolving nature of rights, and the conception of rights as tools for critique of governmental actions rather than ends in themselves. A plurality of values is accommodated through the limitations power,[103] and the specific resolution between conflicting rights, and conflicts between rights and

98 Mac Darrow and Philip Alston, 'Bills of Rights in Comparative Perspective', in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 465, 497 (citation omitted)

99 Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000) 149 (citation omitted).

100 See generally Marks, above n 99; Susan Marks, 'International Law, Democracy and the End of History' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (2000) 532; James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' [2002] *Modern Law Review* 204.

101 Roach, above n 70, 239-51; Roach, above n 94, 490-501.

102 For a discussion of 'better' answers, see section II.E below.

103 Values including and beyond those articulated in the rights themselves.

values, should be assessed by a plurality of institutional perspectives through the dialogue mechanism. All arms of government ought to provide their unique assessment of the appropriate balance to be struck when conflicts over rights arise. Again, this should produce better answers to conflicts over rights.[104]

The *Charter* contains various limitations powers. First, it contains a general limitations clause based largely on the *Canadian Charter*.[105] Section 7(2) provides that the protected rights may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. Section 7(2) lists the factors to be balanced when assessing limit, as follows: (a) the nature of the right; (b) the importance of the purpose of the right; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purposes; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve – a minimum impairment test. The articulation of these factors is intended to aid the executive and parliament in their rights assessments of policy and legislation.[106] It also acts as a template for judicial decision-making. The wording of the factors is borrowed from the South African model,[107] and is not dissimilar to those used under the *Canadian Charter*[108] and the *HRA*.[109] Second, some individual rights contain limitations powers, either as qualifications to the breadth of the right,[110] or as specific articulations of limitations relevant to that right.[111] The general limitations power still applies to rights that are also subject to a specific qualification or limitation.[112] In addition, there is also the

104 See generally Marks, above n 99; Marks, above n 100, 540; Tully, above n 100, 204.

105 The Explanatory Statement notes that the limitations clause is based on the New Zealand *Bill of Rights Act 1990* (NZ): Explanatory Statement, above n 16, 9. However, it is more honest to acknowledge the influence of the *Canadian Charter,* which predates the NZ legislation by eight years and upon which the NZ legislation was based. There is a glaring resistance to acknowledge any influence of the *Canadian Charter.* One can only assume this is because of its constitutional status.

106 Williams, above n 3, 898-99: 'The direct invocation of the relevant factors in the [Charter] makes its operation more transparent and accessible and lessens the need for non-lawyers and political actors to place heavy reliance upon legal advice.'

107 *Constitution of the Republic of South Africa 1996* (RSA), s 36.

108 See section II.C.1 above.

109 A limit is valid if it is: first, prescribed by law; secondly, intended to achieve a legitimate objective, as listed within the article itself; and thirdly, necessary in a democratic society. There are two elements to assessing necessity in a democratic society: (a) necessity, which comes down to a pressing social need (see *The Sunday Times v United Kingdom* (1979) 30 Eur Court HR (ser A) 31 [59]; *Handyside v United Kingdom* (1976) 24 Eur Court HR (ser A) 23 [48]; *Goodwin v United Kingdom* (1996) II Eur Court HR 484); and (b) proportionality (see R v A (No 2) [2002] 1 AC 45 [38] *('R v A'); R v Secretary of State for the Home Department; Ex parte Daly* [2001] UKHL 26, [25 – 28] *('Daly'); R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391, [65] *('Farrakhan'); R v Shayler* [2003] 1 AC 247 [61] *('Shayler'); International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 [181] *('Roth'); R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 [132] *('ProLife Alliance')*. Assessing the lawfulness of *qualifications* to rights usually proceeds similarly to that for limitations, with prescription by law, rationality and reasonableness being the elements that need to be satisfied.

110 See *Charter 2006* (Vic), s 11(3) (Freedom from Forced Work) and s 21 (Right to Liberty and Security of Person).

111 See *Charter 2006* (Vic), s 15. The right to freedom of expression may be subject to restrictions necessary to protect the reputation of others, and for the protection of national security, public order, public health or public morality.

112 See, eg, Explanatory Memorandum, above n 16, 14.

override power which may override the application of any or all of the rights,[113] which will be discussed under mechanism four.

These two mechanisms not only promote dialogue between the arms of government, but they also structure the dialogue. In relation to the latter, when any arm of government considers a rights issue, they must answer the 'classic rights questions'. First, they must ask whether legislation limits rights. This involves an assessment of the scope of the protected right, an assessment of the scope of the legislation, and a comparison of the two. Second, if the legislation does limit rights, they must ask whether that limit is justified under the general or a specific limitations power.[114] All arms of government should use this common framework when analysing rights issues.

In relation to the former, let us explore how the two mechanisms are designed to promote an institutional dialogue. The executive normally makes the first contribution to dialogue through policy formulation and legislative drafting.[115] This contribution is formally recognised through the s 28 statement,[116] with additional contributions being made through other executive communication tools, such as, public discussion papers, exposure drafts of legislation, explanatory memorandum, and the like. A statement must either state that, in the member's opinion, the Bill is compatible with protected rights and how it is so, or that the Bill is not compatible and the nature and extent of the incompatibility.[117] Section 28 statements allow the executive to identify *its* understanding of the open-textured rights because an assessment of whether a right is limited by legislation contains information about the executive's assessment of the scope of the right. Section 28 statements also divulge whether the executive, in pursuing its policy agenda, had to strike a balance between competing rights, or between rights and non-protected values, by limiting a right. The executive must be able to defend any limitations, which involves a global assessment of a limit as being reasonable and necessary in a democratic society, and a specific assessment of at least each of the s 7(2) factors. It may also involve defending an individual limitation or qualification. Thus, dialogue output of the executive, via s 28 statements or other communication tools, explicitly or implicitly contains information about the *executive's* understanding of the scope of rights and the justifiability of limits on rights. Being the first to contribute to the dialogue, the executive is in a prized position because it 'sets the agenda' by initially establishing the parameters of the

113 The broad application of section 7, when read with the override provision in s 31, is problematic from an international human rights perspective. Some rights are absolute, such as, the prohibition on torture, the prohibition on slavery, and the right to be free from punishment without law. Such rights cannot be derogated from and no circumstance justifies a qualification or limitation of such rights under international law.

114 Another relevant question to consider under limits is whether there is an override declaration in place. This will be considered more fully under mechanism four.

115 By and large, bills are usually proposed by the executive. However, it should be acknowledged that private members can also introduce bills into parliament.

116 Statements of (in)compatibility ensure 'that someone has thought about human rights issues during the process of drafting a Bill': David Feldman, 'Whitehall, Westminster and Human Rights' (2001) 21(3) *Public Money and Management* 19, 22.

117 *Charter 2006* (Vic) s 28(3). Section 29 provides that a failure to comply with s 28 does not affect the validity, operation or enforcement of the Act.

rights debate and thereby potentially influencing the legislature's and judiciary's analysis of the issue.

Parliament then contributes to the institutional dialogue through its constitutional roles of legislative scrutineer and law-maker. When scrutinising proposed legislation and deciding whether to enact it, Parliament has the responsibility of ensuring that the proposed legislation is compatible with *its* view of the scope of rights and justifiable limitations thereto. The scrutineer role affects Parliament's relationship with the executive, and the law-making role affects Parliament's relationship with the courts.[118] The *Charter* structures these relationships. First, Parliament receives input from the executive via the s 28 statement and its other communication tools. Under s 30, the SARC must scrutinise the executive's assessment of the scope of rights, the proposed legislation, any identified limits to rights, and the justifiability of any such limits, and report to Parliament. In doing so, SARC is also communicating *its* view of the scope of rights and the justifiability of limits. Parliament then undertakes its own analysis of the rights, the legislation, and the justifiability of any limits on rights through parliamentary debate and voting. Parliament is armed with the executive's and SARC's respective viewpoints. If SARC and/or Parliament disagree with the assessment of the executive, the latter must defend its legislative objectives and means against the protected rights, or alter the legislative objectives or means if Parliament refuses to enact the proposed legislation.

Secondly, the parliamentary output is new legislation which may be subject to judicial interpretation or declaration. Parliament should demonstrate to the judiciary that it has assessed the legislative objectives and means against the protected rights, and considered the justifiability of any limitations imposed on rights. This serves two purposes. First, it is necessary for Parliament in the discharge of its new legislative/quasi-constitutional duty to protect rights. Second, it serves to shape the way the judiciary perceives and assesses the legislation, and demonstrates to the judiciary that parliament has taken rights seriously: 'the judiciary will have little incentive to be sensitive to [Parliament's] perspective' if it 'is seemingly cavalier' about rights.[119] Parliament can do both through the SARC process and reports, parliamentary debate, amendments to proposed legislation, the enacted legislation and the like.

In making these contributions, the representative arms will bring to bear *their* unique understanding of the requirements of, and balance between, democracy and rights. These perspectives will be informed by their distinct role in mediating between different interests and values within society, their responsibilities to their representatives, their motivation to stay in power, and their distinctive institutional strengths. These are all legitimate influences in their decision matrix. Moreover, there is strong incentive for the executive and Parliament to engage in a constructive, educative dialogue with the judiciary about the pressures and motivations driving their respective assessments of rights. They should be motivated to avoid judicial

118 Lord Irvine, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] Summer *Public Law* 308, 309.

119 Hiebert, above n 9, 219.

interpretations of legislation under s 32 because an unexpected interpretation may risk the realisation of the legislative objectives. They should also be motivated to avoid judicial declarations under s 36: whilst Parliament can *legally* enact rights-incompatible legislation, the threat of a declaration 'serves as a *political* and perhaps *moral* disincentive to legislate incompatibly'.[120] A declaration 'impl[ies] a degree of legal impropriety in what Parliament has done even if it does not amount to illegality'.[121]

The judiciary then contributes to the institutional dialogue if legislation is challenged. The judiciary itself must answer the 'classic rights questions'. The first step is to refine the open-textured rights and to decide whether the impugned legislation limits a right. If the Victorian judiciary takes the lead of comparative jurisdictions, which it is empowered to do under s 32(2), it will adopt a purposive analysis of the rights which affords them a generous, substantive, not legalistic, interpretation.[122] The second step is to decide whether any limitation is justified under the general or a specific limitations power. If the *Charter* is implemented similarly to the *Canadian Charter* and the *HRA*, minimum impairment (s 7(2)(e)) will be the focus of the judicial assessment, followed by rationality (s 7(2)(d)).[123]

The analysis of the judiciary will proceed from its distinct institutional perspective, which is informed by its unique non-majoritarian role, and its particular concern about principle, reason, rationality, proportionality, and fairness. In answering the 'classic rights questions', the judiciary is expected to respectfully listen to and critically analyse the representative perspectives, review its own pre-conceived ideas against the representative perspectives, and be open to the persuasion of the representative arms. The executive and the parliamentary outputs educate the judiciary about their legislative objectives, the realisation of objectives through particular legislative means, the impact of the legislative objective and means on protected rights, their justifications for any limitations, and the pragmatic ramifications they confront in executing their policies.

Most importantly, however, dialogue does not require timid judicial contributions, which would be out of line with judicial culture in Victoria and the ideal of institutional dialogue. The judiciary must *not* simply defer to the executive and legislative viewpoints or consider itself bound by them. Any pressure to defer due to the creative role the judiciary has in refining the open-textured rights and resolving conflicts over rights must be resisted. Any creative role of the judiciary is adequately tempered by other means, such as, the robust, educative outputs of the representative arms, and by the limited powers conferred upon the judiciary under the *Charter*. For dialogue to work, the judiciary must robustly contribute *its* view on the scope of the

120 Lord Irvine, above n 118, 310 (emphasis added). See also David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Summer *Public Law* 323, 324.

121 Feldman, 'Parliamentary Scrutiny', above n 121, 324.

122 See, eg, Lord Hope in *R v Director of Public Prosecutions; Ex parte Kebilene* [2002] 2 AC 326 *('Kebilene')*, as per Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319 and Lord Diplock in *Attorney-General (The Gambia) v Momodou Jobe* [1984] AC 689, 700; Dickson CJ in R v Big M Drug Mart Ltd [1985] 1 SCR 295, 344.

123 For Canada, see above section II.C. For UK, see Nicholas Blake, 'Importing Proportionality: Clarification or Confusion' [2002] *European Human Rights Law Review* 19, 23.

rights and the justifiability of limits. Indeed, given its inability to invalidate rights-incompatible legislation, the strongest tool the judiciary has is the persuasiveness of its arguments. The strongest motivation for robust judicial contributions is the fact that the judiciary does *not* have the final say.[124]

Mechanism one and two are apt to produce an institutional dialogue about the 'classic rights questions'. Each institution must contribute *its* understanding of the rights and justifiable limits thereto the debate, thereby increasing each institution's understanding of the differing perspectives about the open-textured, highly contested, non-absolute rights. The refinement of rights is a 'process of careful adaptation ... carried out by all three branches of government',[125] as is the balance struck between rights and justifiable limits. The 'maximum participation by [the] different sectors'[126] of government is vital.

2 *Mechanisms 3 and 4: Limited Judicial Remedies and Representative Response Mechanisms*

The *third institutional dialogue mechanism* is the limited powers conferred on the judiciary under the *Charter*. The judiciary has the s 32 interpretative obligation; however, it is not empowered to invalidate legislation that is not amenable to a s 32 rights-compatible interpretation. Rather, under s 36, the SCV or the VCA are empowered to make a declaration of inconsistent interpretation,[127] after notice and an opportunity to intervene is given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission.[128] A declaration does not affect the validity, operation or enforcement of the legislation, or create in any person any legal right or give rise to any civil cause of action.[129] In other words, a declaration will not affect the outcome of the case in which it is issued, with the judge compelled to apply the incompatible law; nor does it impact on any future applications of the incompatible law. Under ss 36(6) and (7), the SCV must cause a copy of the declaration to be sent to the Attorney-General, who must give a copy to the relevant Minister within various timeframes. Within six months of

124 See further, sections II.D.2 and III

125 Lord Anthony Lester, 'Developing Constitutional Principles of Public Law' [2001] Winter *Public Law* 684, 684.

126 Andrew Clapham, 'The *European Convention on Human Rights* in the British Courts: Problems Associated with the Incorporation of International Human Rights', in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 95, 157.

127 For the position of subordinate legislation, see *Charter 2006* (Vic), s 32(3)(b). Section 32(3)(b) provides that rights-incompatible subordinate instruments will remain valid, as will rights-incompatible subordinate instruments where the parent legislation permits the subordinate instruments to be so make. Where a subordinate instrument is rights-incompatible and the primary legislation did not sanction the incompatibility, the subordinate instrument will simply be *ultra vires* the parent legislation. See Explanatory Memorandum, above n 16, 24. For a discussion on how UK declarations of incompatibility impact on the prerogative powers as exercised under Orders in Council: see Peter Billings and Ben Pontin, 'Prerogative Powers and the Human Rights Act: Elevating the Status of Orders in Council' [2001] Summer *Public Law* 21.

128 *Charter 2006* (Vic), s 36(3) and (4).

129 *Charter 2006* (Vic), s 36(5). The latter part of this subsection is linked to the legal proceedings available under s 39.

receiving the declaration, the relevant Minister must prepare a written response to the declaration and cause it to be laid before both Houses of Parliament and published in the Government Gazette under s 37.[130]

The issue of judicial interpretation versus judicial law-making arises here. Combining the analysis for mechanisms one, two and three, the judicial task is thus twofold. First, the judiciary must refine the scope of the rights and assess whether the impugned legislation is an unjustifiable limitation on the rights (the 'classic rights questions'). If this analysis results in a judicial assessment of an unjustifiable limitation on a right, secondly, the judiciary must exercise its s 32 interpretative or s 36 declaratory obligations (the '*HRA/Charter* questions').

