THE QUIET DEMISE OF DECLARATIONS OF INCONSISTENCY UNDER THE *VICTORIAN CHARTER*

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In over a decade since the Victorian Charter of Human Rights and Responsibilities Act 2006 *(Vic) (*'Victorian Charter'*) fully commenced operation in 2008, there has yet to be a validly made declaration of inconsistent interpretation. A declaration of inconsistent interpretation is a statement made by the Victorian superior courts that a statutory provision is incompatible with human rights protected by the* Victorian Charter. *Considered to be an integral feature of the* Victorian Charter, *little has been said about the likely reasons for this 'quiet demise' of the declaration power. This article undertakes that examination, in light of the High Court case of* Momcilovic v The Queen *(2011) 245 CLR 1, ensuing treatment of the declaration power by the Victorian courts, and other issues associated with the* Victorian Charter.

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I Introduction

Section 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') confers a power on the Victorian superior courts to declare that legislation cannot be interpreted consistently with human rights ('declaration power'). This forms an aspect of the *Victorian Charter*'s 'dialogue model' to protect and promote human rights. Such declarations (sometimes referred to as declarations of incompatibility in other jurisdictions) are one of the mechanisms available to the courts as one branch of government in a dialogue with the Victorian Parliament and executive.

Despite this, in the 12 years since the *Victorian Charter* fully commenced operation, only one declaration has been made which was then set aside on appeal. That was in the leading case on the *Victorian Charter* — *Momcilovic v The Queen* ('*Momcilovic*').[1] Save for issues as to the constitutional validity of the declaration power, relatively little has been said about the power post-*Momcilovic*.[2] It has drawn much less scholarship compared to other provisions of the *Victorian Charter* it is associated with, such as interpretation of legislation in a manner compatible with human rights under s 32(1), or potentially associated with, such as the justification and proportionality test under s 7(2) of the *Victorian Charter*.[3] This article attempts to fill that gap. It seeks to identify the likely reasons for the 'quiet demise' of the declaration power in the *Victorian Charter* jurisprudence.

[1] (2011) 245 CLR 1 ('*Momcilovic*').

[2] See Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340 ('Proportionality'); Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1.

[3] See, eg, Justice Pamela Tate, 'Statutory Interpretive Techniques under the *Charter*: Three Stages of the *Charter*' (2014) 2 *Judicial College of Victoria Online Journal* 43 ('Three Stages of the *Charter*'); Sir Anthony Mason, 'Statutory Interpretive Techniques under the *Charter*: Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69 ('Statutory Interpretive Techniques'); Debeljak, 'Proportionality' (n 2).

Part II of the article provides an overview of the *Victorian Charter* dialogue model, the declaration power conferred by s 36, and the requirements for a ministerial response under s 37. Part III briefly outlines the findings of the Victorian Court of Appeal in *R v Momcilovic*[4] and the High Court in *Momcilovic*, focusing on ss 32(1) and 36. As is well known, several judgments were produced by the High Court in *Momcilovic* which created considerable difficulty in identifying the exact precedent set by the Court. Part IV looks at examples of how the declaration power has been approached (or more accurately, avoided) by the Victorian courts during *R v Momcilovic* and post-*Momcilovic*.

Having set the scene, the main analysis in this article is undertaken by the next three Parts. Part V examines the factors at play for the paucity of declarations arising from *Momcilovic*. These relate to contested findings on the validity of the declaration power in s 36 and the validity and role of s 7(2), the modest role given to interpretation pursuant to s 32(1), and other judicial remarks as to when a declaration can appropriately be made. Part VI identifies other features of the *Victorian Charter* which potentially inhibit the making of declarations, which were not the focus of *Momcilovic*. Part VII argues that the widely-held view that Australia is 'exceptionalist' in its attitude to human rights, both in domestic law and international law, has had an impact on the declaration power. Undertaking a succinct comparative analysis of how declarations are approached under the *Human Rights Act 1998* (UK) ('*UK HRA*') and the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZ BORA*'), this Part confirms that, in the context of the *Victorian Charter*, the courts are exceptionalist. In sum, Parts V to VII provide clarity on the various legal and political–cultural reasons for the current situation in Victoria.

Part VIII considers the pending recommendations made by the eight-year review of the *Victorian Charter* in 2015, and whether they would likely change the status quo. Part IX concludes that the courts are not upholding their clearly conferred role under the *Victorian Charter*. While not essential to the *Victorian Charter*'s operation, the use of the declaration power is advantageous. This is, however, unlikely to change until the declaration power is revisited by the High Court.

This article will also be of interest to those working with the *Human Rights Act 2004* (ACT), which preceded the *Victorian Charter*, and the subsequently enacted *Human Rights Act 2019* (Qld), both being statutory bills of rights which include a declaration power,[5] as well as other jurisdictions with a statutory bill of rights (or contemplating enacting one).

[4] (2010) 25 VR 436 ('*R v Momcilovic*').

[5] *Human Rights Act 2004* (ACT) s 32; *Human Rights Act 2019* (Qld) s 53.

II Overview of the *Victorian Charter* and Declaration Power

The *Victorian Charter* was enacted in 2006 and fully commenced operation on 1 January 2008.[6] The *Victorian Charter* protects predominantly civil and political rights based on the *International Covenant on Civil and Political Rights* ('*ICCPR*').[7] Australia is a State Party to the *ICCPR* and is subject to a complaints process at international law for violations of the *ICCPR* ('individual communications').[8]

The *Victorian Charter* is based on what is commonly known as a 'dialogue'[9] model for human rights.[10] Its rationale is to encourage and promote a dialogue about human rights between the three branches of government — the executive, legislature, and the judiciary. As a statutory version of the 'dialogue' model (like the *UK HRA* and *NZ BORA*), the *Victorian Charter* is not constitutionally entrenched.[11] The *Victorian Charter* is intended to preserve parliamentary supremacy — primary legislation passed by Parliament which is incompatible with human rights is not invalidated.[12]

As one of the branches of government, the courts were recognised as having an integral role under the *Victorian Charter*'s human rights framework. Section 32(1) requires the adoption of a human rights-compatible interpretation of statutory provisions, '[s]o far as it is possible to do so consistently with their purpose'.[13] Section 32(3)(a) provides that s 32 does not affect the validity of an Act, or a provision thereof, that is incompatible with a human right. Where it is not possible to reach a human rights-compatible interpretation, it must still be applied. Section 32 applies to everyone working with legislation — Victorian public servants, statutory bodies and tribunal

[6] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2(2) ('*Victorian Charter*').

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

[8] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[9] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General) ('*Victorian Charter* Second Reading Speech').

[10] It is also termed the 'new Commonwealth model of constitutionalism': Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) 13–14.

[11] Cf *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

[12] *Victorian Charter* (n 6) ss 32(3)(a), 36(5).

[13] Ibid s 32(1): 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'

members — but it is 'the traditional role for the courts in interpreting legislation passed by Parliament'.[14]

The power to make a declaration of inconsistent interpretation is the focus of this article. It is directly linked to s 32(1). Section 36 provides that the Supreme Court of Victoria and its Court of Appeal (collectively, the 'Victorian Courts') can make a declaration of inconsistent interpretation if they are 'of the opinion that a statutory provision cannot be interpreted consistently with a human right' (ss 36(1)–(2)).[15] A declaration cannot be made without notice being given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), and the Victorian Court being satisfied that a reasonable opportunity has been given to them to intervene or make submissions regarding a proposed declaration (ss 36(3)–(4)). Making a declaration does not affect the validity, operation or enforcement of a statutory provision, nor create any legal right or give rise to any civil cause of action (s 36(5)).

Once a declaration is made by the Victorian Court, a copy must be given to the Attorney-General (s 36(6)), and the Attorney-General must, as soon as reasonably practicable, give a copy to the Minister administering the relevant statutory provision, unless that Minister is the Attorney-General themselves (s 36(7)). Section 37 requires the relevant Minister to publicly respond to the declaration, with a written response together with a copy of the declaration laid before each House of Parliament and published in the Government Gazette.[16] Parliament can debate and pass legislative amendments to rectify the incompatibility, but this action is not compelled by the *Victorian Charter*. According to extrinsic materials, the purpose of s 36, together with s 37, is 'to allow the

[14] *Victorian Charter* Second Reading Speech (n 9) 1293.