The British jurisprudence on the '*HRA/Charter* questions' is instructive.[131] In the *Donoghue* case, Woolf CJ outlined an approach to interpretative obligations.[132] First, the court must decide whether, regardless of the interpretative obligation, the legislation unjustifiably limits a right by comparing the right and justifiable limitations thereto with the impugned legislation (the 'classic rights questions'). Second, if a violation would occur, the court must alter the meaning of the legislative words (a '*HRA/Charter* question'). The court must, however, 'limit the extent of the modified [legislative] meaning to that which is necessary to achieve compatibility'.[133] Third, the court must decide whether the altered legislative interpretation is 'possible' (a '*HRA/Charter* question') and consistent with statutory purpose (a '*Charter* question'). In so deciding, the court's 'task is still one of interpretation'.[134] If the court must 'radically alter the effect of the legislation' to secure compatibility, 'this will be an indication that more than interpretation is involved.'[135] In this process, a great deal depends on getting the distinction between judicial interpretation and judicial legislation correct – including the preservation of parliamentary sovereignty, the reputation of the judiciary, the establishment of the dialogue, and the effectiveness of rights protection. We will return to this issue in section III.

In terms of institutional dialogue, the judicial output under the third mechanism will be one of three things. First, the law may be upheld as not limiting rights in an unjustifiable manner. Second, s 32 may be used to produce a rights-compatible interpretation of the otherwise incompatible legislation. Third, a s 36 declaration may be issued where a rights-compatible interpretation is not possible

130 This is an improvement on the *Canadian Charter* and *HRA* which do not have this requirement. This requirement is borrowed from the *Human Rights Act 2004* (ACT), s 33.

131 In the interests of length, not all cases to date can be referred to. For updates on cases, reference should be made to the *European Human Rights Law Review*, which is periodically publishing an updated 'Table of Cases under the *Human Rights Act*', along with the occasional 'Commentary'.

132 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 *('Donoghue')*. This approach has been explicitly and implicitly approved and followed in later cases, such as, R v A [2001] UKHL 25 [58].

133 *Donoghue* [2004] QB 48[75].

134 Ibid. For case examples on this distinction, see *Adan v Newham London Borough Council and Anor* [2001] EWCA Civ 1916 [42] *('Adan'); Roth* [2003] 1 QB 728 [156].

135 *Donoghue* [2001] QB 48 [76].

or not consistent with statutory purpose. These judicial outputs feed back into the dialogue loop via the fourth mechanism.

The *fourth institutional dialogue mechanism* is the representative response mechanisms to the judicial outputs. After an open yet critical consideration of the judicial perspective, as well as a critical re-evaluation of their own prior positions, the legislature and executive *may* respond to s 32 judicial interpretations and *must* respond to s 36 judicial declarations. Let us explore the range of available responses. First, parliament may decide to do nothing, leaving the s 32 judicially-assessed interpretation in place or the s 36 judicially-assessed incompatible law in operation.[136] There is no compulsion to respond to a s 32 rights-compatible interpretation. If the executive and parliament are pleased with the new interpretation, they do nothing. In terms of s 36 declarations, although s 37 requires a written response to a declaration, it does not dictate the content of the response. The response can be to retain the judicially-assessed rights-incompatible legislation,[137] which indicates that the judiciary's perspective did not alter the representative viewpoint. The debate, however, is not over: citizens can respond to the representative behaviour at election time if so concerned, and the individual complainant can seek redress under the *ICCPR*.[138]

Second, Parliament may decide to pass ordinary legislation in response to the judicial perspective.[139] It may legislate in response to s 36 declarations for many reasons. Parliament may reassess the legislation in light of the non-majoritarian, expert view of the judiciary. This is a legitimate interaction between Parliament and the judiciary, recognising that one institution's perspectives can influence the other.[140] Parliament may also change its views because of public pressure arising from the declaration. If the represented accept the judiciary's reasoning, it is quite correct for their representatives to implement this change. Finally, the threat of resort to international processes under the *ICCPR* could motivate change, but this is unlikely because of the non-enforceability of international merits assessments within the Australian jurisdiction.[141]

136 For a discussion of examples of the first response mechanism under the *HRA*, see Julie Debeljak, above n 43, ch 5.5.3(a).

137 Indeed, the very reason for excluding parliament from the definition of public authority was to allow incompatible legislation to stand.

138 The *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) *('First Optional Protocol')* allows individual complaints to be made under the ICCPR. Australia ratified the *First Optional Protocol* in September 1991.

139 For a discussion of examples of the second response mechanism under the *HRA*, see Debeljak, above n 43, ch 5.5.3(b).

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

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

Parliament may legislate in response to s 32 interpretations for many reasons. Parliament may seek to clarify the judicial interpretation, address an unforeseen consequence arising from the interpretation, or emphasise a competing right or other non-protected value it considers was inadequately accounted for by the interpretation. Conversely, Parliament may disagree with the judiciary's assessment of the legislative objective or means and legislate to re-instate its initial rights-incompatible legislation using express language and an incompatible statutory purpose in order to avoid any possibility of a future s 32 rights-compatible interpretation. Institutional dialogue models do *not* envisage consensus. Parliament can disagree with the judiciary, provided Parliament listens openly and respectfully to the judicial viewpoint, critically re-assesses its own ideas against those of the differently motivated and situated institution, and respects the culture of justification imposed by the *Charter* – that is, justifications must be offered for any limitations to rights imposed by legislation and, in order to avoid s 32 interpretation, Parliament must be explicit about its intentions to limit rights with the concomitant electoral accountability that will follow.

Third, under s 31, Parliament may choose to override the relevant right in response to a judicial interpretation or declaration, thereby avoiding the rights issue. The s 32 judicial interpretative obligation and the s 36 declaration power will not apply to overridden legislation.[142] Given the extraordinary nature of an override, such declarations are to be made only in exceptional circumstances and are subject to a five yearly renewable sunset clause.[143] Overrides may also be used 'pre-emptively' – that is, Parliament need not wait for a judicial contribution before using s 31. Pre-emptive uses, however, suppress the judicial contribution, taking us from a dialogue to a representative monologue.

It is unclear why an override provision was included in the *Charter.* Although it is vital in the *Canadian Charter* to preserve parliamentary sovereignty, it is not necessary in Victoria because of the circumscribed judicial powers. Under the *Charter*, use of the override will *never be necessary* because judicially-assessed incompatible legislation cannot be invalidated, unwanted judicial interpretations can be altered by ordinary legislation, and judicial declarations are non-enforceable. Admittedly, an override may be used to avoid the controversy of ignoring a judicial declaration. However, uses of the override itself would surely cause equal, if not more, controversy. Nevertheless, it remains as a third response mechanism.[144] In

142 See legislative note to *Charter 2006* (Vic), s 31(6).

143 *Charter 2006* (Vic), ss 31(4), (7) and (8). The 'exceptional circumstances' include 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria': Explanatory Memorandum, above n 16, 21.

144 Williams defends inclusion of the override provision as an alternative to the temptation to amend the *Charter* itself in times of crisis: Williams, above n 3, 899. This author disagrees with Williams' assessment of the 'high political cost' of using an override and the Canadian reluctance to use their s 33 equivalent: 899-900. According to statistics published in 2001, the Canadian s 33 override provision has been invoked on sixteen occasions and three provincial governments have been re-elected after using the override clause: Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*' (2001) 44 *Canadian Public Administration* 255, 257-9, Tables 1-5 at 260-7. See also Roach, above n 70, 191-2; F L Morton, 'Can Judicial Supremacy be Stopped?' [2003] October *Policy Options* 25, 27.

brief, for the purposes of comparison, the *HRA* has the 'do nothing' and legislation options available, and its equivalent of the override is the ability to temporarily derogate from the protected rights.[145]

The third and fourth institutional dialogue mechanisms lock the arms of government into a relationship of ongoing dialogue about rights and democracy. Each arm shares the responsibility for assessing governmental actions against rights standards – the representative arms make an initial assessment of legislation against rights and justifiable limits thereto; the judiciary then contributes its perspective; and the representative arms can then respond. Moreover, this relationship is not monopolised by any one institution. Rather, all contributors to the dialogue have important, legitimate and influential perspectives to offer, but none monopolise the debate. Further, parliamentary sovereignty is preserved – although the judiciary's contribution should prompt a response by the representative arms, it cannot dictate the content of the response. Furthermore, in exchanging views, each arm must respectfully listen to opposing perspectives, be open to persuasion and be willing to change their pre-conceived ideas, but not be deferential. If it were otherwise, dialogue would descend into a judicial monologue or representative monologue. Finally, the contributing institutions should be motivated to contribute to the debate because no institution can conclude the dialogue. The judiciary does not have the final say; nor do the representative arms, because any 'legislative sequels' are themselves subject to the four dialogue mechanisms.

E *The Preferred Type of Dialogue for Victoria*

Having committed itself to an institutional dialogue model, the Victorian arms of government must identify the precise type of dialogue to be pursued. The benefits of the institutional dialogue theory flow from an honest, robust and respectful exchange of institutional perspectives – perspectives that are based on diverse motivations, reached through distinct processes, and supported by different institutional strengths. The institutional dialogue should promote constructive and educative exchanges designed to expose each arm of government to views that otherwise would not necessarily influence their decision-making. The contribution of distinct perspectives to the shared task of refining the limits of democracy and rights should produce a more complete understanding of the competing values, interests, and concerns at stake. This, in turn, should allow *better* resolutions of conflicts to emerge. 'Better' resolutions are those based on an appreciation of the concerns of each arm of government (rather than just one arm, whichever one that may be); those made after each institution critically re-assesses its pre-conceived views against the views of the differently motivated, tooled and skilled institutions;

145 There is a fourth mechanism, the remedial order, which was *not* adopted in Victoria. A remedial order may be made if a declaration of incompatibility is issued, or if it appears that, having regard to a European Court decision against the United Kingdom, a provision of domestic legislation is incompatible with the Convention: *HRA 1998* (UK) c 42, ss 10(1)(a) and (b). If either condition is satisfied, and if the relevant Minister considers there are *compelling reasons*, the Minister *may*, by order, make such amendments to the legislation as is considered necessary to remove the incompatibility: s 10(2). Remedial orders must ultimately receive the approval of both Houses of Parliament: s 10 and sch 2.

those made by institutions that are willing to listen to alternative views and are open to persuasion and change; and those founded on rationality, proportionality and reason.

Many models of dialogue have been developed with varying degrees of clarity and success.[146] Some of the less attractive models were identified in section II.C.1. and will be explored in our discussion of deference in section III. A model that captures the benefits that institutional dialogue has to offer[147] is articulated by Kent Roach as dialogue based on the distinct, yet complementary, institutional roles of the arms of government.[148]

Let us explore these *distinct roles* – in particular, the distinct motivations, responsibilities and strengths of each institution. The distinct role of the representative arms is to identify policy objectives and pursue legislative programmes designed to promote the common good or mediate between competing legitimate public interests. In performing this role, the legislature is directly, and the executive is indirectly, responsible to the represented. Because of this, the concerns of the represented influence the policy objectives and legislation pursued – the representative arms must be mindful of majoritarian sentiment.[149] This is *not* to say that rights considerations are not and cannot be accounted for by the representative arms; but merely to highlight that majoritarian preferences *correctly* compete with rights concerns.[150] This is also *not* to say that rights considerations are the only or even primary basis for decision-making. The representative arms should incorporate rights considerations 'into a larger policy inquiry that defines and evaluates the merits of proposals to address social concerns, anticipates factors that might undermine the attainment of objectives, and identifies alternative ways to pursue objectives to minimize ... conflicts'[151] with rights. When undertaking such evaluations, '[r]eflection on judicial concerns, and the reasons for contrary judgment, are important considerations'; however, 'these should not be the entire focus of, or a substitute for, Parliament's [or the executive's] reasoned judgment'.[152] The reasoned and reflective representative judgments about the values underlying the rights, their definition, and justified limitations thereto are legitimate contributions to the ongoing debate.

146 See, eg, Hogg and Bushell, above n 42; Hogg and Thornton (Bushell), above n 43; Beatty, above n 75; Hiebert, above n 35. For critics of dialogue theories, see above n 43 and discussion in section II.C.2.

147 It also captures the benefits of Hiebert's relational approach. Hiebert developed the relational approach, which is her slant on dialogue theories: see above n 74.

148 Roach, above n 70, 239-51; Roach, above n 94, 490-501. Due to constraints of length, critics of Roach's analysis cannot be considered: see, eg, Mark Tushnet, 'Judicial Activism or Restraint in a Section 33 World' (2002) 52 *University of Toronto Law Journal* 89; Jeremy Waldron, 'Some Models of Dialogue', *23 Supreme Court Law Review;* James Allan, 'The Author Doth Protest Too Much, Me Thinks: A Review of *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* by Kent Roach' (2003) 20 *New Zealand Universities Law Review* 519.

149 Lord Bingham, 'The Way We Live Now: Human Rights in the New Millennium' in Lord Bingham, *The Business of Judging* 155, 156.

150 The self-interested and non-rights preferences of the majority correctly compete with the protected rights. If representatives hold different opinions to those they represent, it is understandable that the former defer to the latter in order to retain power.

151 Hiebert, *Charter Conflicts*, above n 9, 53.

152 Ibid 55.

In contrast, the distinct role of the judiciary is to adjudicate disputes and uphold the rule of law. It is concerned with legal principle, reason and fairness, rather than policy objectives and reconciling competing public interests. Moreover, the judiciary is the independent arm of government. Being immune from majoritarian pressure, the judiciary can more easily concern itself with the fairness and rationality of the treatment of minorities and the unpopular.[153] Although the judiciary is not motivated by the will of the majority, this does not mean it can ignore the concerns of the representative arms. The judiciary must 'try its best to understand the legislature's [and executive's] objectives and justifications for limiting rights'; but, in the end, it 'must insist on principles and proportionality' even if this results in disagreement between the arms of government.[154]

The *complementary* nature of the dialogue refers to the shared nature of the project. All arms of government share the responsibility for refining rights and limitations thereto.[155] Modern rights instruments reinforce this complementarity by ensuring no arm has the final say over these matters. An important feature of complementarity is the focus on *educative* exchanges – an educative mechanism being the clear preferences of the Victorian Government.[156] It 'allows courts to educate legislatures and society by providing principled and robust articulations of the values of the *Charter* ... while allowing legislatures to educate courts and society about their regulatory and majoritarian objectives and the practical difficulties in implementing those objectives'.[157]

Through the dialogue, each arm has the opportunity to educate and be educated about the concerns, responsibilities and pressures that motivate the other. It allows each arm to 'add their own distinctive voice, talents and concerns to the conversation', such that 'a more enriching and sophisticated dialogue is produced than could be achieved by a judicial or legislative monologue or a dialogue in which courts and legislatures engage in the same task.'[158] Moreover, the educative effect should produce 'better' – more fully informed and considered – resolutions to conflicts. At best, the outcomes will account for the broadest competing visions of society, as encapsulated by the varying institutional responsibilities and concerns. At worst, the institutional perspective of one arm will temporarily prevail, say, with a s 31 override or a s 36 declaration that does not inspire legislative review. However, the cost in rights-terms of allowing one perspective to prevail will have been assessed and articulated by the competing arms of government, such that the citizenry will be fully aware of the positive and negative impacts of the decision.

153 Being removed from the 'immediate conflict may provide judges with more liberty to identify legislative decisions that impose unwarranted or undue restrictions on [human] rights': Ibid 53.

154 Roach, above n 94, 501-2.

155 Hiebert, above n 9, xii.

156 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 1984 (Ms D'Ambrosio); Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 1995 (Ms Barker); Office of the Attorney General, above n 7, [12].