[15] *Victorian Charter* (n 6) s 36:

> (1) This section applies if —
>
> (a) in a Supreme Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or
>
> (b) the Supreme Court has had a question referred to it under section 33; or
>
> (c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a).
>
> (2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

[16] Ibid s 37:

> Within 6 months after receiving a declaration of inconsistent interpretation, the Minister administering the statutory provision in respect of which the declaration was made must —
>
> (a) prepare a written response to the declaration; and
>
> (b) cause a copy of the declaration and of his or her response to it to be —
>
> (i) laid before each House of Parliament; and
>
> (ii) published in the Government Gazette.

Parliament to reconsider the provision in light of the declaration',[17] take 'appropriate action'[18] and 'ensure that there is transparency and parliamentary accountability in the way the government responds to such findings by the court'.[19]

In the existing commentary, the declaration power has been described as a 'key provision'[20] and 'central to the dialogue model'.[21] It is 'novel',[22] in that a declaration is non-binding on the rights of parties and unenforceable. At the front end, it 'serves as a political and perhaps moral disincentive to legislate incompatibly';[23] at the back end, it is a 'signal'[24] which 'place[s] the reform of some laws on the political agenda'.[25] This seeks to 'enhance the quality of legislative rights debate'.[26] For the litigant, the making of a declaration can still provide a symbolically powerful vindication of their human rights — '[r]ights have value, even if inconsistent legislation may override them'.[27]

The above dialogue takes place whilst maintaining parliamentary supremacy. The *Victorian Charter* does not 'give the courts a final, decisive say, on the validity of enactments'.[28] All three branches of government are involved. The *courts* seek to interpret the statutory provision compatibly with human rights,

[17] *Victorian Charter* Second Reading Speech (n 9) 1293. See also Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Report, 2005) 86, describing s 36 as 'a trigger for parliamentary reconsideration'.

[18] Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2848.

[19] *Victorian Charter* Second Reading Speech (n 9) 1293. See also *Rights, Responsibilities and Respect* (n 17) 86: 'a means of holding the executive to account'.

[20] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2018) 289 [CHR.36.40].

[21] Ibid 290 [CHR.36.40].

[22] Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 83.

[23] Lord Irvine, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] (Summer) *Public Law* 308, 310 in the context of the *Human Rights Act 1998* (UK) ('*UK HRA*'). See also Hilary Charlesworth, 'Who Wins under a Bill of Rights?' (2006) 25(1) *University of Queensland Law Journal* 39, 51; Gardbaum (n 10) 76.

[24] Sir Anthony Mason, 'Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power' (2011) 9(1) *New Zealand Journal of Public and International Law* 1, 11 ('Human Rights'); Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 150 [4.91].

[25] Gans et al (n 22) 83. See also Gardbaum (n 10) 76.

[26] Gardbaum (n 10) 76.

[27] Philip A Joseph, 'Declarations of Inconsistency under the New Zealand Bill of Rights Act 1990' (2019) 30(1) *Public Law Review* 7, 11 ('Declarations of Inconsistency').

[28] George Williams, 'The Distinctive Features of Australia's Human Rights Charters' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 22, 23.

but where they cannot do so, the courts can make a declaration.[29] The *executive* (the relevant Minister) publicly responds to the declaration.[30] The *legislature* can debate and rectify the incompatibility, but only if it so chooses. Thus, the declaration power 'can add a further check or balance to the political system, without diminishing its fundamentally democratic character'.[31]

III *Momcilovic* Proceedings

The 2011 High Court case of *Momcilovic* is the leading case on the *Victorian Charter*, including the declaration power. That case was concerned with a reverse onus provision in criminal proceedings — a significant issue which has arisen in other bill of rights jurisdictions, and limits the human right to the presumption of innocence. Here the relevant statutory provision said to impose a reverse onus was s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('*DPCS Act*').[32]

A *Court of Appeal*

In *R v Momcilovic*, the Court of Appeal held that s 32(1) does not replicate the 'very strong and far reaching'[33] effects of the corresponding interpretive provision in s 3 of the *UK HRA*.[34] The United Kingdom ('UK') courts have approached s 3 as allowing for courts, within certain limits,[35] to 'depart from the unambiguous meaning'[36] or 'actual words'[37] of a statutory provision; to 'give an

[29] *Victorian Charter* (n 6) s 36.

[30] Ibid s 37.

[31] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 301.

[32] *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 5 ('*DPCS Act*'):

> Without restricting the meaning of the word *possession*, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by [them] or is used, enjoyed or controlled by [them] in any place whatsoever, unless the person satisfies the court to the contrary.

[33] *Sheldrake v DPP (England and Wales)* [2005] 1 AC 264, 303 [28] (Lord Bingham).

[34] *R v Momcilovic* (n 4) 456–7 [69], [71], [74] (Maxwell P, Ashley and Neave JJA).

[35] The construction cannot be 'inconsistent with a fundamental feature' of the legislation or legislative scheme, and 'must be compatible with the underlying thrust of the legislation' and words being read in or implied must 'go with the grain of the legislation': *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 572 [33] (Lord Nicholls), 586 [68] (Lord Millett), 601 [121] (Lord Rodger) ('*Ghaidan*').

[36] Ibid 571 [30] (Lord Nicholls).

[37] Ibid 600 [119] (Lord Rodger).

abnormal construction',[38] or 'do considerable violence to the language';[39] and to 'depart from the intention of the Parliament which enacted the legislation'.[40]

According to the Court of Appeal, one reason for distinguishing s 32(1) was that the UK enacted the *UK HRA* to make international human rights treaty arrangements domestically enforceable.[41] Section 3 of the *UK HRA* was considered 'the prime remedial measure', whereas the equivalent declaration power was 'a measure of last resort'.[42] By contrast, there was not 'any suggestion in the Victorian Parliament that the interpretive function of the courts under s 32(1) would be "the prime remedial measure"'.[43] Rather than being a 'last resort', the declaration power 'was treated in the [Victorian Parliamentary] debates as epitomising the intended relationship between the courts and the legislature'.[44] The making of a declaration was the 'defining feature' of the *Victorian Charter*'s 'so-called "dialogue model"'.[45] Hence, s 32(1) was not a '"special" rule' of interpretation, or of 'reinterpretation'.[46]

The Court of Appeal ultimately held that s 5 of the *DPCS Act*, as a reverse onus provision, limited the right to the presumption of innocence and could not be interpreted compatibly with that right, pursuant to s 32(1). The Court made a declaration of inconsistent interpretation under s 36 — the only one of its kind under the *Victorian Charter*.

B *High Court*

On appeal in *Momcilovic*, a 6:1 majority of the High Court upheld the distinction between s 32(1) of the *Victorian Charter* and s 3 of the *UK HRA*.[47] Nevertheless, as has been discussed elsewhere, the precise operation of s 32(1) remains unclear.[48]

[38] Ibid 584 [60] (Lord Millett).

[39] Ibid 585 [67] (Lord Millett).

[40] Ibid 571 [30] (Lord Nicholls).

[41] *R v Momcilovic* (n 4) 462 [92].

[42] *Ghaidan* (n 35) 575 [46] (Lord Steyn).

[43] *R v Momcilovic* (n 4) 462 [92].

[44] Ibid.

[45] Ibid 463 [95].

[46] Ibid 445 [30]–[31], 447–8 [43], 456 [69], 465 [105].

[47] The majority comprised French CJ, Gummow and Hayne JJ, Crennan and Kiefel JJ, and Bell J, with Heydon J dissenting.

[48] See generally Debeljak, 'Proportionality' (n 2); Tate, 'Three Stages of the *Charter*' (n 3); Mason, 'Statutory Interpretive Techniques' (n 3). See also *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 61–2 [188]–[190] (Tate JA) ('*Taha*').

The constitutional validity of the *Victorian Charter*, particularly ch III separation of powers issues, came to the fore in the High Court proceedings. As to the declaration power, a bare 4:3 majority upheld the validity of s 36. Chief Justice French, Crennan and Kiefel JJ, and Bell J were in the majority on this issue.

Chief Justice French held that making a declaration of inconsistent interpretation did not amount to an exercise of judicial power,[49] nor was it incidental to the exercise of judicial power.[50] Nevertheless, this was 'not fatal to its validity',[51] as the declaration power was conferred by a State law on State courts. Provided that it did not impair the institutional integrity of the Victorian Courts, so as not to be incompatible with their role as repositories of federal jurisdiction under the '*Kable* doctrine',[52] then s 36 would be valid. His Honour held that s 36 was valid.[53] Justice Bell expressly agreed.[54]

Justices Crennan and Kiefel agreed that the making of a declaration did not amount to judicial power,[55] but disagreed with French CJ — finding that it was a function incidental to the exercise of judicial power.[56] However, their Honours did hold, similarly to French CJ, that the conferral of the declaration power did not impair the institutional integrity of the Victorian Courts.[57]

Justices Gummow, Hayne and Heydon dissented on s 36. Justice Gummow, with Hayne J agreeing, held that s 36 created a 'novel regime',[58] conferring on the Victorian Courts the role of giving an advisory opinion to the executive on a question of law.[59] This placed the Victorian Courts in a position which was incompatible with their institutional integrity under the *Kable* doctrine.[60] Justice Heydon held that making a declaration did not involve the exercise of judicial power and was not incidental to judicial power.[61] A declaration was

[49] *Momcilovic* (n 1) 65 [89].

[50] Ibid 65–6 [90]–[91].

[51] Ibid 66 [92].

[52] Ibid 66–8 [92]–[96]. See generally *Kable v DPP (NSW)* (1996) 189 CLR 51, 96 (Toohey J), 103–4 (Gaudron J), 116–19 (McHugh J), 127–8 (Gummow J) ('*Kable*').

[53] *Momcilovic* (n 1) 68 [97].

[54] Ibid 241 [661].

[55] Ibid 222 [584].

[56] Ibid 223–4 [589]–[590].

[57] Ibid 227 [600].

[58] Ibid 93 [172] (Gummow J, Hayne J agreeing at 123 [280]).

[59] Ibid 95–6 [181]–[184].

[60] Ibid 97 [188].

[61] Ibid 185 [457].

'merely advisory in character' and s 36 took the Victorian Courts 'outside the constitutional conception of a "court"'.[62]

Thus, a 4:3 majority upheld the constitutional validity of s 36 in respect of the exercise of State jurisdiction.[63] Ultimately, the declaration made by the Court of Appeal in relation to s 5 of the *DPCS Act* was set aside. That was because Crennan and Kiefel JJ (in the majority on s 36) held that, as a matter of statutory interpretation, the *DPCS Act* did not actually impose a reverse onus on the relevant criminal offence. The declaration should not have been made.[64] Thus, together with the three dissentients on s 36, the Court of Appeal's declaration was set aside.

IV Post-*Momcilovic* Proceedings

At its simplest, the upshot of *Momcilovic* is that s 32 has a more modest role to play than s 3 of the *UK HRA*, and s 36 is constitutionally valid.

On the first point, the Victorian Court of Appeal has predominantly interpreted *Momcilovic* as equating s 32(1) with the common law principle of legality, but with 'a wider field of application'.[65] In any event, in practice s 32(1) has rarely been used post-*Momcilovic*. When it has been used, the courts have usually done so conservatively, to fortify constructions of statutes already reached on other principles of statutory interpretation.[66]

Given s 32(1) is not being treated as 'the prime remedial measure' (as per the Court of Appeal in *R v Momcilovic*),[67] one might at first glance expect some correlative effect on s 36. If the Victorian Courts are not dealing with disputes about the incompatibility of statutory provisions in the realm of interpretation under s 32(1), then logically, they would be pushed down the line to the realm

[62] Ibid.

[63] In that majority, French CJ held that s 36 could not apply where the Supreme Court was exercising federal jurisdiction: ibid 70 [100].

[64] Ibid 229 [606], 240 [658].

[65] See *Slaveski v Smith* (2012) 34 VR 206, 215 [23], 219 [45] (Warren CJ, Nettle and Redlich JJA) ('*Slaveski*'), quoting *Momcilovic* (n 1) 50 [51] (French CJ); *Noone v Operation Smile (Australia) Inc* (2012) 38 VR 569, 608 [139] (Nettle JA); *Taha* (n 48) 12–13 [25] (Nettle JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (Redlich, Osborn and Priest JJA); *Carolan v The Queen* (2015) 48 VR 87, 103–4 [46] (Ashley, Redlich and Priest JJA). Cf *Taha* (n 48) 61–2 [188]–[190] (Tate JA). The Victorian Court of Appeal was more cautious of this characterisation in the more recent case of *R v DA* (2016) 263 A Crim R 429, 443 n 46 (Ashley, Redlich and McLeish JJA).

[66] See Bruce Chen, 'Revisiting Section 32(1) of the Victorian *Charter*: Strained Constructions and Legislative Intention' (2020) 46(1) *Monash University Law Review* 174 ('Revisiting Section 32(1)').

[67] *R v Momcilovic* (n 4) 462 [92] (Maxwell P, Ashley and Neave JJA) (citations omitted).

of whether to make a declaration under s 36. However, that does not seem to have occurred in practice. Ironically, the courts are availing themselves of neither s 32(1) nor s 36.

That is not to say that, in Victoria, there have not been attempts or potential opportunities to seek a declaration. In *WBM v Chief Commissioner of Police (Vic)*, decided after *R v Momcilovic* but before *Momcilovic*, the appellant had pleaded guilty and received an aggregate sentence of imprisonment for several child pornography and other non-sexual offences.[68] Subsequently, the *Sex Offenders Registration Act 2004* (Vic) was enacted.[69] It provided for a sex offender registration scheme for certain offenders who were serving a sentence for a 'registrable offence'.[70] The issue before the Supreme Court was whether the appellant, as a matter of interpretation, was subject to the scheme. The appellant raised the right to privacy under s 13(a) and the right against a retrospective criminal penalty under s 27(2) of the *Victorian Charter*, arguing that the scheme did not apply to him.[71] If the scheme did apply, he sought a declaration of inconsistent interpretation in the alternative.[72]

Justice Kaye held that, properly construed, the scheme did apply to the plaintiff.[73] There was no incompatibility with the human rights raised,[74] and so the application for a declaration was rejected. The proceeding could have been disposed on this basis. Nevertheless, Kaye J went further. In respect of the declaration, his Honour noted 'it is important to bear in mind, and keep in perspective, the ultimate relief sought by the plaintiff'.[75] A declaration 'would not, at least in an immediate way, vindicate or protect any rights of the plaintiff'.[76] His Honour emphasised the *Victorian Charter* was an ordinary Act of Parliament, and the appropriate relationship between the three branches of government:

> [T]he judiciary is not, and could never sensibly be understood to be, a part of the public service. The corollary of that proposition is that the judiciary is not part of the legislative or executive arms of government. In making decisions, whether between government and subject, or between subject and subject, the judiciary

[68] (2010) 27 VR 469, 470 [2] (Kaye J) ('*WBM*').

[69] Ibid 471 [3].

[70] *Sex Offenders Registration Act 2004* (Vic) s 7.

[71] *WBM* (n 68) 478–80 [33], [38]–[39].

[72] Ibid 477 [32].

[73] Ibid 477 [31].

[74] Ibid 484 [58], 487 [69].

[75] Ibid 478 [34].

[76] Ibid.