157 Roach, above n 94, 485.

158 Ibid.

Another feature is the necessity for *robust* contributions. Given that rights and democracy are indeterminate, evolving and subject to legitimate disagreement, no arm of government should be timid or deferential to the other arms. In fact, the opposite it true, with the success of the dialogue depending on vigorous and honest exchanges. Judicial reverence or deference will result in an 'under-enforcement' of rights, which 'can turn dialogues between litigants, the court, legislatures, and societies into complacent monologues that fail to generate self-criticism or moral growth'.[159] The judiciary should speak confidently and authoritatively about *its* unique vision of rights, a task made easier in the knowledge that their vision is *not* the final word on the subject. Indeed, an element of judicial activism is required, but this is not problematic because the dialogue model balances judicial activism with representative activism.[160]

The same commitment is expected of the representative arms. The representative understandings of rights and justifiable limits will frame the debate and legitimately influence the judiciary. To be in a position to frame the debate is advantageous. The pre-legislation processes provide an opportunity to develop persuasive justifications for representative actions, which may include challenges to pre-conceived judicial perspectives on rights and limits thereto. If the representative arms identify a reasonable starting point and offer a rational framework for resolving a conflict over rights, it will be difficult for the judiciary to change the starting point and alter or undermine the framework. If the representative arms fail to take this opportunity, the dialogue may become a judicial monologue. Moreover, if the representative arms simply *Charter*-proof their activities, the dialogue will become a judicial monologue. *Charter*-proofing is the notion that the representative arms of government alter their policy objectives and legislative programs in order to avoid *Charter* challenges, s 32 judicial interpretations, or s 36 declarations. Central to this notion is a judicial-centric approach to *Charter* interpretation and enforcement.[161] Most importantly, for each institution to benefit from exposure to diverse perspectives, they all must be willing to freely express their institutional views, *especially in the context of disagreement.* Deference by the representative arms to the judiciary, or vice-versa, is contrary to this.

The strength of creating a dialogue based on distinct, yet complementary institutional roles, is highlighted when alternatives are considered. For example, a dialogue theory that endorsed the domination of one voice over another would, in truth, be a monologue that sacrificed the benefits of dialogue.[162] Moreover, a dialogue theory that denied the exchanging institutions of the opportunity to make

159 Roach, above n 70, 284. Dialogue requires 'a strong judicial voice that defends principles such as minority rights, fair process, and fundamental values': 239.

160 Traditionally, judicial independence was, in part, justified because the judiciary was merely understood to declare the law. Declaring the law is considered an apolitical function that does not involve substantive value judgments. Under an inter-institutional dialogic model, the judicial role will require creative, substantive judgments to be made – it will require an element of judicial activism. However, this increase in activism should not be balanced by an increase in judicial accountability (or decrease in judicial independence), as this would undermine the robust, educative inter-institutional dialogue. Rather, judicial activism ought to be balanced by the activism of the representative institutions.

161 The notion of *Charter*-proofing comes from the *Canadian Charter* debate: Hiebert, above n 9, 224.

162 See discussion under section II.C.2.

contributions based on *their* unique institutional strengths would be problematic, primarily because the benefits of exposing decision-makers to the diverse perspectives of those institutionally differently placed would be forfeited. These alternatives will be further explored in section III, particularly when we consider the use of judicial deference as a tool to retain parliamentary sovereignty.

III RETAINING PARLIAMENTARY SOVEREIGNTY THROUGH JUDICIAL REMEDIAL POWERS

With this theoretical and contextual background, let us consider some difficulties associated with the mechanism adopted under the *Charter* to preserve parliamentary sovereignty – that being, the adoption of judicial interpretative and declaratory powers. Our discussion necessarily turns to the British model at this point because the mechanisms were borrowed from this model. The Canadian debate about institutional dialogue informs this discussion.

As identified in the Introduction, there are three inter-related difficulties. First, there is no clear line between 'proper' judicial interpretation and 'improper' judicial law-making leaving the judiciary vulnerable to claims of illegitimate judicial activism. Second, because of the difficulty with line-drawing and because there is arguably more power in judicial interpretation than in declaration (at the very least, there is power involved in judicial interpretation that impacts on parliamentary sovereignty), calls for judicial deference are inevitable, which has consequential implications for the type of dialogue produced. Third, judicial interpretations may be unduly preferred to judicial declarations because of the power differential between the two. In total, these difficulties may undermine parliamentary sovereignty, threaten the educative dialogue amongst the differently placed, skilled and motivated arms of government, erode the justificatory and accountability aspects of rights instruments, and undermine the protection of rights. These issues will be addressed in turn.

A *The Line Between Judicial Interpretation and Judicial Law-Making*

Under s 32 of the *Charter*, the power of judicial interpretation is not absolute. There are two important provisos on judicial interpretation, being that a s 32 rights-compatible interpretation must be (a) 'possible' and (b) 'consistent with [statutory] purpose'. In other words, a s 32 rights-compatible interpretation that was *not* possible and that was *in*consistent with statutory purpose would, in truth, be an act of judicial law-making which is not permitted under s 32; in this situation, a s 36 declaration of inconsistent interpretation ought to be made. We will consider both provisos to s 32 in turn.

1 *The British Experience with 'Possible' Interpretations*

The 'possible' interpretation limit under s 32 and the s 36 declaration power are based on ss 3 and 4 respectively of the *HRA*. Accordingly, the British experiences with 'possible' interpretations and declarations are highly instructive for Victoria. Indeed, the distinction between proper judicial interpretation (*possible* interpretation) and improper law-making (*not possible* interpretation) has proved 'elusive',[163] with s 3 being described as 'dangerously seductive, for there is bound to be a temptation to apply the section beyond its proper scope and trespass upon the prerogative of Parliament in what will almost invariably be a good cause'.[164] This threatens parliamentary sovereignty, exposes the judiciary to allegations of illegitimate judicial activism and law-making, and will predictably produce calls for judicial deference.

During debate on the Human Rights Bill, the Lord Chancellor stated that the *HRA*, 'while significantly changing the nature of the interpretative process', does not allow the courts 'to construe legislation in a way which is so radical and strained that it arrogates to the judges a power completely to rewrite existing law: that is a task for the Parliament and the Executive'.[165] The Home Secretary stated that 'it is not our intention that the courts, in applying [s 3], should contort the meaning of words to produce implausible or incredible meanings'.[166] Rather, s 3 is supposed to enable 'the courts to find an interpretation of legislation that is consistent with Convention rights, *so far as the plain words of the legislation allow*'.[167] Both statements fail to illuminate the point, in practice, where judicial interpretation ends and law-making begins, yet both statements clearly identify judicial law-making as illegitimate.

The judicial interpretations of the s 3 obligation shed dim light.[168] Let us return to Woolf CJ in *Donoghue*.[169] His Honour emphasised that if the court must 'radically alter the effect of the legislation' to secure compatibility, 'this will be an indication that more than interpretation [improper judicial legislation] is involved.'[170] Woolf CJ acknowledged that '[t]he most difficult task which courts face is distinguishing

163 *Ghaidan* [2004] 2 AC 557, 570 (Lord Nicholls).

164 Ibid, 584 (Lord Millett).

165 Lord Irvine, 'Activism and Restraint: Human Rights and the Interpretative Process' (Paper presented at the Paul Sieghart Memorial Lecture, London, 20 April 1999) [4.1]. Judicial interpretation cannot 'stretch legislative language – beyond breaking point': at [4.1].

166 United Kingdom, *Parliamentary Debates*, House of Commons, 3 June 1998, col 421 (Jack Straw MP, Secretary of State for the Home Department).

167 Ibid, col 421-3 (emphasis added).

168 In the interests of length, not all cases to date can be referred to. For updates on cases, reference should be made to the *European Human Rights Law Review*, which is periodically publishing an updated 'Table of Cases under the *Human Rights Act*', along with the occasional 'Commentary'.

169 *Donoghue* [2002] QB 48.

170 Ibid,[76]. For case examples on this distinction, see *Adan* [2001] EWCA Civ 1916 [42]; *Roth* [2003] 1 QB 728, [156].

between legislation and interpretation' and that 'practical experience of seeking to apply section 3 will provide the best guide'.[171]

In *R v A (No 2)* (*'R v A'*),[172] Lord Steyn confirmed that s 3 required a 'contextual and purposive interpretation' and that 'it will be sometimes necessary to adopt an interpretation which linguistically may appear strained'.[173] His Lordship held that s 3 empowers judges to *read down* express legislative provisions or *read in* words so as to achieve compatibility,[174] provided the essence of the legislative intention was still viable. Judges could go so far as the 'subordination of the niceties of the language of the section'.[175] His Lordship justified this interpretative approach by reference to the parliamentary intention in enacting the *HRA*: Parliament clearly intended that a declaration be 'a measure of last resort',[176] with 'a *clear* limitation on Convention rights [to be] stated *in terms*'.[177] Lord Hope was more restrained, holding that any modified legislative interpretation should not conflict with the express language of the legislation, nor any necessary implications thereto, as both are 'means of identifying the plain intention of Parliament'.[178]

In *Lambert*,[179] Lord Hope recognised that s 3 may require an explanation of 'the effect of the provision ... without altering the ordinary meaning of the words used' or require the statutory words adopted 'to be expressed in different language in order to explain how they are to be read in a way that is compatible.'[180] His Lordship also stated that 'it may be necessary for words to be *read in* to explain the meaning that must be given to the provision if it is to be compatible',[181] but that reading in 'will *not* be possible if the legislation contains provisions ... which expressly [or by necessary implication] contradict the meaning which the enactment would have to

171 Ibid.

172 *R v A* [2002] 1 AC 45. This case dealt with the admissibility of evidence in a rape trial under *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, s 41.

173 Ibid, 68 (Lord Steyn).

174 Ibid. For examples of 'reading in', see *Goode v Martin* [2001] EWCA Civ 1899, especially at [46]–[47]; *R (Whitehead) v Chief Constable of Avon & Somerset* [2001] EWHC Admin 433, [19]–[29].

175 *R v A* [2002] 1 AC 45, 68 (Lord Steyn).

176 Ibid.

177 Ibid (emphasis in original). Lord Steyn's approach has been followed in numerous cases, including *Adan* [2001] EWCA Civ 1916 [42], [87] – [92]; *Roth* [2003] QB 728, 782; *R (Hooper) v Secretary of State for Work and Pensions* [2002] EWHC Admin 191 [157] *('Hooper No 1'); R (Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813 [26] (*'Hooper No 2'*). Lord Hope was more restrained in this case: [110]. Other judges have expressed a preference for the approach of Lord Hope: see, eg, *Adan* [2001] EWCA Civ 1916 [93] (David Steele J).

178 *R v A* [2002] 1 AC 45, 87 (Lord Hope). His Lordship preferred to read down any language that threatened compatibility: 87. Other judges have expressed a preference for the approach of Lord Hope: see, eg, *Adan* [2001] EWCA Civ 1916 [93] (David Steele J).

179 *R v Lambert* [2002] 2 AC 545 *('Lambert')*.

180 Ibid, 586. See, eg, *Cachia v Faluyi* [2001] EWCA Civ 998, [20], where the word 'action' was taken to mean 'served process' in order to ensure compatibility of s 2(3) of the *Fatal Accidents Act* 1976 (UK), c 30, with the art 6(1) right to access to a court.

181 *Lambert* [2002] 2 AC 545, 584. This has been approved in later cases, including *Hooper No 1* [2002] EWHC Admin 191 [158]; *Hooper No 2* [2003] EWCA Civ 813 [26].

be given to make it compatible.'[182] Lord Hope also emphasised that 'reading words in to give effect to the presumed intention must always be distinguished carefully from amendment'.[183] His overarching concern was that s 3 be used in a manner that 'respect[s] the will of the legislature so far as this remains appropriate'.[184] In *Lambert*, the majority of the House of Lords retained the original words used by the legislator, but altered the meaning of the words. Rather than reading the legislative words as imposing a legal burden of proof on the defendant in violation art 6(2), the majority read the legislative words as imposing only an evidential burden of proof on the defendant which the prosecution had the legal burden of rebutting.[185]

The House of Lords in *re S*,[186] however, reined in the s 3 interpretative obligation. This case concerned provisions of the *Children Act 1989*,[187] under which a court could issue a care order for a child based upon, inter alia, a care plan presented by a local authority.[188] The Court of Appeal saved the care scheme from incompatibility with arts 6 and 8 of the *European Convention on Human Rights* ('*ECHR*') by, *inter alia*, reading an innovation into the legislation. The Court was to 'star' the essential goals of the local authority's care plan; if the starred items were not realised within a reasonable time, the local authority had to inform the child's guardian, which then empowered the guardian or the local authority to seek further direction from the Court.[189]

Lord Nicholls, writing unanimously for the House of Lords, overturned the Court of Appeal decision. Lord Nicholls identified a clear parliamentary intent to divide responsibility for care of children between the courts and local authorities.[190] Under the legislation, the court functions as 'the gateway into care',[191] considering

182 *Lambert* [2002] 2 AC 545, 583 (emphasis added). His Lordship emphasised that the power to read in 'does not give power to the judges to overrule decisions which the language of the statute shows have been taken on the very point at issue by the legislator': 586. This has been approved in later cases, including *Hooper No 1* [2002] EWHC Admin 191 [158]; *Hooper No 2* [2003] EWCA Civ 813 [26].

183 Ibid 584.

184 Ibid 585 (Lord Hope).

185 Ibid 563 (Lord Slynn), 574 (Lord Steyn), 586, 589, 591 (Lord Hope), 609 (Lord Clyde). Lord Hutton dissented at 625. *Lambert* has been followed in *R v Forsyth* [2001] EWCA Crim 2926, *R v Lang*; *R v Deadman* [2002] EWCA Crim 298. *Lambert* has been discussed and distinguished in obiter in *R v Daniel* [2002] *EWCA* Crim 959 [23]–[26]. Another example of altering the legislative meaning of words is the case of *R v Offen, R v McGilliard, R v McKeown, R v Okwuegbunam, R v S* [2001] 1 WLR 253 (CA). See Keir Starmer, 'Two Years of the *Human Rights Act*' [2003] *European Human Rights Law Review* 14, 18.

186 *In re S (Minors) (Care Order: Implementation of Care Plan); In re W (Minors) (Care Order: Adequacy of Care Plan)* 2 AC 291 ('*re S*').

187 *Children Act 1989* (UK) c 41.

188 The proceedings related to two cases: in the first case the local authority failed to implement the care plan and, in the second, the court issued a final care order based on an uncertain care plan.

189 *W and B (Children); W (Children)* [2001] EWCA Civ 757 [30] (*'W and B'*). The other judicial innovation read into the legislative scheme was the articulation of guidelines which gave judges wider discretion to make an interim care order: at [29]. The House of Lords rejected these guidelines in favour of a more flexible approach which was consistent with the legislation and conformed to the requirements of art 8: re S [2002] 2 AC 291, 323-6.

190 *re S* [2002] 2 AC 291, 310, 312.

191 Ibid 311.

whether the threshold requirements for a care order are satisfied and whether a care order is in the best interests of the child. The local authority then became responsible for the care of the child; the court was *not* to retain any supervisory role over the care of the child.

Lord Nicholls noted that s 3 was stated in 'uncompromising language' and 'a powerful tool whose use is obligatory'; however, 'the reach of this tool is not unlimited'.[192] The outer limit of s 3 precludes legislation by the judiciary.[193] Identifying the outer limit of s 3 was acknowledged as the challenge, with the following guidance given:

> [A] meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation.[194]

The outer limit of s 3 interpretation 'may be crossed even though a limitation on Convention rights is *not* stated in express terms', with Lord Nicholls expressly stating that 'Lord Steyn's observations in *R v A* ... are *not* to be read as meaning that a clear limitation on Convention rights in terms is the *only* circumstance in which an interpretation incompatible with Convention rights may arise'.[195] Applying s 3, the 'starring' system innovation was inconsistent with a fundamental feature of the care scheme – that courts do not retain a supervisory role – such that it was improper judicial amendment, not interpretation.[196]

In *Bellinger*,[197] the House of Lords held that the traditionally gendered definition of marriage under s 11(c) of the *Matrimonial Causes Act*[198] was incompatible with the rights of post-operative transsexuals and could not be saved by s 3 interpretation. Therefore a declaration of incompatibility was granted.[199] Lord Hope approved

192 Ibid 313.

193 Ibid.

194 Ibid.

195 Ibid (emphasis added).

196 The 'far-reaching practical ramifications for local authorities and their care of children' under such a "starring" system is a 'matter ... for decision by Parliament, not the courts': Ibid 314. Additional ramifications included the additional administrative work and expense, and the impact on the discharge by authorities of their duties to children: at 314. Turning to compatibility, Lord Nicholls held that the legislative scheme did not violate the art 8 right to respect for family life: at 318. However, his Lordship held that the art 6(1) right to fair trial could be violated in certain circumstances relating to decisions taken by the local authority while a care order is in force (at 322); however, the solution for such a violation lies in the grant of judicial remedies under s 8 of the *HRA* and, on the facts, no violation was found (at 323).