> is not involved in a legislative activity, or in policy making. Rather, the judiciary is strictly involved in interpreting and applying principles of law, the source of which is either legislation or the common law. It is axiomatic, but critical, that in performing that role, no judge acts according to [their] own values or individual views. …
>
> There is nothing in the Charter which justifies, or licences, judicial policy making. Nor does it permit, or invite, the intrusion of an individual judge's values or views in determining whether, in an individual case, a particular legislative enactment might be inconsistent with one of the human rights specified in the Charter. The rather lofty title of the Charter — 'Charter of Human Rights and Responsibilities Act' — is not a licence to any individual judge, such as myself, to apply [their] values in determining whether a particular Act of Parliament is inconsistent with one or more of the human rights specified in the Charter. No such warrant is to be found in the Charter …[77]

The above passages are telling. Clearly, the declaration power under s 36 was anathema to Kaye J. It conferred a new power which went beyond the traditional boundaries between the three branches of government. His Honour signalled that the making of a declaration under s 36 would not be an exercise of judicial power, a position echoed by some of the Justices in the subsequent *Momcilovic* decision. Had the legislation actually been found incompatible with human rights, it would appear doubtful that his Honour would have been willing to exercise the discretion to make a declaration. Justice Kaye's judgment was laden with scepticism as to the declaration's appropriateness and utility.[78] However, as one overseas commentator has put it:

> [I]t seems logical to suppose that [a declaration] has a real value to a person willing to expend considerable time, effort, and resources on pursuing such a remedy. Why, then, should a court deny that person something [they value] highly, on the basis that the court would value it less?[79]

A less overt example is *Director of Public Prosecutions (Vic) v Bryar*,[80] where there was a missed opportunity to seek a declaration. The respondent was charged with speeding on a motorcycle, in a roadworks area with a lowered speed limit of 40 km/h (it was usually 80 km/h). The matter came before a

[77] Ibid 481–2 [46]–[47].

[78] See ibid 478 [34], 481–2 [46]–[47].

[79] Léonid Sirota, 'Breaking the Silence: New Zealand's Courts and Parliament after Attorney-General v Taylor' (2019) 30(1) *Public Law Review* 13, 16, in the context of the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZ BORA*') discussed below.

[80] (2014) 241 A Crim R 172.

Judicial Registrar, who found that he could not be satisfied beyond reasonable doubt that the signage complied with the roadworks' management plan. As a result, the respondent was found guilty of speeding over the 80 km/h limit (rather than 40 km/h).[81] The police sought a de novo review (where the matter is heard afresh) before a Magistrate, who accepted the respondent's plea of double jeopardy and ordered costs against the police.[82] Before the Supreme Court was the issue of whether s 16K of the *Magistrates' Court Act 1958* (Vic) enabled an unsuccessful police informant to seek a de novo review to the Magistrate.[83] The respondent raised the right not to be tried or punished more than once under s 26 of the *Victorian Charter*.[84]

Justice Rush held that the proper construction of s 16K of the Act did enable a police informant the right to seek a de novo review before a magistrate, from a decision of the Judicial Registrar.[85] This finding would appear to limit the right not to be tried or punished more than once. It is unclear why a declaration was not sought by the respondent. At least from the judgment, it does not seem that the possibility was raised by either the respondent or the Court. Instead, the Court's line of enquiry stopped at the construction of the relevant statutory provision.

As these examples tend to illustrate, there has been a quiet demise of the declaration power. There are relatively few attempts by represented litigants to seek a declaration.[86] Post-*Momcilovic*, none have been granted. Thus, '[i]t cannot be said that the dialogue between the judiciary and the political branches has been [particularly] effective'.[87] The reason for the quiet demise of the declaration power is likely to be multifaceted, to which this article now turns.

[81] Ibid 175 [1]–[2] (Rush J).

[82] Ibid 175 [5].

[83] Ibid 175 [7].

[84] Ibid 182 [36].

[85] Ibid 183–4 [39], 184 [41].

[86] But see *Director of Housing v Sudi* (2011) 33 VR 559, 570 [55] (Warren CJ), 582 [104] (Maxwell P), 610–11 [308] (Weinberg JA); *DPP (Vic) v JPH [No 2]* (2014) 239 A Crim R 543, 567 [110] (T Forrest J); *Rich v The Queen* (2014) 43 VR 558, 624 [295] (Nettle, Neave and Osborn JJA). Note also the attempt to refer a *Victorian Charter* (n 6) question from the Victorian Civil and Administrative Tribunal ('VCAT') to the Victorian Supreme Court to request a declaration: *Fidge v Municipal Electoral Tribunal* [2019] VSC 639, [21] (Ginnane J) ('*Fidge*').

[87] Janina Boughey, 'The Victorian Charter: A Slow Start or Fundamentally Flawed?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 207, 224.

V Reasons for the Quiet Demise: *Momcilovic*

Several potential reasons for the demise of the declaration power can be attributed to the High Court's *Momcilovic* decision. *Momcilovic* has likely had a 'chilling effect' on declarations being sought and granted. Yet there are other probable reasons, which lie beyond the *Momcilovic* decision and go to associated provisions of the *Victorian Charter* (discussed in Part VI), and the Australian culture when it comes to human rights (discussed in Part VII).

Arising from *Momcilovic*, the issues discussed in this Part are: first, the lack of certainty over the constitutional validity of s 36; second, the nature of s 36 as ancillary to s 32(1); third, the lack of certainty over the constitutional validity and role of s 7(2); fourth, the appropriateness of making declarations in criminal proceedings; and fifth, whether there must be an existing 'matter' under ch III of the *Constitution*. Each of these issues is considered in turn below.[88]

A *Validity of s 36*

First, a likely prevailing issue from *Momcilovic* is that the constitutional validity of s 36 was upheld by only a bare 4:3 majority. This finely balanced outcome would be enough to cause a litigant to pause and think twice about seeking a declaration. The composition of the High Court has changed greatly since *Momcilovic* was handed down. Six Justices from that decision have retired — French CJ, and Gummow, Crennan, Heydon, Hayne and Bell JJ. The only remaining Justice is Kiefel CJ, who held that the declaration power was valid. However, the views of the newer appointments to the High Court bench are relatively unknown.[89] The numbers forming a majority might easily shift post-*Momcilovic*.

Herein lies the conundrum. A litigant, as an advocate of the *Victorian Charter*, might press for a declaration. A willing Victorian court might make that declaration. However, this potentially re-agitates the issues of whether s 36 is constitutionally valid. This has the undesirable effect of exposing much of the *Victorian Charter*'s dialogue model to risk — particularly the modest role that

[88] Another potential issue, not covered in this article, is the finding by French CJ in *Momcilovic* (n 1) 70 [100] (who held s 36 constitutionally valid) that s 36 'could not apply in proceedings in the exercise of federal jurisdiction'. See also Bateman and Stellios (n 2) 26–8. But this does not fully explain the Victorian Courts' reticence in making declarations when exercising State jurisdiction.

[89] Although see Stephen Gageler, in the capacity of Solicitor-General of Australia, advising pre-*Momcilovic* (n 1) on a national statutory bill of rights: *National Human Rights Consultation* (Report, September 2009) app E.

the Victorian Courts are intended to have as a check on Parliament in enacting legislation. To seek or make a declaration may sink the ship.

B *Interconnection with s 32(1)*

The various positions taken by the High Court on the *Victorian Charter* provisions are interconnected and cannot be separated out. As Debeljak has observed: 'Even where there was apparent agreement on one provision, the reasoning underlying that agreement differed, and/or opinions on other interconnecting provisions differed.'[90]

Another potentially influential reason for the lack of willingness to seek and make a declaration relates to its nature and relationship to s 32(1). A declaration 'may not be seen as a legal remedy' in the strict sense.[91] It has no binding effect (aside from a ministerial response) and provides no immediate or guaranteed remedy (aside from vindication of breach). Typically, a declaration is raised as an 'in the alternative' submission. It is more likely to be ancillary to a 'primary' submission that s 32(1) requires that a court adopt a human rights-compatible construction.