197 *Bellinger v Bellinger* [2003] 2 AC 467 *('Bellinger')*.

198 *Matrimonial Causes Act 1973* (UK), c 18.

199 *Bellinger* [2003] 2 AC 467, 475, 478, 481-2.

of the entirety of Lord Steyn's assessment of s 3 in *R v A*,[200] including the view that incompatibility will arise 'if a *clear* limitation on Convention rights is stated *in terms*'.[201] Lord Hope also referred to Lord Nicholls' judgment in *re S*, but interestingly did not cite his refinement of Lord Steyn's observations.[202] Despite Lord Hope's support in *Bellinger*, Lord Steyn in *Anderson* accepts the views expressed in *re S*. His Lordship stated that 's 3(1) is not available where the suggested interpretation is contrary to the express statutory words or is by implication necessarily contradicted by the statute'.[203]

In *Ghaidan v Godin-Mendoza* ('*Ghaidan*'),[204] a provision of the *Rents Act 1977*[205] which secured a statutory tenancy by succession for survivors in heterosexual relationships, whether married or unmarried, was held to violate the rights of cohabiting homosexual couples – in particular, the right to respect for home under art 8 when read with non-discrimination rights under art 14 of the *ECHR*. The rights-incompatible provision was the definition of 'spouse': 'a person who was living with the original tenant as his or her wife or husband'.[206] The House of Lords, in upholding the Court of Appeal, saved this provision through s 3 interpretation by reading in three words, so the definition became 'as *if they were* his or her wife or husband...'.[207]

Lord Nicholls admitted that 'section 3 itself is not free from ambiguity'[208] because of the word 'possible'. His Lordship pondered what 'standard' or 'criterion' should be used to construe 'possibility', admitting that a 'comprehensive answer to this question is proving elusive'.[209] Describing s 3 as 'unusual and far-reaching in character', Lord Nicholls opined that s 3 may require 'a court to depart from the unambiguous meaning the legislation would otherwise bear' and depart from 'the intention reasonably to be attributed to Parliament in using the language in

200 See also *Shayler* [2003] 1 AC 247 [52], where Lord Hope reiterates his previous understandings of s 3.

201 See *Bellinger* [2003] 2 AC 467, 486 citing *R v A* [2002] 1 AC 45, 68 (emphasis in original).

202 See *Bellinger* [2003] 2 AC 467, 486. Lord Hope cited [38] and [39] only of Lord Nicholls' judgment; his Lordship did not cite Lord Nicholls, above n 194 and 196 and accompanying text. His Lordship did agree that the judiciary could not resolve the incompatibility between the legislative definition of marriage and Convention rights 'judicially by means of the interpretative obligation in s 3(1)': at 486.

203 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 894 (*'Anderson'*). Again, interestingly, although Lord Steyn referred to re S is support of this proposition, he did not refer to Lord Nicholls' statement that directly related to his opinion in *R v A*. Lord Steyn cited [41] rather than [40] which directly addressed his comments: *Anderson* [2003] 1 AC 873, 894.

204 2 AC 557.

205 *Rents Act 1977* (UK).

206 *Rents Act 1977* (UK), Sch 1, para 2(2).

207 *Ghaidan* [2004] 2 AC 557 [35], [36] (Lord Nicholls); [51] (Lord Steyn); [129] (Lord Rodger); [144]. [145] (Baroness Hale). Lord Millett dissented. His Lordship agreed that there was a violation of the rights [55], and agreed with the approach to s 3 interpretation [69], but did not agree that the particular s 3 interpretation that was necessary to save the provision was 'possible': see espec [57], [78], [81], [82], [96], [99], [101].

208 Ibid [27].

209 Ibid.

question'.[210] The elusive question is 'how far, and in what circumstances, section 3 requires the court to depart from the intention of the enacting Parliament'[211] which, in turn, depends on Parliament's intention in enacting s 3 of the *HRA*. According to Lord Nicholls, the parliamentary intention in enacting s 3 allows courts to interpret legislative language 'restrictively or expansively', 'to read in words which change the meaning of the enacted legislation', to 'modify the meaning, and hence the effect' of legislation, and to imply words provided they 'go with the grain of the legislation'.[212] However, the parliamentary intention in enacting s 3 does not allow courts to 'adopt a meaning inconsistent with a fundamental feature of legislation' or 'the underlying thrust of the legislation being construed', nor 'to make decisions for which they are not equipped'.[213]

Lord Steyn considered s 3 in its context as the 'principal remedial measure'[214] in the *HRA*, and identified two problems with its use. First, his Lordship resisted claims that reading in or reading down undermined the parliamentary intention in enacting the impugned legislation. According to his Lordship, such claims fail to account for the 'countervailing will of Parliament as expressed in the [*HRA*]',[215] and the fact that the British Parliament rejected the New Zealand model which would have required s 3 interpretations to be *reasonable interpretations*.[216] Second, Lord Steyn criticised the 'excessive concentration on linguistic features'[217] of legislation. If the 'core remedial purpose of s 3(1) is not to be undermined a broader approach is required', an approach 'concentrating ... in a purposive way on the importance of the ... right'.[218] This approach reinforces 'that resort to [a declaration of incompatibility] must always be an exceptional course'.[219]

This review indicates the difficulty in identifying 'possible' s 3 interpretations. The judiciary has retreated from the 'boldest exposition'[220] of Lord Steyn, who initially signalled 'that the interpretative obligation is so powerful that [the judiciary] need scarcely ever resort to s 4 declarations', suggesting that 'interpretation is more in the nature of a "delete-all-and-replace" amendment'.[221] This has been moderated

210 Ibid, [30]. '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': at 571.

211 Ibid.

212 Ibid [32]-[33]. Lord Rodger agreed with these propositions ([121], [124]), as did Lord Millett ([67]).

213 Ibid [33]. Lord Rodger agreed with these propositions([121]), as did Lord Millett ([585]).

214 Ibid [39].

215 Ibid [40].

216 Ibid.[44]

217 Ibid [41].

218 Ibid [41] and [49] respectively.

219 Ibid [50]. Lord Millett held that s 3 allows a court to give legislative language 'a meaning which, however unnatural or unreasonable, is intellectually defensible': Ibid [67]. Indeed, courts 'can do considerable violence to the language and stretch it almost (but not quite) to breaking point': Ibid [67].

220 Starmer, above n 185, 16. See also Lord Irvine, above n 118, 320. C.f. Aileen Kavanagh, 'Unlocking the *Human Rights Act:* The "Radical" Approach to Section 3(1) Revisited' (2005) 3 *European Human Rights Law Review* 259.

221 Danny Nicol, 'Are Convention Rights a No-Go Zone for Parliament?' [2002] Autumn *Public Law* 438, 442, 443 respectively.

by Lord Hope in *Lambert*, the Law Lords in *Re S* and *Gahidan,* and Lord Steyn himself in *Anderson*. These decisions indicate s 3 allows the judiciary to clarify the meaning and effect of ordinary legislative words, to express legislative words in different language, to read down over-broad legislation and to read in legislative provisions. Section 3, however, excludes the de facto enactment or amendment of legislation. Accordingly, s 3 *cannot* save incompatible legislation if its use would contradict the express or implicit will of Parliament, or alter the fundamental features or underlying thrust of a legislative scheme.[222]

The salient point is that, no matter how many judicial expositions are offered, there is no clear line between judicial interpretation and judicial law-making. Woolf CJ admits its clarity lies in application rather than exposition. But even in its application, s 3 causes controversy. One need look no further than the commentary provoked by *R v A*. This case addressed the admissibility of evidence in a rape trial. Section 41 of the *Youth Justice and Criminal Evidence Act 1999*[223] prohibited the leading of prior sexual history evidence, without the leave of the court; that is, there was a general prohibition with some narrowly defined exceptions.[224] The House of Lords held that the provision unjustifiably limited the defendant's right to a fair trial under art 6 of the *ECHR*[225] – although the legislative objective was beyond reproach, the legislative means were excessive. The provision was saved through s 32 'possible' interpretation, with the House of Lords interpreting the provision as being 'subject to the implied provision that evidence or questioning which is required to ensure a fair trial ... should not be treated as inadmissible.'[226] Accordingly, a non-discretionary general prohibition on evidence was re-interpreted to allow discretionary exceptions.

The main criticism of *R v A* is that injecting discretion back into a non-discretionary, prohibitory rule of evidence goes against the intention of Parliament.[227] Kavanagh disagrees with this assessment because it exaggerates what the s 3 re-interpretation achieves in that particular case.[228] Nevertheless, she acknowledges that s 3 re-interpretations may go against the parliamentary intention behind the impugned legislation, but that this must be balanced against the parliamentary intention behind the *HRA*. If there is a clash between the parliamentary intentions in the *HRA* (rights-compatibility) and the impugned legislation (rights-incompatibility),

222 See generally Starmer, above n 185, 17; Francesca Klug and Claire O'Brien, 'The First Two Years of the *Human Rights Act*' [2002] Winter *Public Law* 649, 654.

223 *Youth Justice and Criminal Evidence Act 1999* (UK) c 23.

224 The court could grant leave to lead evidence where the sexual behaviour was contemporaneous to the alleged rape (s 41(3)(b)) or the sexual behaviour is similar to past sexual behaviour (s 41(3)(c)).

225 The *ECHR*, opened for signature 4 November 1950, 213 UNTS 222, arts 6 and 8 (entered into force 3 September 1953).

226 *R v A* [2001] 1 AC 45, 68. In particular, Section 41(3)(b) was interpreted so as to admit evidence of contemporaneous sexual behaviour, only if it was truly contemporaneous to the alleged rape. Section 41(3)(c) was interpreted so as to admit evidence of similar past sexual behaviour, only if it was so relevant to the issue of consent, that to exclude it would endanger the fairness of the trial.

227 For a review of and critique of the criticisms, see Kavanagh, above n 220.

228 Ibid 267-8.

Kavanagh argues that the *HRA* takes priority.[229] Section 3 may require judges to create a compatible interpretation when Parliament enacts incompatible legislation. To many, this will look more like judicial legislation than judicial interpretation. Lords Nicholls and Steyn acknowledge this clash of intentions in *Ghaidan*.

Scrutiny of the judiciary and debate about whether judges merely interpreted or actually legislated in particular cases, per se, is not a problem. Indeed, it will be legitimate to criticise the judiciary if it strays into the territory of judicial legislation, as this undermines the preservation of parliamentary sovereignty under the *Charter*. However, because the difference between judicial interpretation and judicial law-making is imprecise, there will be no clear answer: at what point does expressing legislative intent in different language become judicial law-making? At what point does reading down, or reading in, parliamentary language by the judiciary become judicial law-making? How substantial a change from the fundamental features of legislation must judges make before s 3 interpretation is 'likely' to be judicial amendment? It will be impossible to determine such debates in an objective fashion, making allegations of improper judicial activism and law-making easy to make and very difficult to defend or resolve.

This has the real potential to undermine the independence and standing of the judiciary, the administration of justice, and the rights project. Recall the public and media reactions in Australia to previous rights-based judicial decisions.[230] The decision in *Dietrich* was 'denounced as an unwarranted judicial interference'.[231] The cases developing the implied freedom to political communication garnered 'a considerable amount of criticism of the High Court [as] acting beyond its proper function'.[232] It was *Mabo* and *Wik*,[233] the land rights cases which attracted the

229 Ibid 269. This is because the concept of implied repeal – that later inconsistent legislation impliedly repeals earlier legislation – is not contained in the *HRA*. The s 3(1) interpretative obligation applies to legislation whenever enacted. This is the same under the *Charter* because the interpretative obligation applies to all statutory provisions: *Charter 2006* (Vic), s 32.

230 See, eg, Debeljak, above n 43, 43-5; Sir Ninian Stephen, 'Judicial Independence: A Fragile Bastion' in Simon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (1985) 529, 538-40; Justice Michael Kirby, 'Attacks on Judges – A Universal Phenomenon' (1998) 72 *Australian Law Journal* 599; George Williams, 'Judicial Activism and Judicial Review in the High Court of Australia', in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy, and Legal Positivism* (1999) 43; Cheryl Saunders, 'Judicial Independence in Its Political and Constitutional Context' (Paper presented at the Australian Judicial Conference Colloquium, Canberra, 2 November 1996) 20-21; John M Williams, 'Judicial Independence in Australia' in Peter Russell and David O'Brien, (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (2001) 173, especially 177-80; Helen Cunningham, 'The Role of the Judiciary in a Modern Democracy' (Presented at the Judicial Conference of Australia, Sydney, 8-9 November 1997) [7].

231 Leslie Zines, 'Judicial Activism and the Rule of Law in Australia', in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy, and Legal Positivism* (1999) 391, 395.

232 Ibid 396.

233 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1.

'loudest and most shrill'[234] allegations of judicial activism. The criticism of *Mabo* went beyond legitimate advocacy for legislative alteration of the legal principles established in the case, to illegitimate 'subject[ing of] judges to personal abuse, and that is to be deplored'.[235] It has been described as 'scathing criticism, sometimes descending to the personal'.[236] The *Wik* decision attracted a 'torrent of abuse'.[237] The criticism of the decision has been described as 'extreme and ... irresponsible';[238] a 'strident attack' that 'was not only intemperate; it could reasonably be construed as inciting contempt for the Court';[239] it 'went beyond criticism of the majority reasoning ... and [was] damaging to public confidence in the High Court'.[240] The integrity of the Court was challenged in this process, with the descent 'to abuse and personal attack'.[241]

If the *Charter* creates anxiety about judicial activism, care is needed in response. In particular, various beliefs fuel perceptions of judicial activism, including: that in a liberal democracy, 'real' rights are rarely threatened; that rights are trumps for the judiciary to enforce against the elected arms of government; and that true democracy requires parliamentary supremacy.[242] Each of these assumptions represents views that people may validly hold. However, it is these assumptions that need to be discussed and debated, not slogans such as 'judicial activism', which 'hints at, if not judicial impropriety, at least judicial overreaching, while hiding controversial assumptions about judging, rights, and democracy'.[243] Allegations of judicial activism will also undoubtedly result in calls for increased judicial deference, with the concomitant risks for the institutional dialogue and under-enforcement of rights, issues further explored in Section III.B.

234 Zines, above n 231, 403. The allegations included the improper appeal to the expectations of the international community, the improper judicial (rather than parliamentary) assessment of contemporary Australian values, the uncertainty cast over property law, the fact that the court did not confine itself to the facts before it, and the improper use of history and emotive language: at 406-7. The High Court came under attack by Tim Fischer (then Deputy Prime Minister) before the decision, who complained of an unjustifiable delay in handing down the decision: Hoong Phun Lee, 'Subverting Judicial Independence' (1998) 1 *Constitutional Law and Policy Review* 55, 56.

235 Sir Anthony Mason, 'The State of the Judicature' (1994) 68 *Australian Law Journal* 125, 133.

236 Justice Leonard James King, 'The Attorney-General, Politics and the Judiciary' (2000) 74 *Australian Law Journal* 444, 455.

237 Zines, above n 231, 408.

238 Sir Anthony Mason, 'No Place in a Modern Democratic Society for a Supine Judiciary' (1997) 35 (ii) *Law Society Journal* 51 [1].