However, much of the normative force of s 32(1) has been removed by the High Court in *Momcilovic* and the post-*Momcilovic* jurisprudence. As seen earlier, the Victorian Court of Appeal has predominantly interpreted *Momcilovic* as aligning s 32(1) with the principle of legality.[92] Subject to the range of rights protected, it supposedly does what an existing common law presumption already does. As one counsel put it, the jurisprudence has 'significantly dampened the appetite of most lawyers to raise s 32(1) of the [*Victorian*] *Charter* in arguments about statutory interpretation'.[93]

This has probable flow-on effects for s 36. If there is little to be gained from raising s 32(1), there is not much incentive to raise it as the primary submission, together with a declaration as the 'fall back' submission. The rare and conservative use of s 32(1) may ultimately hinder s 36. This is contrary to any initial impression one might have that disputes about incompatibility if not dealt with under s 32(1), would be dealt with under s 36.

[90] Debeljak, 'Proportionality' (n 2) 341.

[91] Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17(4) *Public Law Review* 264, 270 ('Legal Redress under the Victorian Charter').

[92] See above n 65.

[93] Emrys Nekvapil, 'Using the Charter in Litigation' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 84, 84.

C *Validity and Role of s 7(2)*

A third and associated reason relates to uncertainty as to the constitutional validity of s 7(2) of the *Victorian Charter*, and its proper role. Section 7(2) provides a justification and proportionality test.[94] Justification and proportionality are central concepts to human rights — both internationally and in comparative jurisdictions which have bills of rights.[95] They acknowledge that human rights are not absolute.

Like the issue of s 36, the constitutional validity of s 7(2) and its proper role within the scheme of the *Victorian Charter* was highly controversial. Several Justices in *Momcilovic* (and the Court of Appeal in *R v Momcilovic*) were unsympathetic to the notion that s 7(2) might apply to interpretation pursuant to s 32(1). For example, French CJ agreed with submissions that 'a proportionality assessment of the reasonableness of legislation is not an interpretive function'.[96] His Honour went on: 'the justification of limitations on human rights is a matter for the Parliament. That accords with the constitutional relationship between the Parliament and the judiciary.'[97] This statement goes to concerns as to the separation of powers between legislating and interpreting laws.

Another narrow 4:3 majority upheld the constitutional validity of s 7(2), but there was no binding ratio on what role it played under the *Victorian Charter*.[98] The majority that upheld the validity of s 7(2) was French CJ, Gummow, Hayne and Bell JJ. Chief Justice French found that s 7(2) applied, or may be relevant, to the exercise of the declaration power in s 36.[99] By contrast, Bell J was of the view that it applied to interpretation pursuant to s 32(1).[100] Justice Gummow,

[94] *Victorian Charter* (n 6) s 7(2):

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

[95] See generally Debeljak, 'Proportionality' (n 2); Tate, 'Three Stages of the *Charter*' (n 3).

[96] *Momcilovic* (n 1) 43 [34].

[97] Ibid 44 [36].

[98] This is examined in greater detail elsewhere: see generally Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*' [2013] (74) *Australian Institute of Administrative Law Forum* 67; Debeljak, 'Proportionality' (n 2).

[99] *Momcilovic* (n 1) 44 [36].

[100] Ibid 250 [684].

with Hayne J agreeing, appeared to adopt a similar position.[101] However, Hayne J dissented as to the final orders.[102]

The minority of Crennan and Kiefel JJ, and Heydon J, held that s 7(2) was constitutionally invalid. They too disagreed amongst themselves as to the proper role of s 7(2). Justices Crennan and Kiefel held that s 7(2) applied to neither s 32(1) nor s 36(2).[103] In a further illustration of the interconnected nature of the various findings, their Honours hinted that, had s 7(2) applied to s 36, this would potentially render s 36 invalid.[104] Justice Heydon held that s 7(2) applied to interpretation pursuant to s 32(1).[105]

Post-*Momcilovic*, the Victorian Courts have been reluctant to apply s 7(2), likely due to these lingering questions over constitutional validity, and lack of clarity as to which end it applies — interpretation under s 32(1) or declarations under s 36. For the most part, the Victorian Courts have managed to avoid the application of s 7(2) when it comes to potential incompatibility of legislation. For a litigant to seek a declaration, or for the Victorian Courts to consider granting one, would reopen these issues (in addition to the issue of constitutional validity of s 36 described above).

D *Appropriateness in Criminal Proceedings*

In *Momcilovic*, Crennan and Kiefel JJ considered that the declaration power was discretionary in nature.[106] However, their Honours went further — casting serious doubts on the declaration's appropriateness in criminal proceedings. A declaration would involve 'a denial of the appellant's Charter rights even though it upheld the validity of the conviction. In such a circumstance not only does a declaration serve no useful purpose to the appellant, it is not appropriate that it be made.'[107] Their Honours continued: '[u]ndermining a conviction is a serious consideration. … [I]n the sphere of criminal law, prudence dictates that a declaration be withheld'.[108]

[101] Ibid 91–2 [166]–[168] (Gummow J, Hayne J agreeing at 123 [280]).

[102] Ibid 123 [280].

[103] Ibid 219–20 [574]–[575].

[104] Ibid 224 [590].

[105] Ibid 164 [409], 170 [427].

[106] Ibid 225 [597]. But see Bateman and Stellios (n 2) 25–6, who considered there is a 'strong argument' that where the Court finds that a statutory provision is incompatible, a declaration must be made.

[107] *Momcilovic* (n 1) 228–9 [604].

[108] Ibid 229 [605]. See also Mason, 'Human Rights' (n 24) 14.

Unlike the New Zealand[109] and UK experience,[110] there has been a rather tepid response from the courts as to the *Victorian Charter*'s impact on the interpretation and application of criminal law.[111] Moreover, there is anecdotal evidence suggesting that the notice requirements and intervention rights (discussed further below) are a disincentive for criminal lawyers to raise *Victorian Charter* arguments, due to fears over possible delay of proceedings for litigants in custody.[112]

The above statements from Crennan and Kiefel JJ are a further hammer blow to the *Victorian Charter* when it comes to criminal proceedings. The view that the declaration power is particularly inappropriate for criminal proceedings is rather unconvincing.[113] First, it is the unjustness of the legislation (ie its incompatibility with human rights) that is perceived to undermine a conviction, not the court's declaration of such. Second, s 36 on its terms does not limit the power to civil proceedings. As French CJ said, there was 'no distinction in principle to be drawn … between civil and criminal proceedings which would render a declaration of inconsistent interpretation inappropriate in the latter class of case'.[114] Third, Crennan and Kiefel JJ alluded to a declaration providing no immediate or guaranteed relief to a litigant. Yet that is the nature of the declaration for *all* court proceedings — the intention is to facilitate dialogue, not provide a binding and enforceable remedy.

E *A 'Matter' under Ch III*

The final issue arising from *Momcilovic* again returns us to the joint judgment of Crennan and Kiefel JJ. Their Honours considered that the 'exercise under

[109] See, eg, *Ministry of Transport v Noort* [1992] 3 NZLR 260.

[110] See, eg, *R v A [No 2]* [2002] 1 AC 45 ('*R v A*').

[111] See generally Claudia Geiringer, 'Inside and outside Criminal Process: The Comparative Salience of the New Zealand and Victorian Human Rights Charters' (2017) 28(3) *Public Law Review* 219 ('Inside and outside Criminal Process').

[112] Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 167–8. See also Geiringer, 'Inside and outside Criminal Process' (n 111) 231.

[113] Although there is some support for this in the *NZ BORA* (n 79) context: see the case preceding *A-G (NZ) v Taylor* [2019] 1 NZLR 213 ('*Taylor*'), *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174, [13]–[16] (William Young P for William Young P, Chambers, O'Regan and Robertson JJ). Cf the post-*Taylor* (n 113) commentary in Robert Kirkness, 'Declarations of Inconsistency under the New Zealand Bill of Rights Act 1990' (Speech, Human Rights Law: New Frontiers 2019, 8 May 2019) 12–14.

[114] *Momcilovic* (n 1) 68 [96].

s 32(1) is integral to the resolution of the "matter" … Standing alone, s 36 could not give rise to any "matter" within the meaning of Ch III of the *Constitution*'.[115]

This statement strongly suggests that unless there is an actual interpretive contest between the parties to which s 32(1) pertains, a declaration could not be sought. To do so would not give rise to a 'matter'. It would not amount to judicial power or be incidental to judicial power. This was picked up in Victorian government submissions made in the case of *Fidge v Municipal Electoral Tribunal* ('*Fidge*')[116] — where no interpretive dispute had been raised but a declaration was sought. The applicant had conceded that the relevant statutory provisions were not capable of being interpreted compatibly with the *Victorian Charter*. In other words, s 32(1) was displaced and could not be applied to reach a human rights-compatible interpretation. The Attorney-General argued that

> an s 36 declaration could not be made in a vacuum and required that some feature of the challenged provision had led to a dispute or a matter. No such dispute existed here. A declaration of inconsistent interpretation must attach to a judicial dispute and be connected to the carrying out of a judicial function.[117]

Whether the declaration power can be exercised in the absence of an interpretive dispute was not squarely answered in *Fidge*, due to the way in which the proceedings arose.[118]

Chapter III of the *Constitution* relevantly provides for: 'matters' in which the High Court has original jurisdiction, 'matters' in which the Commonwealth Parliament can confer additional original jurisdiction on the High Court, and 'matters' for which the Commonwealth Parliament can define other federal jurisdiction and invest State courts with federal jurisdiction.[119] Notably, French CJ took a different view to Crennan and Kiefel JJ in *Momcilovic*. His Honour rightly recognised that 'the concept of a "matter" … does not mark out the bounds of judicial functions able to be exercised by State courts'.[120] The declaration power is conferred by the *Victorian Charter*, as a state statute on state courts.

[115] Ibid 222 [584].

[116] *Fidge* (n 86).

[117] Ibid [44] (Ginnane J).

[118] The issue was whether VCAT had erred in refusing to exercise a discretion to refer a *Victorian Charter* (n 6) question to the Supreme Court of Victoria, pursuant to s 33, for the applicant to seek a declaration: *Fidge* (n 86) [6]–[7].

[119] *Australian Constitution* ss 75–7.

[120] *Momcilovic* (n 1) 62 [83].

Even if Crennan and Kiefel JJ are correct, as noted above, an application for a declaration would usually accompany a s 32(1) argument. Unlike *Fidge*, practically speaking, there are likely to be few litigants who would seek a declaration on its own.[121] Moreover, it will usually be possible to identify a competing construction for argument, even if this represents a rather artificial exercise.[122] Interestingly in New Zealand, the Supreme Court's recent recognition of the power to make a declaration in *Attorney-General (NZ) v Taylor* ('*Taylor*')[123] (discussed further below) was not preconditioned on a requirement 'that a litigant first argue for a plausible rights-consistent meaning'.[124]

The above issue, together with constitutional issues regarding ss 36 and 7(2), illustrate how a federal system with a formalised constitution has loomed large over the *Victorian Charter*. *Momcilovic* demonstrates the complexities in attempting to affect change at the Victorian sub-national level within this system. The declaration power under the dialogue model has not 'transplant[ed]' well to the Australian climate.[125] Under the High Court's 'restrictive approach',[126] the declaration power 'was shown to have, at best, a patchy operation'.[127]

VI Other Features of the *Victorian Charter*

A *Notice Requirements and Intervention Rights*

There are other features of the *Victorian Charter*, not dealt with in *Momcilovic*, which likely have some bearing on the declaration power. One of those is the notice requirements for,[128] and intervention rights of,[129] the Attorney-General and VEOHRC.

[121] See generally John Ip, '*Attorney-General v Taylor*: A Constitutional Milestone?' [2020] (1) *New Zealand Law Review* 35, in the context of the *NZ BORA* (n 79).

[122] See generally Ip (n 121). However, this may 'create an unfortunate incentive for a plaintiff to dress an application for a declaration in the sheep's clothing of an untenable interpretation argument': Claudia Geiringer, 'On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act' (2009) 40(3) *Victoria University of Wellington Law Review* 613, 634 ('On a Road to Nowhere'). See also the overarching obligations under the *Civil Procedure Act 2010* (Vic) ch 2.

[123] *Taylor* (n 113).

[124] Ip (n 121).

[125] Cheryl Saunders, 'Transplants in Public Law' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 257, 270–1.

[126] Geiringer, 'Inside and outside Criminal Process' (n 111) 230.

[127] Saunders (n 125) 271.

[128] *Victorian Charter* (n 6) s 35.

[129] Ibid ss 34, 40.

Both the Attorney-General (represented by the Victorian Government Solicitor's Office) and VEOHRC possess unique institutional knowledge of the *Victorian Charter* and provide expert submissions when they intervene in proceedings. They play a meaningful role in contributing to the development of the *Victorian Charter*'s jurisprudence. However, as we have seen, there is anecdotal evidence that such procedural rights inhibit litigants from raising *Victorian Charter* arguments in the criminal law context. Concerns about 'the length and complexity' of proceedings when *Victorian Charter* issues are raised can be extrapolated to court proceedings generally.[130]

Further, the Attorney-General and VEOHRC can have 'two bites at the apple' in deciding whether to intervene.[131] If the court is unable to reach a human rights-compatible construction and is considering making a declaration, the *Victorian Charter* provides that a further notice must be given to the Attorney-General and VEOHRC, and they must have a 'reasonable opportunity' to intervene or make submissions.[132] This likely compounds any existing concerns held by litigants. Although a declaration has no binding and enforceable effect, its very public nature, broader relevance to other potentially affected persons, and the need for a political response means that, on issuing a further notice, the Attorney-General and/or the VEOHRC is likely to be drawn into the proceeding by this stage, if they have not already intervened. The Attorney-General and VEOHRC's public guidelines on what they consider when deciding whether to intervene support this proposition.[133]

[130] Nekvapil (n 93) 84; Young (n 112) 165–6.

[131] Cf *UK HRA* (n 23) s 5 regarding the notice requirements and intervention right of the Crown. See also *Equality Act 2006* (UK) s 30 regarding the intervention right of the Equality and Human Rights Commission.

[132] *Victorian Charter* (n 6) ss 36(3)–(4).

[133] See Victorian Government Solicitor's Office, *Attorney General Charter Intervention Guidelines* (Web Page, 11 November 2017) <http://humanrights.vgso.vic.gov.au/content/attorney-general-charter-intervention-guidelines>, archived at <https://perma.cc/8YX6-UYL8>. Some of the factors the Attorney-General considers include:

- whether the proceeding involves a new or unsettled area of law, or provides an opportunity to clarify a disputed interpretation of the law;
- whether the Charter issue raised has significant ramifications beyond the parties to the proceeding;
- whether the effect on human rights is significant; and
- the Government's policy position in relation to the Charter issue, for example where it involves a balancing of competing rights.

See Victorian Equal Opportunity and Human Rights Commission, *Charter Intervention Guidelines* (Web Page, 8 May 2018) <https://www.humanrightscommission.vic.gov.au/human-rights/the-role-of-the-commission-under-the-charter/interventions/intervention-

B *Override Declaration Power in s 31*

The lack of declarations under s 36 'should not necessarily be read as an indication that all Victorian law is compatible with the [*Victorian*] *Charter*'.[134] Indeed, this is evidenced by the making of statements of *in*compatibility on several occasions when Bills have been introduced,[135] and the use of an 'override declaration' power conferred on the Victorian Parliament. As to the latter, s 31 provides that Parliament may, in enacting legislation, include an override declaration. To the extent of that override declaration (depending on how it is drafted), the *Victorian Charter* is overridden. The *Victorian Charter* has no application to an Act, or a provision thereof, to which the override declaration

guidelines>, archived at <https://perma.cc/BTZ3-W7VQ>. The Victorian Equal Opportunity and Human Rights Commission will consider intervening in proceedings where:

- the Charter issues are significant and not peripheral to the proceedings;
- the orders that could be made in the proceedings may significantly affect the Charter rights of persons who are not parties to the proceedings;
- the proceedings may have significant implications for the ongoing interpretation or operation of the statutory provision being interpreted in light of the Charter; and/or
- the proceedings may have significant implications for the ongoing application, implementation and/or operation of the Charter.