239 Lee, above n 234, 56.

240 Mason, above n 238, [16]. See also King, above n 236, 455-6. Daryl Williams (Attorney-General) considered that 'the recent debate [following *Wik*] has fallen well short of undermining public confidence in the ability of the judiciary to deal with cases impartially, on their merits and according to law', such that it was not 'proper [nor] incumbent on an Attorney-General to intervene': King, above n 236, 457 (citation omitted).

241 Sir Anthony Mason, above n 238, [11]. See also NSW Parliamentary Library Research Service, *Judicial Accountability*, Background Paper 1/98 (1998), 1-5.

242 Roach, above n 70, ch 11, especially 207. See also Kent Roach, 'The Myths of Judicial Activism' (2001) 14 *Supreme Court Law Review* 297.

243 Roach, above n 70, 207.

These points are, again, no better illustrated than by *R v A*. Although criticism was primarily launched at the *HRA* itself and the judicial application of the *HRA*, the real problems with *R v A* lie elsewhere. First, the subject matter (sexual history evidence) and the outcome of the case (that conviction in rape cases may be more difficult) are inherently controversial. That there were strong competing interests to be balanced – those of defendants and of victims – amplified the controversy.[244] 'Real' rights were at stake here, even though the rights of defendants in sexual assault cases failed to garner public sympathy. Secondly, *R v A* confirmed fears that the *HRA* would expand judicial power – in this case, by judges injecting discretion back into a non-discretionary evidentiary rule.[245] This perpetuates the myth that judges trump the representative arms with rights under the *HRA*. Thirdly, it was difficult to accept *R v A* because the impugned legislation was enacted after the *HRA*.[246] This reaction, however, fails to acknowledge that the *HRA* makes no differentiation between pre- and post-*HRA* legislation and, that in enacting the *HRA*, Parliament acknowledged that democracy and parliamentary supremacy must be tempered by rights that are partly enforceable by judges. The salient point is that debate should focus on the underlying issues – the precise balance of rights between competing rights-holders, that the representative arms can trump the judicial interpretation under the *HRA*, and that the meaning of democracy is contested – rather than simply court- or *HRA*-bashing.

The ambiguity of the interpretative obligation and the elusiveness of the distinction between proper judicial interpretation and improper judicial law-making have been inherited under the *Charter*. Even though the s 32 interpretative power states explicitly that the statutory interpretation must be compatible 'so far as it is possible to do so *consistently with [statutory] purpose*', the debate about 'possible' interpretations may not be avoided. Let us now consider the additional proviso placed on the judicial interpretative power under the *Charter*.[247]

2 *'Consistently With [Statutory] Purpose'?*

We need to establish whether the additional phrase 'consistently with [statutory] purpose' is an additional, unique proviso placed on the s 32 judicial interpretative power, or simply a codification of the British jurisprudence. Let us explore what 'consistently with [statutory] purpose' means, how it interacts with the other provisions of the *Charter* and how, if at all, it differs from the British jurisprudence.

The additional phrase 'consistently with [statutory] purpose' in s 32 is at odds with other relevant provisions under the *Charter*. Section 1(2) states that:

244 Kavanagh, above n 220, 270.

245 Ibid 271.

246 Ibid.

247 Lord Nicholls clearly states that conceptually, there is only one limit under s 3 of the *HRA* in *Ghaidan* [2004] 2 AC 557 [32] as follows: 'the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation'.

> '[t]he main purpose of this *Charter* is to protect and promote human rights by: ... (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as it possible in a way that is *compatible* with human rights; (c) imposing an obligation on all public authorities to act in a way that is *compatible* with human rights; ... and (e) conferring jurisdiction on the Supreme Court to declare that a statutory provisions cannot be interpreted *consistently* with a human right...' (emphasis added).

Section 36(2) states that 'if... a statutory provision cannot be interpreted *consistently* with a human right, the [Supreme] Court may make a declaration to that effect' (emphasis added).

The first matter to note is that ss 1(2) and 36 do not include the additional phrase 'consistently with [statutory] purpose'. Most importantly, there is a clear discrepancy between the interpretation obligation as stated in the purposes provision which does not refer to consistency with statutory purpose (s 1(2)(b)) compared with the substantive provision which requires consistency with statutory purpose (s 32). Secondly, the pre-condition to issue a judicial declaration as stated in both the purposes provision (s 1(2)(e)) and the substantive provision (s 36) is that a statutory provision cannot be interpreted 'consistently' with protected rights, whereas the wording of the interpretative obligation as stated in the purposes provision (s 1(2)(b)) or the substantive provision (s 32) refers to statutory interpretations that are 'compatible' with protected rights. Moreover, it is unclear why s 32 uses the word 'consistently' with respect to the statutory purpose of the impugned legislation, whilst the declaration provisions use the word 'consistently' with respect to the protected rights.

These discrepancies will have to be clarified by the judiciary come 1 January 2008. Some guidance on this clarification comes from the Explanatory Memorandum to the *Charter*, which states that the reference to statutory purpose is to ensure 'courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation'.[248] This is no more than a *codification* of the British jurisprudence to date, which categorises displacement of parliamentary purposes and displacement of legislative objectives as examples of *im*possible interpretations. The HRC Committee recommended the inclusion of 'consistently with [statutory] purpose' and it expressly acknowledged that the inclusion of this phrase was 'consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured'.[249] The HRC Committee cited the case of *Ghaidan*, particularly Lord Nicholls' opinion that s 3 interpretation 'must be compatible with the underlying thrust of the legislation being construed' and Lord Rodger's opinion that s 3 'does not allow the courts to change the substance of a

248 Explanatory Memorandum, above n 16, 23. The parliamentary debate was silent on the matter.

249 HRC Committee, above n 4, 83. See also Human Rights Law Resource Centre, 'The Victorian Charter of Human Rights and Responsibilities', *Human Rights Law Resource Manual* (2006), c 5, 46.

provision completely, to change a provision from one where Parliament says that *x* is to happen into one saying that *x* is not to happen'.[250]

Beyond *Ghaidan*, many British cases support 'consistently with [statutory] purpose' as an example of *im*possible interpretations. In relation to the concern evident in the Explanatory Memorandum to preserve parliamentary intention, there is growing British jurisprudence that a displacement of parliamentary intention would not constitute a possible interpretation. Indeed, even in the 'high water mark'[251] judgment of Lord Steyn in *R v A*, his Lordship recognised the need to ensure the viability of the essence of the legislative intention of the legislation being construed under s 3.[252] Lord Hope in *R v A* emphasised that a s 3 interpretation is not possible if it contradicted express or necessarily implicit provisions in the impugned legislation because express legislative language or necessary implications thereto are the 'means of identifying the plain intention of Parliament.'[253] His Lordship further highlighted in *Lambert* that interpretation involves giving 'effect to the presumed intention'[254] of the enacting parliament. Lord Nicholls in *re S* identified a clear parliamentary intent to give the courts threshold jurisdiction over care orders with no continuing supervisory role, which the s 3 interpretation of the Court of Appeal improperly displaced.

In relation to the concern evident in the Explanatory Memorandum to preserve legislative objects, the British jurisprudence has held that s 3 interpretation will not allow displacement of the fundamental features of legislation. This is clear in *Ghaidan*, *re S* and in *R v Anderson*.[255] Overall, the additional phrase 'consistent with [statutory] purpose' in the *Charter* simply codifies the British jurisprudence, such that the main operative limit on the s 3/s 32 judicial interpretation power is that an interpretation must be 'possible', with an interpretation that is *in*consistent with statutory purpose being an example of an *im*possible interpretation. With the

250 *Ghaidan* [2004] 2 AC 557 [33] (Lord Nicholls), [100] (Lord Rodger). Pamela Tate SC, the Solicitor-General, further explains that the focus on the *Ghaidan* decision and the more purposive approach to interpretation was to avoid judicial interpretations, such as, R v A [2002] 1 AC 45: Pamela Tate, 'The *Charter of Human Rights and Responsibilities*' (Paper presented at the Australian Institute of Administrative Law (Victorian Chapter), Melbourne) 19-20; Pamela Tate, 'Some Reflections on Victoria's *Charter of Human Rights and Responsibilities*' (2007) 52 *Australian Institute of Administrative Law Forum* 18, 28. See also Williams, above n 3, 902.

251 John Wadham, 'The *Human Rights Act:* One Year On' (2001) 6 *European Human Rights Law Review* 620, 638.

252 *R v A* [2002]1 AC 45[44]– [45].

253 Ibid [108] (Lord Hope) (as above).

254 *Lambert* [2001] 2 AC 545, [81].

255 *Ghaidan* [2004] 2 AC 557 and re S [2002] 2 AC 291are discussed above. In *Anderson* [2003] 1 AC 837, the imposition of a sentence, which includes the tariff period, was held to be part of the trial such that the involvement of the Home Secretary in tariff setting violated the convicted murderers' art 6(1) right ([20] – [29] (Lord Bingham), [49], [54] – [57] (Lord Steyn), [67], [78] (Lord Hutton). The House of Lords then concluded that the legislative provision on tariff setting could not be interpreted compatibly with Convention rights under s 3 of the *HRA*. Under legislation 'the decision on how long the convicted murderer should remain in prison for punitive purposes is [the Home Secretary's] alone' ([30] (Lord Bingham), [80] (Lord Hutton). To interpret the legislation 'as precluding participation by the Home Secretary ... would not be judicial interpretation but judicial vandalism' ([30] (Lord Bingham), giving the provision a different effect from that intended by Parliament. See also [59] (Lord Steyn), [81] (Lord Hutton). The House of Lords issued a declaration of incompatibility.

focus of s 32/3 being on 'possibility', the debates identified in section III.A.1 will be alive in Victoria.

It is important to canvas another aspect of *Ghaidan* that was not mentioned in the HRC Committee report, the Explanatory Memorandum or the parliamentary debate on the Bill.[256] Recall that Lord Nicholls in *Ghaidan* acknowledges the potential for a clash of intentions – the parliamentary intention in enacting the *HRA* (rights-compatibility) and a parliamentary intention evident in impugned legislation (rights-incompatibility). His Lordship did *not* hold that one parliamentary intention would *automatically* prevail over the other. Rather, his Lordship set out the circumstances when the *HRA* intention would prevail (such as, reading legislation expansively or restrictively, reading-in words, modifying the meaning of words and the like) and when the impugned legislative intention would prevail (such as, when a fundamental feature is displaced).

Applying the idea of two competing purposes to the additional phrase 'consistently with [statutory] purpose' in s 32 is illuminating. If the Supreme Court was to follow the reasoning in *Ghaidan*, the discrepancy between s 1(2)(b) and s 32 becomes highly relevant. *Ghaidan* clearly indicates that, in pursuing the purpose of the impugned legislation, the purpose behind the s 3/s 32 interpretative power itself cannot be ignored. The purpose behind the *Charter* as expressed in s 1(2)(b) is to achieve rights-compatible interpretation without explicit reference to consistency with statutory purpose. How is this purpose to be balanced against both the express language of s 32 and the purpose in impugned legislation? Regarding s 32, a legitimate interpretation could be to read 'consistently with [statutory] purpose' as a mere codification of British jurisprudence, including *Ghaidan*. This means that the statutory purpose of impugned legislation is *not* an automatic override of the *Charter* statutory purposes. Regarding balancing competing purposes, when balancing the purposes of the *Charter* with an inconsistent purpose contained in impugned legislation, one simply looks to the rules on 'possibility', which include rules about not undermining the statutory purpose; that is, one follows the formula on possibility and impossibility in the British jurisprudence, including *Ghaidan*. Accordingly, the additional phrase 'consistently with [statutory] purpose' will not mute the debate which occurs in Britain over which of the two parliamentary purposes ought prevail. Again, the debates identified in section III.A.1 will be alive in Victoria.

If the Supreme Court was to reject that the inclusion of 'consistently with [statutory] purpose' is a codification of the British jurisprudence and particularly the *Ghaidan* authority, numerous problems and anomalies arise. Is it open for the Supreme Court to hold that 'consistently with [statutory] purpose' requires the judiciary to *automatically* favour the statutory purposes of the impugned legislation over the purposes of the *Charter* when interpreting under s 32? If yes, this significantly reduces the impact of an already relatively weak human rights instrument. This would basically emasculate the s 32 interpretative power from a rights perspective. It would become too easy for the majoritarian legislature to restrict the protection

256 See also Simon Evans and Carolyn Evans, 'Legal Redress Under the *Charter of Human Rights and Responsibilities*' (2006) 17 *Public Law Review* 264, 268.

and promotion of the rights of the weak, the vulnerable and the minority. Moreover, it would also undermine s 32, which is indeed the primary remedial mechanism in the *Charter*.[257] Section 36 does not affect the statutory provision, nor create any legal rights or give rise to any civil cause of action. Section 39 does not create any free-standing relief or remedies where a public authority acts unlawfully, by breaching its statutory duty to act compatibly with protected rights or give proper consideration to human rights when making decisions. Section 32 is a complete remedy for incompatible legislation: a rights-compatible interpretation is a complete remedy for a person whose rights would have otherwise been violated by incompatible law. Section 32 is also a complete remedy against public authorities who act unlawfully, as it prevents a public authority relying on the major exception to the obligation to act lawfully in s 38(2), being that the public authority was simply giving effect to incompatible legislation. Indeed, Lord Steyn in *Ghaidan* recognises that the interpretation power is the primary remedy under the *HRA* and the remedial reach of the interpretative power will be undermined if a broad approach to interpretation is not adopted.[258] If the purpose of the protected right is automatically overridden by the purposes of the impugned legislation under the *Charter* because of the phrase 'consistently with [statutory] purpose', s 32 loses much of its remedial thrust.

Further, can the purpose of impugned legislation be properly assessed without any reference to the purpose of the *Charter* in protecting and promoting rights? Surely the commitment to the protected rights – which are 'essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom'[259] – contained in the quasi-constitutional *Charter* must have some weight when assessing the purposes behind legislation enacted after 1 January 2007, being the date when ss 28 and 30 came into effect. For legislation enacted before 1 January 2007, is it fair to allow the purposes behind pre-*Victorian Charter* legislation to trump the operation of the *Charter*, particularly given the fact that pre-*Victorian Charter* legislation could not have been enacted with avoidance of protected rights in mind? Furthermore, how would such a restricted reading of s 32 interact with statements of compatibility? Would a statement of compatibility that was contradictory with an incompatible statutory purpose simply be ignored, rendering s 28 farcical and one dialogue tool unreliable? This outcome is not far-fetched when you consider that statements of compatibility are not binding on courts or tribunals,[260] but an automatic preference for the statutory purpose of impugned legislation over *Victorian Charter* purposes would be. Again, this outcome seems untenable. Surely it is preferable to allow the later in time statement of compatibility (which suggests that the intended statutory purpose was to uphold rights) to be used to ensure that compatible statutory purposes of impugned legislation are identified in the s 32 interpretation process, such that any apparent competing contrary statutory purpose behind impugned legislation

257 Human Rights Law Resource Centre, above n 249, ch 5, 46.

258 *Ghaidan* [2004] 2 AC 557 [39], [41], [46], [49]. See also above n 214, 217, 218.

259 *Charter 2006* (Vic) perambulatory paragraph 2.

260 *Charter 2006* (Vic) s 28(4).

does not prevail. Finally, such a restrictive reading of s 32 is not consistent with the Explanatory Memorandum that states that 'the object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to give effect to human rights'.[261] A narrow reading of s 32 will reduce the ability of courts and tribunals to give effect to the protected rights.