134 Boughey (n 87) 214.

135 *Control of Weapons Amendment Act 2010* (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 27 May 2010, 1998–2002 (Robert Cameron, Minister for Police and Emergency Services);

Corrections Amendment (Parole) Act 2018 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 24 July 2018, 2235–8 (Lisa Neville, Minister for Police);

Firearms Amendment Act 2018 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 2955–62 (Lisa Neville, Minister for Police);

Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2016, 4722–6 (Lisa Neville, Minister for Police);

Justice Legislation Amendment (Protective Services Officers and Other Matters) Act 2017 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1470–80 (Lisa Neville, Minister for Police);

Justice Legislation Miscellaneous Amendment Act 2018 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 21 June 2018, 2133–44 (Martin Pakula, Attorney-General);

Summary Offences and Control of Weapons Acts Amendment Act 2009 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 4018–24 (Robert Cameron, Minister for Police and Emergency Services);

Wrongs Amendment (Prisoner Related Compensation) Act 2015 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 1273–6 (Martin Pakula, Attorney-General).

applies. Section 31 makes clear that an override declaration should only be made in 'exceptional circumstances'.[136]

To date, override declarations have been passed in three statutes (on each occasion, the *Victorian Charter* was excluded in its entirety).[137] The power under the *Victorian Charter* to enact an override declaration, peculiar to statutory bills of rights,[138] may have implications for potential opportunities to seek a declaration of inconsistent interpretation. An override declaration may have been made because of an incompatibility or risk of incompatibility identified by the Victorian government, and the potential implications of the *Victorian Charter* applying are considered so serious as to require its exclusion.[139]

Accordingly, the exercise of the override declaration may reduce the frequency with which genuine issues of incompatibility can arise for consideration. Although some restraint has been shown by the Victorian Parliament to date with few override declarations made, this practice could always be subject to change. That is because the threshold of 'exceptional circumstances' is a matter for political judgment,[140] and is non-justiciable.[141] The override declaration allows a risk-averse Parliament to 'immunise'[142] legislation from the declaration power (and interpretive obligation). In such circumstances, the dialogue between the court and the other branches of government is stunted. This feature of the *Victorian Charter* distinguishes it from other statutory bills of rights (it has now been replicated in the *Human Rights Act 2019* (Qld) div 2 pt 3).

[136] *Victorian Charter* (n 6) s 31(4).

[137] *Corrections Amendment (Parole) Act 2014* (Vic) s 3; *Corrections Amendment (Parole) Act 2018* (Vic) ss 4–5; *Legal Profession Uniform Law Application Act 2014* (Vic) s 6. See also Corrections Amendment (Parole) Bill 2016 (Vic) s 3, but this was superseded by the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic).

[138] The override declaration power is taken from the *Canadian Charter of Rights and Freedoms* (n 11) s 33.

[139] Although note that an override declaration does not necessarily require that there be a human rights incompatibility in the statute. For example, see the Statement of Compatibility for the *Legal Profession Uniform Law Application Act 2014* (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 12 December 2013, 4661–2 (Robert Clark, Attorney-General).

[140] Evans and Evans, 'Legal Redress under the Victorian Charter' (n 91) 272.

[141] George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880, 899–900 ('Origins and Scope').

[142] Julie Debeljak, 'Rights Dialogue Where There Is Disagreement under the Victorian Charter' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Lawbook, 2020) 267, 274 [9.30] ('Rights Dialogue').

VII Exceptionalism to Human Rights

A *Australia and Victoria*

The final likely reason discussed in this article for declarations failing to take hold is Australia's 'exceptionalist'[143] or 'legalist' and 'formalist'[144] approach to human rights. To date, only the Australian Capital Territory, Victoria and Queensland have enacted statutory bills of rights. There remains no bill of rights at the national level. This has a storied history.[145] There have been many failed attempts to enact a national bill of rights — the most recent in 2009–10.[146] Australia is now 'the only democratic country in the world without a national charter of rights'.[147]

This cultural lack of will to enact an Australian bill of rights exists amongst both the political and legal fraternities.[148] Several parliamentarians[149] and judges[150] (not all of course) are sceptical of, or oppose, bills of rights. Such critics place their faith in parliament, the *Constitution* and/or the common law to

[143] See generally George Williams and Daniel Reynolds, 'Out on a Limb: Australia's Troubling Exceptionalism on Human Rights' [2017] (38) *Law Society Journal* 40; Dianne Otto, 'From "Reluctance" to "Exceptionalism": The Australian Approach to Domestic Implementation of Human Rights' (2001) 26(5) *Alternative Law Journal* 219; Gillian Triggs, 'Overreach of Executive and Ministerial Discretion: A Threat to Australian Democracy' (2017) 7(1) *Victoria University Law and Justice Journal* 8, 10.

[144] See generally Rosalind Dixon, 'An Australian (Partial) Bill of Rights' (2016) 14(1) *International Journal of Constitutional Law* 80, 95, 97–8; Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195; Justice MD Kirby, 'Human Rights: The Challenge for Law Reform' (1976) 5(2) *University of Tasmania Law Review* 103, 116. Specifically in relation to s 36, *Momcilovic* (n 1) has been critiqued as 'somewhat formalistic': Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, 2015) 532 [154].

[145] See generally Michael Kirby, 'Protecting Human Rights in Australia without a Charter' (2011) 37(2) *Commonwealth Law Bulletin* 255.

[146] See National Human Rights Consultation Committee (n 89), and the subsequent Commonwealth of Australia, *Australia's Human Rights Framework* (Report, April 2010).

[147] George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017) 17.

[148] By contrast, there appears to be high levels of support in the broader community: see Human Rights Consultation Committee (n 17) 3–4; National Human Rights Consultation Committee (n 89) 263–4.

[149] See, eg, George Brandis, 'The Debate We Didn't Have to Have: The Proposal for an Australian Bill of Rights' [2008] (15) *James Cook University Law Review* 24; Bob Carr, 'The Rights Trap: How a Bill of Rights Could Undermine Freedom' (2001) 17(2) *Policy* 19.

[150] See, eg, PA Keane, 'In Celebration of the Constitution' [2008] *Queensland Judicial Scholarship* 64; JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130 (July) *Law Quarterly Review* 392, 398–407; Chief Justice Paul de Jersey, 'A Reflection on a Bill of Rights' in Julian Leeser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre, 2009) 3.

protect rights. As a State bill of rights, the *Victorian Charter* has also been subject to criticism as to its appropriateness,[151] and its repeal was debated during a review following four years of operation.[152] This article is not the place to debate these kinds of arguments. The *Victorian Charter* was enacted through the democratic will exercised by the Victorian Parliament, and has been retained since then.

What it does mean is that the *Victorian Charter* 'operat[es] in the shadow of scepticism following rejection of a statutory bill of rights at the national level',[153] and scepticism to a lesser extent at the state level. This observation likely extends to the declaration power, and the dialogue model which it facilitates. In *Momcilovic*, several Justices expressed unease about the dialogic features of the *Victorian Charter*.[154] Chief Justice French considered that '[t]he metaphor of "dialogue between the three arms of the government" … is inapposite'.[155] Justice Gummow said '[r]eferences to "dialogue" … are apt to mislead'.[156] Justices Crennan and Kiefel were of the view that '"dialogue" is an inappropriate description' and 'it is inaccurate to describe the process suggested by s 36(2) as involving a dialogue'.[157] Naming the s 36 power a *declaration* of inconsistent interpretation was also 'a misdescription'.[158] Justice Heydon, who would invalidate the *Victorian Charter*, expressed downright hostility towards the dialogue

[151] See, eg, Chris Merritt, 'Victoria's A-G Robert Clark Slams Rights Charter as Ineffective', *The Australian* (online, 9 December 2010) <https://amp.theaustralian.com.au/business/legal-affairs/victorias-a-g-robert-clark-slams-rights-charter-as-ineffective/news-story/92fac78f26b2fc9b4e299454fc04d485>.

[152] See Farah Farouque, 'Liberals Split on Rights Charter', *The Age* (online, 9 March 2012) <https://www.theage.com.au/national/victoria/liberals-split-on-rights-charter-20120308-1un8d.html>, archived at <https://perma.cc/5J59-MFRG>. The majority view from the four-year review of the *Victorian Charter* (n 6) recommended that the role of the courts be removed: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2011) 172–3 [687]–[692] (recommendation 35).