Another argument that may arise in support of giving 'consistently with [statutory] purpose' prevalent status is that s 32 ought to be limited to allowing 'reasonable interpretations'. Use of the word 'reasonable' is another way of limiting the interpretative power of the judiciary: 'the meaning of "possible" [interpretations] are not necessarily "reasonable"',[262] such that a reasonable interpretation gives the judiciary a less radical interpretative obligation than 'possible' interpretation. The idea of 'reasonable' interpretations comes from the New Zealand *Bill of Rights Act*.[263] Section 6 of that Act states that a meaning consistent with the protected rights is to be preferred if the legislation 'can be given' that meaning. This 'only authorises consistent meanings that can be "reasonably" or "properly" given, or that are "fairly open" and "tenable"... [I]t does not authorise a "strained interpretation"'.[264] This approach is significantly different to s 32 of the *HRA*. Indeed, a proposed amendment to adopt the New Zealand approach was rejected by the House of Commons when enacting the *HRA*, with the difference between 'reasonable' interpretations and 'possible' interpretations being fully recognised and the latter preferred.[265] Victorian too was free to choose between the New Zealand and British models and chose the British model. Thus, any arguments based on 'reasonable' interpretations should be dismissed.

Finally, reference to the *ICCPR* may help to clarify the meaning of 'consistently with [statutory] purpose'. Art 2(3) of the *ICCPR* imposes an obligation on States parties to provide effective remedies for violations of rights. The narrower the s 32 judicial power of interpretation, the less likely Victorians will be provided with effective remedies. This not only risks a violation of international human rights law, it also undermines the international rule of law which, according to the first perambulatory principle in the *Charter*, is an essential part of a democratic society.[266]

In any event, the suggested approach to identifying statutory purpose by Evans and Evans has much to commend it. Rather than identifying statutory purpose from the plain, natural and literal meaning of the legislation, Evans and Evans argue that a purposive approach should be used. That is, the judiciary should look to the

261 Explanatory Memorandum, above n 16, 23.

262 Stephen Tierney, 'Convention Rights and the *Scotland Act:* Re-defining Judicial Roles' [2001] Spring *Public Law* 38, 46.

263 *Bill of Rights Act 1990* (NZ) s 6.

264 *Hansen v R* [2005] NZCA 220 [23] (citations omitted).

265 United Kingdom, *Parliamentary Debates,* House of Commons, 3 June 1998, col 421-3 (Mr Jack Straw MP, Secretary of State for the Home Department). The Home Secretary stated '[i]f we had used just the word "reasonable", we would have created a subjective test. "Possible" is different. It means, "What is the possible interpretation? Let us look at this set of words and the possible interpretations"': at col 422-3. This was confirmed in *Ghaidan* [2004] UKHL 30 [44] (Lord Steyn).

266 *Charter 2006* (Vic), preamble.

purpose, or the mischief, that the legislation sought to achieve when attributing statutory purpose to the impugned legislation. This approach is supported by *Ghaidan*. Lord Nicholls opines that too much emphasis has been placed on the 'language of a statute, as distinct from the concept expressed in that language' under s 3 analysis.[267] This obsession with the form of words chosen by a draftsperson is nonsensical 'once it is accepted that s 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear'.[268] Similarly, Lord Steyn laments the 'excessive concentration on linguistic features'[269] of legislation.

Let us turn to the drafting discrepancy between ss 32 and 36. There is no explanation in the Explanatory Memorandum,[270] the second reading speech or parliamentary debate about why s 32 refers to compatibility of human rights, whilst s 36 uses the word consistency with human rights. The HRC Committee draft Charter did not make such a distinction, with both ss 32 and 36 using compatibility terminology. The terminology of the draft Charter is preferable to the terminology of the *Charter* because consistent use of terminology between ss 1(2)(b) and (e), 32 and 36 is most sensible. It remains to be seen if the judiciary place any weight on the different terminology. Evans and Evans have argued that the difference in terminology may be intended to ensure that s 36 declarations are viewed 'merely as disagreements between parliament and the courts over interpretation rather than acknowledging that declarations are evidence of problems with human rights compliance'[271] of the State. This difference in terminology could thus promote the dialogue model because it supports the idea that interpretation of rights is not exclusively for the judiciary. If this proves to be the reasoning, it may be undermined if a generous reading is given to 'consistently with [statutory] purpose', as this restriction on the judicial task of interpretation will reduce the potential for dialogue.

3 *Conclusion*

Section III.A.1 explored the British jurisprudence on the proper scope of s 3 judicial interpretation. It highlighted that s 3 has the potential to result in allegations of improper judicial law-making and activism, which consequently threatens the standing of the judiciary. To avoid such allegations and judicial disrepute thereby created, the judiciary may become deferential to the representative arms of government which compromises the judicial contribution to the dialogue, undermines the protected rights, and threatens the system of rights accountability introduced under the *Charter*, issues to be addressed in Section III.B. The discussion in section III.A.2 confirms that s 32 of the *Charter* is a codification of the British

267 *Ghaidan* [2004] 2 AC 557 [31]. This is supported by Lord Steyn: at [41] and [49].

268 Ibid [31]. Indeed, Lord Nicholls describes the natural outcome of a linguistic obsession as making 'the application of s 3 something of a semantic lottery': at [31].

269 Ibid [41].

270 The Explanatory Memorandum discussion of s 36 is of no assistance: 'The Supreme Court must be of the opinion that a statutory provision cannot be interpreted consistently with a human right'. See Explanatory Memorandum, above n 16, 26).

271 Evans and Evans, above n 256, 271. See also Williams, above n 3, 902-3.

jurisprudence on s 3 of the *HRA* or, at the very least, that both s 32 and s 3 consider a rights-compatible interpretation that undermines the explicit or implicit statutory purpose of the legislation being construed to be an *im*possible interpretation. In other words, the inclusion of 'consistently with [statutory] purpose' will not avoid the controversy over 'possible' interpretations in Victoria, that the inclusion of this phrase does not render the British jurisprudence irrelevant, and that this phrase ought to be construed with care, lest it operates to undermine the primary remedial provision of the *Charter*.

B *Judicial Deference and Institutional Dialogue*

Let us now consider judicial interpretation and judicial declarations. There is more power for the judiciary in interpretation than declaration: through judicial interpretation, a law could operate in a manner differently to that enacted by the representative arms, whereas a declaration does not impact on the validity, operation and enforcement of the law.[272] This may influence where the judiciary draws the line between interpretation and legislating; in particular, one could expect interpretation to be favoured over declaration.[273] Two matters flow from this. First, once the power differential is recognised, there may be calls for judicial deference to control the judicial power. This matter is linked to discussion in Section III.A – the antidote to perceived judicial activism and law-making under s 32 is to require the extension of judicial deference. Judicial deference as a tool to prevent judicially-activist s 32 interpretations, and to prevent an abuse of power in the judicial choice between using s 32 interpretations rather than resorting to s 36 declarations, will be explored in this section. Secondly, the power differential between ss 32 and 36 may result in the over-use of interpretation and the under-use of declaration, a matter to be addressed in section III.C.

The judiciary acquires substantial power under a judicial interpretative model of domestic rights protection. Moreover, the line between proper judicial interpretation and improper judicial law-making is opaque. The British experience highlights that the challenge is to find the correct balance between achieving compatibility through proper interpretations and using declarations. The British judiciary began by adopting judicial deference techniques as *the* tool to achieve this balance: Jonathan Parker LJ opined that 'the interpretative obligation in s 3 is the corollary of "deference", in that the point at which interpretation shades into legislation will inevitably be affected by the degree of "deference" which the courts should accord to the legislative body in recognising its discretionary area of judgment'.[274]

272 See generally Lord Harry Woolf, 'Human Rights: Have the Public Benefited?' (Paper presented at the Thank-Offering to Britain Fund Lecture, The British Academy, London, 15 October 2002) 7.

273 A prime example is the case of *Hooper*, where the Court of Appeal, in effect, required extra-statutory payments to be made in order to avoid incompatibility in preference to issuing a declaration of incompatibility: *Hooper No 2* [2003] EWCA Civ 813. *R v A* [2001] 1 AC 45 is another case which highlights the extremes to which the judiciary will go to avoid incompatibility: see Nicol, above n 221, 442.

274 *Roth* [2003] QB 728 [144].

An unquestioning resort to judicial deference, and the basis upon which deference is extended, must be challenged. In relation to the latter, some approaches to judicial deference sanctioned by the British judiciary reflect a desire to make the judiciary democratically accountable and, at times, produce tensions associated with co-ordinate construction of rights. In relation to the former, judicial deference threatens to undermine the structure and spirit of the British and Victorian models.[275] When judicial deference is extended, legislation is too readily construed as compatible. This means that (a) the standard of justification for and accountability about limits to rights expected of the representative arms is lowered or eliminated altogether (the 'classic rights questions'); and/or (b) the judiciary does not fulfil its duty to ensure compatible interpretations or to issue declarations (the '*HRA/Charter* questions'). Moreover, judicial deference can undermine the establishment of the sought after institutional dialogue, because the judicial voice is non-existent or too deferential.

1 *Judicial Deference and Problematic Dialogue*

Let us begin by examining the types of dialogue promoted by the application of judicial deference in the British jurisprudence. This discussion serves as a lesson for the application of the *Charter*. Individual instances of judicial deference have sanctioned problematic forms of dialogue. On numerous occasions the extension of judicial deference has been linked to the democratic imperative.[276] Democratic accountability has justified judicial deference in decisions regarding numerous subject areas, including the allocation of resources,[277] the eviction of tenants by registered social landlords,[278] the quality of public housing,[279] immigration control,[280] planning decisions,[281] the discriminatory provision of social security benefits,[282] the regulation of mounted foxhunting with dogs,[283] the denial of

275 Danny Friedman, 'From Due Deference to Due Process: Human Rights Litigation in the Criminal Law', (2002) 2 *European Human Rights Law Review* 216, 219.

276 *R v DPP' Ex parte Kebilene* [2002] 2 AC 326 and *Brown v Stott* [2003] 1 AC 681 ('*Brown*').

277 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions; Ex parte Holding and Barnes PLC* [2003] 2 AC 295 *('Alconbury')*. This decision has been described as a 'striking illustration of judicial deference': Nicol, above n 221, 447. See, eg, *Hooper No 1* [2002] EWHC Admin 191 [115].

278 *Donoghue [2001] QB 48 [69] – [72]; Sheffield City Council v Smart; Central Sutherland Housing Company Limited v Wilson* [2002] EWCA Civ 4 [32], [35], [40]-[42] *('Sheffield City Council'); Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271 [41], [78].

279 *Lee v Leeds City Council; Ratcliffe and Ors v Sandwell Metropolitan Borough Council* [2002] EWCA Civ 6 [49].

280 *R v Secretary of State for the Home Department; Ex parte Isiko* [2001] 1 FCR 633 [31]; *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391 [74].

281 *Alconbury* [2003]2 AC 295 [71] – [72], [129], [159].

282 *R (Reynolds) v Secretary of State for Work and Pensions* [2002] EWHC Admin 426, [27], [34]; *R (Carson) v Secretary of State for Work and Pensions; R (Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797 [72] – [73], [82] – [83] *('Carson'); Hooper No 2* [2003] EWCA Civ 813 [63].

283 *Adams v Lord Advocate* (Unreported, Outer House, Court of Session, P557/02, 31 July 2002) [92] *('Adams')*.

prisoners' right to vote,[284] and the treatment of suspected terrorists.[285] Laws LJ stated that clashes between rights and legislation should 'be exceptional, not least for the good reason that distribution of the Convention rights goes hand-in-hand with deference to the *democratic* legislature'.[286]

Regardless of whether judicial deference is extended when answering the 'classic rights questions' or the '*HRA/Charter* questions', extending deference based on democratic imperatives encourages institutional dialogue based on judicial accountability to the majority. Dialogue based on judicial accountability proceeds with all arms of government speaking 'in similar voices that reflect and defer to majority sentiment'.[287] The aim of this type of dialogue is consensus. Because the representative arms more closely reflect majority will, the courts should defer to their judgments and the representative arms should respond to judicial decisions that are unacceptable to the democratic mainstream by re-asserting the majority will.[288]

There are many weaknesses with this type of institutional dialogue. First, this type of dialogue precludes the judiciary from making *its distinct* contribution; rather, this model requires the legislature and judiciary to 'devote their different talents to the same exercise: the discovery and reflection of majority sentiment'.[289] This is particularly problematic; the non-majoritarian perspective that the judiciary brings to the rights debate is legitimate and its inclusion is imperative – if not for the judiciary, this perspective may not be heard.[290] Second, this model of dialogue forfeits the educative effect judicial perspectives may have on the representative arms and the concomitant critical self reflection this engenders. Third, it incorrectly presupposes that consensus is the aim of the dialogue, and that consensus about resolutions to conflicts over rights exists.[291] Fourth, there is ample opportunity for the expression of democratic concerns within the structure of the *HRA*. The representative arms in policy-making and law-making can place limits on rights to further non-protected democratic values. If majoritarian-inspired limits are questioned by the judiciary through interpretations or declarations, there are numerous representative responses available to re-assert majority sentiment, as discussed in section II.D.2 above.

Fifth, rights instruments require transparent justifications for representative decisions that limit rights. Too readily deferring to representative decisions does

284 *R (Pearson and Martinez) v Secretary of State for the Home Department* EWHC Admin 239 [20] (*'Pearson'*).

285 *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 [62] (Lord Hoffman); *A v Secretary of State for the Home Department* [2004] QB 355 [40], [44] (Woolf CJ), [81] (Brooke LJ) ('A').

286 *Sheffield City Council* [2002] EWCA Civ 04 [41] (emphasis added).

287 Roach, above n 94, 495.

288 Ibid 496.

289 Roach, above n 70, 245.

290 See Ibid 243-6; Roach, above n 94, 494-6.

291 Janet L Hiebert, 'A Relational Approach to Constitutional Interpretation: Shared Legislative Responsibilities and Judicial Responsibilities' (2001) 35 *Journal of Canadian Studies* 161, 170 ('A Relational Approach').

not ensure an independent review of the scope given to the relevant rights and the justifications offered for limits placed on rights. Indeed, the 'most damaging form of deference' is where the subject matter itself is considered to warrant deference, because questions of rights and justifiable limits are *not even asked* (the 'classic rights questions'), let alone questions of interpretation or declaration (the '*HRA/ Charter* questions').[292] This may eventually weaken the justificatory aspects of public decision-making as the representative arms realise that their reasons for justification are never thoroughly scrutinised and assessed. Sixthly, there is an advantage in democratic sentiment being expressed by the representative arms through policy-making, law-making, and the response mechanisms, rather than by relying on judicial deference – that is, accountability. Allowing judges to contribute their perspective about rights and their limits to the debate, unfiltered by deferential niceties, highlights the judicially-assessed cost of democratic action in rights-terms. The judicial perspective may be unacceptable from the democratic viewpoint and not prevail, but at least the representative arms are forced to acknowledge and take responsibility for the judicially-assessed rights implications of their actions. Finally, this may result in the 'under-enforcement'[293] of rights. Rights protect all, including the minority within a majority. If rights standards are ultimately dictated by the majority, minorities and the unpopular are in a precarious position.

There are also examples of judicial deference encouraging a co-ordinate construction approach to the institutional dialogue in the British jurisprudence. A co-ordinate construction model envisages that all arms of government are empowered to define rights and limits thereto, with the judicial, executive and legislative interpretations of rights being *equally* valid.[294] Moreover, there is no ordering of the rival opinions, such that 'what the Court has concluded to be illegal and unconstitutional may be considered by the legislature and the executive to be perfectly legal and constitutional'.[295]

Co-ordinate construction is evident in relation to the definition of rights (mechanism one: the first 'classic rights question'), with numerous examples of deference being extended 'as part of the initial determination as to the scope of the right in question, and as to whether there has been a breach of it'.[296] When the judiciary defers to the legislative understandings of rights, it does not voice its opinion on the scope of rights and it potentially subjugates its rival interpretation. Co-ordinate construction is also evident in the judiciary's assessment of representative

292 Richard A Edwards, 'Judicial Deference under the Human Rights Act' [2002] 65 *Modern Law Review* 859, 868.

293 See Roach, above n 70, 230.

294 Roach, above n 94, 490.

295 Roach, above n 70, 242. See also Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 249 (citation omitted). For a European view of co-ordinate construction, see Alec Stone, 'Complex Coordinate Construction in France and Germany', in C Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (1995) 205, 205-25.

296 Paul Craig, 'The Courts, the *Human Rights Act* and Judicial Review' (2001) 117 *Law Quarterly Review* 589, 592, discussing *Brown* [2003] 1 AC 681, *Pearson* EWHC Admin 239, *Lambert* [2002] 2 AC 545, *Alconbury* [2003] 2 AC 295 See also Edwards, above n 292, 868-70.

justifications for limitations on rights (mechanism two: the second 'classic rights question'). The judiciary has regularly upheld the objective of a limitation, and held that the necessity, rationality and proportionality of a limitation "'is obvious or self-evident"',[297] without articulating its reasoning for so holding[298] or requiring 'convincing evidence'.[299] Indeed, the limitations analysis in the *Brown* case has been described as 'superficial and attenuated', there being 'a rather haphazard approach to the issue of proportionality', with 'no application of the [proportionality] test at a level of sophistication that might reasonably have been expected'.[300] The lack of reasoning and supporting evidence[301] in these cases indicates that the judiciary is not rigorously seeking justifications for limits, and may be succumbing to rival interpretations of rights.

Co-ordinate construction is problematic from an institutional dialogue perspective, and is an unworkable compromise between parliamentary and judicial supremacy. First, rather than respecting the *distinct* and *unique* roles of the different governmental institutions, it requires each institution to perform the same role – the interpretation of rights. This requirement does not account for the different *motivations* of the institutions. For instance, it assumes that the majoritarian institutions will selflessly protect the rights of the unpopular, vulnerable and minority. Nor does the requirement account for the different *roles* of the institutions. The role of the judiciary is to adjudge the fairness and proportionality of governmental action based on principle and rationality, not to rubber stamp decisions of the representative arms based on policy, the mediation of conflicting views and expediency. Nor does co-ordinate construction account for the different *strengths* of the institutions. The representative arms are well placed to identify pressing legislative objectives and assess the least-rights restrictive ways of achieving them, whereas the judiciary is well placed to assess the substantive content of rights.[302]

Second, dialogue based on co-ordinate construction pits the rival interpretations against one another without a *de jure* rule dictating which interpretation is to be preferred.[303] This will inevitably inflate tensions between the representative arms

297 Edwards, above n 292, 880 (citation omitted). See, eg, *A* [2002] EWCA Civ 1502 [40] (Woolf CJ).

298 The case of *Donoghue* [2002] QB 48[72] is an example. See Edwards, above n 292, 864-5, 880.

299 Edwards, above n 292, 864, 870-1, 881, discussing *Brown* 1 AC 681 and *Farrakhan* [2002] QB 1391. See also Richard Clayton, 'Regaining a Sense of Proportion: The *Human Rights Act* and the Principle of Proportionality' [2001] *European Human Rights Law Review* 504, 525:

> A close analysis of the factual justification for the decisions of public authorities is the only practical method of achieving a proper balance between respect for the democratic will and the protection of human rights... As the Canadian case law makes clear, protection of fundamental rights will only become effective if the courts engage in a detailed and penetrating examination of the facts where public authorities seek to justify restrictions placed upon them.

300 Edwards, above n 292, 871.

301 The *Canadian Charter* requires those who pursue legislative objectives in a way that denies 'bedrock values of our democratic tradition' to 'justify their action by evidence and reasoned argument': Sharpe, above n 56, 452.

302 Roach, above n 94, 493.

303 See Roach, above n 70, 242-3; Roach, above n 94, 490-3. Although in non-constitutional domestic rights instruments, the representative arms are more likely to win out.

and the judiciary and does not encourage a respectful exchange. If each arm can insist on the validity of its own interpretation of rights, there is no incentive to be open to the persuasion of other perspectives, and to genuinely critique one's own preconceived ideas against those of rivals. Third, allowing the rival interpretation of the representative arms to prevail without judicial input and engagement forfeits the benefits associated with an educative dialogue.

Fourth, too readily accepting the representative arms' conception of rights undermines the accountability mechanisms within the *HRA*. Despite the preservation of parliamentary sovereignty under the *HRA*, 'judges have gone further than is necessary in dismissing human rights claims by asserting the importance of the intentions of Parliament'.[304] The dialogue does not even engage the 'classic rights questions', let alone the '*HRA/Charter* questions'. This undermines rights, is 'inimical to the culture of justification'[305] under rights instruments, and mutes the judicial contribution on these matters. Finally, no institution should be able to determinatively assert *its* understanding of the rights against the other institutions. A co-ordinate construction approach to dialogue, *de facto*, produces a *legislative monologue* about rights.

However, rejecting a co-ordinate construction version of dialogue by no means sanctions judicial supremacy vis-à-vis rights enforcement. The representative arms can enact laws based on their own understanding of rights, but they must proceed within the structures set down by the rights instruments, including properly justifying limits placed on rights, and utilising the representative response mechanisms when there is disagreement with the judiciary.[306]

2 *General-Application Principles of Deference*

Let us now consider how general-application principles of deference in Britain impact on the institutional dialogue, which again provides valuable lessons for Victoria. There have been numerous attempts at elaborating general-application deference principles. These attempts suffer from the problems associated with dialogue as judicial accountability and co-ordinate construction. They also create their own unique difficulties. Let us consider the model proposed by Laws LJ in the *Roth* case in detail.

Laws LJ associates the need for deference with the democratic legitimacy of the representative arms of government and envisages a spectrum – at times deference will be almost absolute and at other times it will be minimal.[307] His Lordship then identifies four principles. The first principle envisages dialogue as judicial accountability – 'greater deference' is to be extended to primary legislation than to

304 John Wadham, 'The *Human Rights Act:* One Year On' [2001] *European Human Rights Law Review* 620, 631.

305 Edwards, above n 292, 870.

306 Roach, 'Constitutional and Common Law Dialogues', above n 94, 493. See further Hiebert, above n 291, 169.

307 *Roth* [2003] QB 728 [75].

subordinate legislation or executive decisions, because where the decision-maker is Parliament the tension between democracy and rights 'is at its most acute'.[308] His Lordship's second principle requires more deference '"where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified"'.[309] As discussed above, too readily deferring to the balance struck by the representative arms undermines the requirements of accountability and justification, and stifles the judicial contribution to the debate. Elements of judicial accountability and co-ordinate construction emerge.

His Lordship's third principle – 'that greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts'[310] – is simply unworkable. Examples given of uniquely representative matters are defence of the realm and immigration control; examples given of uniquely judicial matters are maintenance of the rule of law and criminal matters.[311] However, subject matters cannot be so easily categorised. For example, criminal matters, which are supposedly clearly within the realm of the judiciary, have regularly been classified as social problems justifying the extension of judicial deference. For instance, sentencing is part of the trial process, but the severity of penalty has been classified as a social problem justifying deference.[312] The rules relating to admissibility of evidence in criminal trials have also been classified as addressing a social problem thereby justifying deference.[313] The denial of the vote to prisoners provoked a deferential response, despite its intimate link to crime and punishment.[314] The third principle allows *ad hoc*, rather than principled, exercises of judicial discretion.[315] The emerging dialogue centres on democratic accountability and ready acceptance of the representative point of view – or co-ordinate construction. The fourth principle 'is that greater or lesser deference will be due according to whether the subject matter lies more readily

308 Ibid [83]. See also *Holder v Law Society* [2003] EWCA Civ 39 [31].

309 *Roth* [2003] QB 728 [84], citing *Kebilene* [2002] 2 AC 326 , 381 (Lord Hope).

310 *Roth* [2003] QB 728 [85]. This has been supported in other cases, see, eg, *R v A (No 2)* [2002] 1 AC 45 [36] (Lord Steyn).

311 *Roth* [2003] QB 728 [86] (Laws LJ).

312 Ibid [183] (Jonathan Parker LJ); *R v Lichniak; R v Pyrah* [2003] 1 AC 903 [14]. There are strong arguments that the seriousness of a crime cannot dictate the amount of deference afforded: Friedman, above n 275, 222-3.

313 *R v A (No 2)* [2002] 1 AC 45 [99] (Lord Hope).

314 *Pearson* (Unreported, Queen's Bench Division (Divisional Court), CO/31/01, CO/448/01, 4 April 2001).

315 It is not easy to distinguish the criminal law from the social policy issues being addressed under the criminal law, such that 'deciding when exactly the courts will resort to deference has become a speculative business as they adopt the doctrine on a largely subjective basis': see Edwards, above n 292, 864. In Canada, the criminal law is no longer characterised as a matter between the State and individual, but about the competing rights of victim and accused thereby justifying greater judicial deference: see Roach, above n 70, 165-6.

within the actual or potential expertise of the democratic powers or the courts'.[316] The third principle seems to be a particular instantiation of the fourth principle. The problems associated with the third principle are applicable to the fourth.

3 *Dialogue Based On Distinct Yet Complementary Institutional Roles*

Despite the tendency of judicial deference to promote dialogue as co-ordinate construction and judicial accountability, and the unworkable general-application principles of judicial deference, there are signs that the preferred dialogue approach is gaining favour in Britain. The House of Lords, in *R (on the application of Prolife Alliance) v BBC*,[317] recognises that the *HRA* requires an institutional dialogue which relies on the distinct, yet complementary, roles of the differently situated and motivated arms of government, and that automatic and undue judicial deference may be contrary to such a dialogue. This case concerned whether a registered political party, Prolife Alliance, could use its party election broadcast to broadcast graphic images of aborted and mutilated foetuses.

Lord Walker sought to apply Laws LJ's principles of deference when judicially reviewing the proportionality of the broadcasters' decision refusing to broadcast the images.[318] Lord Walker could only apply the second principle.[319] Criticism of Laws LJ's deference principles is implicit in Lord Walker's explanation of the inapplicability of the other principles:

> In this case (as in many cases raising human rights issues) responsibility for the alleged infringement of human rights cannot be laid entirely at the door of Parliament or ... the ... executive decision-maker. Responsibility ... is ... spread between the two ... Moreover the court's ... role as the constitutional guardian of free speech is a proposition with which many newspaper publishers might quarrel ... A third difficulty is that the principles stated by Laws LJ do not allow, at any rate expressly, for the manner (which may be direct and central, or indirect and peripheral) in which Convention rights are engaged in the case before the court.[320]

Lord Walker cites with approval commentators who warn that '[t]he need for deference should not be overstated' and state that '[i]t remains the role and responsibility of the Court to decide whether, *in its judgment*, the requirement of

316 *Roth* [2003] QB 728 [87]. Laws LJ gives the instance of issues impacting on macro-economic policy. Laws LJ's views have been approved in many cases, see, eg, *Carson* [2003] EWCA Civ 797 [73], [82] – [83]; *Adams* (Unreported, Outer House, Court of Session, P557/02, 31 July 2002) [90], [92]. C.f. Francesca Klug, 'Judicial Deference Under the *Human Rights Act 1998*' [2003] *European Human Rights Law Review* 125, 132.

317 *Prolife Alliance* [2004] 1 AC 185.

318 Only some of the Law Lords considered the earlier question of whether the art 10 freedom of expression was violated by subjecting the content of party election broadcasts to restrictions on offensive material: Ibid [53] (Lord Hoffman), [86] (Lord Scott), [125] (Lord Walker). Lord Nicholls, with whom Lord Millet agreed, did not (at [9] – [10]).

319 Ibid [137].

320 Ibid.

proportionality is satisfied'.[321] Indeed, his Lordship suggests that the word deference 'may not be the best word to use, if only because it is liable to be misunderstood'.[322] Lord Walker warns that it is too early for the judiciary 'to go too far in attempting any comprehensive statement of principle. But it is clear that any simple "one size fits all" formulation of the test would be impossible'.[323]

In direct response to Laws LJ, Lord Hoffman rejected the idea that deference – with 'its overtones of servility, or perhaps gracious concession'[324] – appropriately describes the new relationship between the judiciary and representative arms. Rather, his Lordship insisted that the rule of law and the separation of powers dictate that the judiciary decide which arm of government has the power to act and the limits of that power.[325] The judicial allocation of decision-making power and the articulation of its limits are based on 'principles of law', not 'courtesy or deference'.[326] His Lordship recognised the different motivations and strengths of the arms of government, and linked the allocation of responsibilities to these.[327] However, his Lordship insisted that '[t]he allocation of these decision-making responsibilities is based upon recognised [legal] principles': that judicial independence 'is necessary for a proper decision of disputed legal rights or claims of violations of human rights is a legal principle', just as the necessity for majority support 'for a proper decision on policy or allocation of resources is also a legal principle'.[328] When the judiciary allocates decision-making responsibility to the executive or legislature, 'it is not showing deference' but 'deciding the law'.[329] Lord Hoffman captures the essential – yet vital – difference between deference as respect, which is acceptable within the preferred institutional dialogue framework, and deference as submission, which is not.[330]

321 Ibid [138] (emphasis added) (citation omitted).

322 Ibid [144].

323 Ibid. Whatever the test or principles of deference, there will always be holes. The version proposed by Rabinder Singh, Murray Hunt and Marie Demetriou, 'Is There a Role for the "Margin of Appreciation" in National Law after the *Human Rights Act?*' (1999) *European Human Rights Law Review* 15, 21-2 includes aspects of deference as judicial accountability (whether the body under review is elected or otherwise accountable to the electorate; whether there is a fairly constant standard throughout democratic societies regarding this issue), elements of co-ordinate construction (whether the right is important, whether the interference is serious, whether aim of law is to promote human rights), and elements of the distinct, yet complementary, role approach (the relevant specialist knowledge of the body under review compared with that of the court, whether we have unpopular or vulnerable people). The version described by Friedman, above n 275, 219-24, equates closely with the distinct, yet complementary, role approach (e.g. deference should not frustrate s3; popular opinion should not sway constitutional interpretation), but seems too judicial-centric. Edwards suggests that the British judges should adopt the *Canadian Charter* approach: Edwards, above n 292, 871-80.

324 *Prolife Alliance* [2004] 1 AC 185 [75].

325 Ibid.

326 Ibid [76].

327 Ibid: 'The courts are the independent branch of government and the legislature and the executive are ... the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others.'

328 Ibid.

329 Ibid. In this particular case, it was proper for Parliament, as representative of the people, to decide whether the pursuit of freedom of expression should be subject to taste and decency: at [77]. Lord Hoffman's view has been approved in later cases, such as, *Carson* [2003] EWCA Civ 797 [70].

330 See also Edwards, above n 292, 879; Lord Irvine, above n 118, 314.

In *Bellinger*, Lord Nicholls also adopts the preferred dialogue model. As discussed above, the House of Lords held that the legislative definition of marriage, as being between parties that were respectively male and female,[331] was incompatible with rights in the context of post-operative transsexuals.[332] His Lordship could not interpret away the incompatibility because to recognise Mrs Bellinger, a post-operative female, as a female under the legislation 'would necessitate giving the expressions "male" and "female" in [the] Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex'.[333] Such an interpretation went beyond the legitimate task under s 3.[334] In so concluding, Lord Nicholls held that such an interpretation 'would represent a major change in the law, having far-reaching ramifications', raising issues that 'are altogether ill-suited for determination by courts and court procedures' but which are 'pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation'.[335] His Lordship concluded judicial intervention 'would be peculiarly inappropriate'[336] given: first, the uncertainty of the criteria for recognising when gender reassignment has occurred; secondly, that legal recognition of gender re-assignment should not be approached in a piecemeal fashion given the many areas of regulation affected; and, thirdly, the long-standing social and religious understanding of marriage.[337]

There was nothing in Lord Nicholls' analysis indicating judicial deference was extended on democratic grounds or sanctioning a rival interpretation, despite the obvious sensitivity of the subject matter. Rather, his Lordship recognised that Parliament ought to begin the conversation on this matter because of its relative institutional strengths. The House of Lords granted a declaration of incompatibility,[338] rather than avoiding the rights issue altogether by refusing to assess the 'classic rights questions' because of the sensitivity of the subject-matter or the democratic mandate, or by refusing to disagree with the representative arms by twisting the interpretative obligation.[339]

331 *Matrimonial Causes Act 1973* (UK), c 18, s 11(c).

332 *Bellinger* [2003] 2 AC 467 [20] -[27].

333 Ibid [36]. See also Lord Hope: at [56], [57], [69]; Lord Hobhouse: at [71], [77]; Lord Scott: at [80]; Lord Rodger: at [81], [83].

334 Ibid [78] (Lord Hobhouse).

335 Ibid [37].

336 Ibid [38].

337 Ibid [39]-[46]. In relation to the first consideration, concern was expressed about the flow-on effects of nominating the criteria: at [41].

338 Ibid [53]-[55], [70], [78] – [79], [80], [81].

339 The legislature responded by enacting the *Gender Recognition Act 2004* (UK) c 7. The legislation allows someone to apply for a "gender recognition certificate" if the person is living in the other gender, or has changed gender. It then lists a range of consequences flowing from the issue of a certificate. The basic rule is that the person's gender becomes, for all purposes, the acquired gender. In particular, the legislation amends the *Matrimonial Causes Act* to recognise the acquired gender. It also goes beyond the judicial decision by exempting clergymen from having to solemnize a marriage of a person in an acquired gender and allowing annulments of marriages if, at the time of the marriage, one party to the marriage did not know the other party was previously of another gender.

4 *Deference and Justificatory and Accountability Requirements*

The *HRA* and the *Charter*[340] impose requirements of justification and accountability vis-à-vis protected rights. When creating policy and legislation that impact on rights, the representative arms must justify their views on rights and limits thereto. When legislation is judicially reviewed, the judiciary must scrutinise the justifications offered. If the judiciary disagrees with the justifications of the representative arms, it can resolve incompatibilities by interpretation or issue a declaration. If parliament wishes to retain the incompatibility, it can enact legislation that negates the interpretation and bolster this was an executive statement of incompatibility, or retain legislation irrespective of a declaration. This process requires the representative arms to confront the judicially-assessed rights implications of their decisions and to justify their choices. Unfortunately, the British judiciary's 'preoccupation ... with leaving an area of discretion to the executive and legislature has frustrated the development of a culture of justification'.[341] The extension of judicial deference means that the representative arms are not required to justify their decisions and the judiciary relinquishes its responsibility to scrutinise.[342] This weakens rights protection and the citizenry does not get the benefits of an educative institutional dialogue with its justificatory teachings.

Fortunately, there is increasing judicial recognition in Britain that the *HRA* introduces a requirement of justification which, in turn, creates an institutional dialogue about rights and their limits.[343] Lord Steyn opined that '[a] culture of justification now prevails: it requires constitutional arrangements which differ from constitutional principles to be justified in the public interest'.[344] Lord Hoffman recognised that although the retention of parliamentary sovereignty allows parliament to legislate incompatibly with rights, there *are* political constraints on power: 'the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost'.[345] Woolf CJ recognised that 'the courts must carefully scrutinise the explanations given by the executive for its actions'.[346] Morritt VC also refused to allow judicial deference 'to be equated with unquestioning acceptance'[347] of representative actions and justifications: 'It is one thing to accept the need to defer to an opinion which can be seen to be the product of reasoned consideration based

340 Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006, 1293 (Mr Hulls, Attorney-General); Victoria, *Parliamentary Debates,* Legislative Assembly, 13 June 2006, 1990 (Ms Neville); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2556 (Mr Madden, Minister for Sport and Recreation); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2658 (Mr Scheffer).

341 Edwards, above n 292, 882.

342 Klug, above n 316, 132.

343 Edwards, above n 292, 867.

344 Lester, above n 125, 688, citing Lord Steyn.

345 *R v Secretary of State for the Home Department; Ex parte Simms and Anor* [2000] 2 AC 115, 131.

346 *A* [2004] QB 335 [44] (Woolf CJ).

347 *Wilson v First Country Trust Ltd* [2002] QB 74 [33] (Morritt VC, with Chadwick and Rix LLJ agreeing).

on policy; it is quite another thing to be required to accept, without question, an opinion for which no reason of policy is advanced'.[348]

5 *Deference and Under-Enforcement of Rights*

The final issue is the under-enforcement of rights. Whenever deference is extended, the standard of justification is reduced and rights are under-enforced. This is evident from the British experience.[349] For example, according to *Kebilene*, judicial deference may be necessary in relation to all of rights.[350] Such an expansive deference rule promotes parliamentary sovereignty, but substantially undermines rights. The problems with under-enforcement of the rights are manifold.

First, to extend judicial deference with respect to the 'classic rights questions' may result in judicial sanctioning of dubious interpretations of rights, illegitimate legislative objectives, or irrational, unreasonable, overly restrictive or disproportionate legislative means. The judiciary basically abdicates its responsibility as a guardian of rights.[351] If the judiciary does not even engage with the 'classic rights questions', the '*HRA/Charter* questions' will too go unanswered. Second, under-enforcement undermines the authority of the democratically-mandated rights instrument, which requires policy and legislative decisions to be justified against rights.[352] Third, it may have longer-term consequences, such as reducing the motivation of the representative arms to consider rights issues in planning policy and legislation if there is no real threat of accountability.

Fourth, this outcome is not necessary given the structure of modern rights instruments. Judicial deference is used to avoid judicial supremacy (or at least undesirable judicial activism).[353] Given the structure of the *HRA* and the *Charter*, however, one could expect the opposite – that is, vigorous judicial contributions. Both instruments protect parliamentary sovereignty by giving judges powers of interpretation and declaration only: 'The issue of judicial deference to the legislature was settled through the intersection of'[354] judicial interpretation and declaration. Parliament can override judicial interpretations by ordinary legislation, simply ignore declarations, and override the operation of the *Charter*. Given this, 'in principle it should follow that, other things being equal, the courts ought to be willing to apply the proportionality test more rigorously and critically to

348 Ibid. The Lord Chancellor also recognises that judicial deference should not result in a lack of accountability: Lord Irvine, above n 118, 314.

349 Klug and O'Brien, above n 222, 653; Clapham, above n 126, 131.

350 *Kebilene* [1999] 3 WLR 972, 994. That is, deference is applicable to all categories of rights: absolute, qualified and limited rights.

351 *Roth* [2003] 1 QB 728 [81].

352 Lord Irvine, above n 118, 314: 'The *[UK] Human Rights Act* constitutes a promise to the citizens that public bodies will ... act compatibly with their rights.'

353 Many commentators have noted that the judiciary seems intent on making the rights fit with the common law, rather than vice-versa: Alasdair Maclean, 'Crossing the Rubicon on the Human Rights Ferry' (2001) 64 *Modern Law Review* 775, 787; Wadham, above n 304, 631.

354 Klug, above n 316, 128. 'There is no need ... to develop complex theories of judicial deference if the *scheme* of the Act is properly appreciated:' at 133.

[legislation]',[355] rather than deferentially. Moreover, under the structure of the *HRA* and *Charter*, judicial activism can be readily balanced by legislative activism via the representative response mechanisms, reducing the need for complex theories of judicial deference: '[c]onstitutional dangers exist no less in too little judicial activism as in too much'.[356]

6 *Conclusion*

The search for a rule of judicial deference to protect against judicial activism in implementing the interpretation power, or by favouring judicial interpretation over judicial declaration, is unwarranted because of the structure of the *HRA* and *Charter*. Moreover, the judicial deference strategy has its risks: it has the tendency to sanction problematic forms of institutional dialogue, undermines the culture of justification, and weakens the protection afforded by rights. The British experience with judicial deference ought to provide valuable lessons for Victoria.

C *The Balance Between Interpretation and Declaration*

Let us consider the interaction between judicial interpretations and judicial declarations. If the power of interpretation vis-à-vis declaration is superior, there is an incentive for the judiciary to unduly favour interpretation resulting in the under-use of declarations. The British judiciary has, on occasion, pushed interpretation to its extremes to avoid legislative incompatibility.[357] The under-use of declarations may undermine parliamentary sovereignty and hinder the representative arms' ability to contribute to the institutional dialogue.

The British parliamentary debates indicate that judicial interpretation and declaration are to operate in tandem. A preference for rights-compatible interpretations, rather than frequent declarations, was emphasised to preserve parliamentary sovereignty.[358] The Lord Chancellor stated that the courts should 'strive to find an interpretation of legislation which is consistent with convention rights *so far as the language of the legislation allows* and only in the last resort to conclude that the legislation is simply incompatible with them'.[359] His Lordship stated that 'in 99 per cent of the cases ... there will be no need for judicial declarations of incompatibility'.[360] The Home Secretary expected 'that, in almost all cases, the courts will be able to interpret legislation compatibly with

355 Edwards, above n 291, 867-8 (citation omitted).

356 *Roth* [2003] 1 QB 728 [54] (Simon Brown LJ).

357 See above n 273.

358 This is evident in United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) Cm 3782, [2.13]. It was also confirmed in debate: United Kingdom, *Parliamentary Debates*, House of Lords, 19 January 1998, col 1294 (Lord Irvine, Lord Chancellor).

359 United Kingdom, *Parliamentary Debates*, House of Lords, 18 November 1997, col 535 (Lord Irvine, Lord Chancellor) (emphasis added). See also United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, col 1240 (Lord Lester).

360 United Kingdom, *Parliamentary Debates*, House of Lords, 5 February 1998, col 840 (Lord Irvine, Lord Chancellor).

the Convention. However, we need to provide for the *rare* cases where that cannot be done'.[361]

The British judiciary have been mindful of this sentiment. In the first couple of years, the judiciary focussed more heavily on interpretations than declarations. There was arguably a reluctance to use declarations. The judiciary viewed s 4 'as a measure of last resort' because it presumed a declaration 'effectively *forc[es]* the executive, through Parliament, to change the law'.[362] There was a *misconception* 'that legislative amendment *must* follow a declaration'.[363] This is simply not true. Certainly, the representative arms may respond, but a response is not obligatory, and a response need not be the wholesale adoption of the judicial perspective. Indeed '[i]t will *not* be a sign that the [*HRA*] has failed when the day comes ... that the Government, with strong Parliamentary backing, refuses to amend a statute that the courts declare breaches fundamental rights'.[364]

In contrast, statistics from the first four years of jurisprudence indicate a different picture. Lord Steyn, in *Ghaidan*, highlighted that the interpretative power was used in 10 cases, and the declaration power was used in 15 cases, of which five were reversed on appeal.[365] In his Lordship's opinion, the statistics reveal 'a question about the proper implementation'[366] of the *HRA*, given that interpretation was supposed to be the primary remedial mechanism. The British parliamentary debate is often cited to support Lord Steyn's sentiment. This position is flawed. As Klug and Starmer highlight, this parliamentary debate is not 'a statement of law, nor ... an actuarial prediction', but rather a 'political assertion' about the state of British law at the *HRA* enactment date: that it is compatible and that neither interpretation or declaration would be needed often.[367] Despite the primacy of interpretation over declaration, no assumptions can be made about the frequency of the use of either.[368] Indeed, if we go back to parliamentary sovereignty and institutional dialogue, the frequent use of declarations could be expected. Declarations preserve parliamentary sovereignty and are one trigger for continuing contributions to the dialogue by the representative arms.[369]

The salient point is that the right balance must be struck between interpretation and declaration, and that balance is difficult to predict and, at times, difficult

361 United Kingdom, *Parliamentary Debates,* House of Commons, 16 February 1998, col 778 (Mr Jack Straw MP, Secretary of State for the Home Department) (emphasis added).

362 Klug, above n 316, 131 (emphasis added).

363 Ibid (emphasis in original). See also Wadham, above n 304, 629: 'The judiciary's cautious approach to the Act may in part be explained as an attempt to distance itself from accusations of the judiciary usurping parliament's function (never a realistic prospect!).'

364 Klug, above n 316, 132.

365 *Ghaidan* [2004] 2 AC 557 [39] and Appendix (Lord Steyn). By 2005, 17 declarations of incompatibility had been issued, with seven being reversed on appeal: Francesca Klug and Keir Starmer, 'Standing Back From the *Human Rights Act:* How Effective Is It Five Years On' [2005] Winter *Public Law* 716, 721 ('Standing Back').

366 *Ghaidan* [2004] 2 AC 557, [39].

367 Klug and Starmer, above n 365, 722.

368 Ibid.

369 Ibid.

to justify. Declarations have a vital role to play: they are 'a vehicle for cross-institutional dialogue between the limbs of government over what constitutes ... rights compliance'.[370] To achieve dialogue based on the distinct, yet complementary, roles of the arms of government requires robust use of declarations.[371] Uses of declarations should not be seen as confrontational or 'activist' in themselves; nor should judges extend deference or use interpretation tools improperly to avoid declarations. The structure of the *HRA* and *Charter*, and the consequent institutional dialogue, resolve fears about illegitimate judicial activism and law-making.

IV CONCLUSION

The enactment of a domestic human rights instrument for Victoria (and Australia, for that matter) is long overdue and should be supported. The issue is not whether Victoria should have a bill of rights; but rather, which model should be adopted. The Victorian Parliament has adopted an interpretative model based heavily on the *HRA*. This article has sought to highlight some of the problems that have arisen under the *HRA*. The main problem is the precise scope of the judicial interpretative power. There is no clear distinction between proper judicial interpretation and improper judicial law-making. This could easily result in allegations of improper judicial activism, calls for extensive judicial deference, a lack of rights accountability, under-enforcement of rights, and an under-use of declarations. These difficulties must be resolved by reference to the *Charter* itself.

First, judicial activism ought to be expected. The judiciary cannot invalidate legislation and the representative arms can respond to any judicial interpretations or declarations. Therefore, the judiciary ought to thoroughly and critically review representative actions, and express its honest, unique and expert view without fear. Secondly, judicial activism must not be offset by the unwarranted or improper extension of judicial deference. Rather, the *Charter* adopts mechanisms to offset judicial activism with representative activism – namely, the representative response mechanisms. The judiciary must fully contribute its view in order to create the sought after dialogue, to promote the culture of justification, and to protect against under-enforcement – a challenge made easier in the knowledge that its perspective on rights is not the final say on the matter. Thirdly, the judiciary must acknowledge and respect the retention of parliamentary sovereignty. The judiciary must utilise declarations in appropriate circumstances, rather than extend deference or stretch 'possible' interpretations as a means to avoid confrontation with the representative arms. The judiciary must also accept that usage of declarations will produce rights-incompatible outcomes in cases at hand and future uses of the impugned law. Using declarations appropriately should shield the judiciary from allegations of inappropriate acts of judicial legislation and activism, and ensure a transparent dialogue between the institutions of government: 'dialogue based on the power of interpretation ... will be less transparent than dialogue based on clear

370 Klug and O'Brien, above n 222, 662.

371 Klug, above n 316, 131.

declarations by either the courts or Parliament that legislation is incompatible with [rights]'.[372]

These difficulties are not insurmountable. Rather, the Victorian arms of government ought to be aware of them and not replicate them under the *Charter*. In particular, the judiciary (when developing jurisprudence on the interpretative obligation) and the representative arms (when responding to judicial decisions) ought to be mindful of the type of institutional dialogue they are creating. Moreover, the commitment to preserving parliamentary sovereignty cannot be ignored by any arm of government. The judiciary must utilise the *Charter* mechanisms in a manner that respects parliamentary sovereignty. And, importantly, the representative arms must also guard against simply deferring to judicial perspectives – we do not want the representative arms to simply *Charter*-proof[373] their policy and legislative initiatives, which would produce a judicial monologue. The success of the *Charter* will come down to a fine balancing act: balancing between rights and democracy, parliamentary sovereignty and rights-accountability, dialogue and monologue, and legislative activism and judicial activism.

372 Roach, above n 70, 280, n 62.

373 Hiebert, above n 9, 224: 'Risk-aversion epitomises a judicial-centric approach.'