[153] Gardbaum (n 10) 221.

[154] It can also be noted that another dialogic feature of the *Victorian Charter* (n 6) is that public authorities are bound to act compatibly with human rights and to give proper consideration to relevant human rights: at s 38(1). However, the courts are not bound by these obligations except when acting in an administrative capacity: at s 4(1)(j), cf s 6(2)(b). This may potentially constrain judicial culture when it comes to human rights, an issue which is discussed at a more general level in Part VII(D) of this article.

[155] *Momcilovic* (n 1) 67 [95].

[156] Ibid 84 [146(iii)] (citations omitted).

[157] Ibid 207 [534].

[158] See ibid 221 [582]–[583], where their Honours outline how the s 36 power 'is not a declaratory order granting relief'.

model and human rights law generally.[159] There are clear overtones to watchful Victorian Courts below. Members of the High Court, those who would invalidate the declaration power and even those who would uphold it, were apprehensive about the nature of the declaration power or dialogue model.[160] Some contrasts can be drawn here to the UK and New Zealand experiences.

B *United Kingdom*

While caution should be exercised when drawing comparisons to court statistics in other jurisdictions, a further sense of the paucity of *Victorian Charter* declarations can be gained by reference to the *UK HRA*. The *UK HRA* provides a similar power for certain courts to make a 'declaration of incompatibility'.[161] Even as a 'measure of last resort',[162] the UK courts have not been overly timid in exercising this power.[163] They have made declarations on 42 occasions since the *UK HRA* came into operation on 2 October 2000.[164] This is, on average, over two declarations per year. In a similar timeframe to where the *Victorian Charter* currently stands, the UK courts made declarations on 27 occasions in the *UK HRA*'s first 12 years of operation. Unlike the *Victorian Charter*, there is

[159] See especially ibid 183–4 [453]–[455]. See generally Michael Kirby, 'Foreword' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) v, v–vi.

[160] Cf Williams, 'Origins and Scope' (n 141) 901–2 (citations omitted):

> Whether or not "dialogue" is the correct word for what the [*Victorian Charter*] will achieve, it is clear that it does create new and innovative forms of deliberation and interaction for law, policy and politics as they relate to human rights;

Debeljak, 'Rights Dialogue' (n 142) 270 n 9:

> Whether the dialogue metaphor survives the disparate judgments of the High Court in *Momcilovic* … remains to be seen. The answer may be neither here nor there, in any event, because the metaphor serves a political as well as legal purpose, and the fact remains that the [*Victorian Charter*] was enacted on the basis of creating an interaction between all the arms of government.

[161] *UK HRA* (n 23) s 4.

[162] *R v A* (n 110) 68 [44] (Lord Steyn).

[163] Although the United Kingdom ('UK') courts have on occasion declined to make a declaration: see generally, eg, *R (Chester) v Secretary of State for Justice* [2014] AC 271; *R (Nicklinson) v Ministry of Justice* [2015] 1 AC 657.

[164] As at the end of July 2019, 10 of those declarations had been overturned on appeal and two were subject to appeal: Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2018–2019* (Command Paper No 182, October 2019) 37 ('*Responding to Human Rights Judgments*').

no statutory requirement on Parliament to respond.[165] However, that has not dissuaded Parliament from doing so. The track record of the UK Parliament illustrates that they have always eventually rectified human rights incompatibilities identified by a declaration.[166]

This may, however, say something about the supranational settings in which the *UK HRA* operates, by contrast to the *Victorian Charter*. The UK is a member of the Council of Europe,[167] which necessitates compliance with the European Convention on Human Rights ('*ECHR*')[168] and the civil and political rights it protects. The European Court of Human Rights, an international judicial body, can make findings as to a 'violation' of the *ECHR* and award payment by the respondent State Party of 'just satisfaction' similar to damages or compensation.[169] The respondent State Party is bound by the judgment of the Court,[170] and so is required to rectify any findings of violation including by way of legislative amendment.

Prior to the *UK HRA*, the UK courts had limited means to determine matters on human rights grounds. This led to a number of findings by the European Court of human rights violations by the UK. The stated intention of the *UK HRA* then, was to 'bring those rights home'.[171] It meant that 'the British people will be able to argue for their rights in the British courts'.[172] This reduced the likelihood of litigation working its way to the *ECHR* for findings of violation and awards of payment. Unlike the *Victorian Charter*, the *UK HRA* operates in a 'heavily constraining environment of international legal obligations and oversight'.[173]

[165] Although a Minister of the Crown has the power to fast track remedial action to rectify the incompatibility: *UK HRA* (n 23) s 10.

[166] See *Responding to Human Rights Judgments* (n 164) 37.

[167] This membership is not directly related to 'Brexit', which involved the UK's withdrawal from the European Union.

[168] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) ('*ECHR*'). There have, however, been ongoing debates about whether the UK should withdraw from the *ECHR* (n 168).

[169] *ECHR* (n 168) art 41.

[170] Ibid art 46.

[171] Secretary of State for the Home Department (UK), *Rights Brought Home: The Human Rights Bill* (Command Paper No 3782, October 1997) [1.19].

[172] Ibid [1.14].

[173] Gardbaum (n 10) 221.

C *New Zealand*

The stated purpose of the *NZ BORA* was to 'affirm'[174] the civil and political rights it protected. Like the *Victorian Charter*, these rights were based on the *ICCPR*. The long title of the *NZ BORA* also indicated Parliament's intention 'to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights'. New Zealand and Australia are both subject to the individual communications process before the United Nations Human Rights Committee (a quasi-judicial expert committee), and bound by international law to comply with their 'views' (decisions).

The *NZ BORA* is unique in that it does not confer any express declaration power on the courts. However, the New Zealand Supreme Court has, in a ground-breaking development, confirmed the existence of an implied power to make a declaration. For some time, the New Zealand courts have contemplated whether such a power can be exercised.[175] This followed a practice of the courts generally seeking to give the *NZ BORA* work to do.[176] Relevantly, they have previously recognised the availability of an effective remedy for human rights breaches by government bodies, despite the *NZ BORA*'s silence on that issue as well.[177]

In the 2018 case of *Taylor*, a 3:2 majority (Glazebrook and Ellen France JJ, Elias CJ agreeing) confirmed the existence of the implied declaration power and upheld the lower court's exercise of that power for the first time.[178] In *Taylor*, there was no dispute between the parties as to the interpretation of the legislation, and that it was incompatible with human rights. The majority held that making a declaration was 'a logical step from the settled position … that an effective remedy should be available for a breach' of human rights.[179] Without a declaration power, there would be 'no other effective remedy';[180] it was 'especially important where no other relief is available'.[181] Despite the lack of an

[174] *NZ BORA* (n 79) s 2. See also the long title of the *NZ BORA*: 'to affirm, protect, and promote human rights and fundamental freedoms in New Zealand'.

[175] See *Quilter v A-G (NZ)* [1998] 1 NZLR 523, 554 (Thomas J); *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17 [19]–[20] (Tipping J for the Court) ('*Moonen*').

[176] See Paul Rishworth, 'The Bill of Rights and "Rights Dialogue" in New Zealand: After 20 Years, What Counts as Success?' (Speech, The University of Sydney Workshop on 'Judicial Supremacy or Inter-Institutional Dialogue?: Political Responses to Judicial Review', May 2010) 7–8.

[177] See generally *Simpson v A-G (NZ)* [1994] 3 NZLR 667.

[178] See generally Ip (n 121); Sirota (n 79); Joseph, 'Declarations of Inconsistency' (n 27); Andrew Geddis, 'Prisoner Voting in New Zealand's Supreme Court' (2019) 30(1) *Public Law Review* 3.

[179] *Taylor* (n 113) 232 [38] (Ellen France J for Glazebrook and Ellen France JJ), 243 [95] (Elias CJ).

[180] Ibid 232–3 [41] (Ellen France J for Glazebrook and Ellen France JJ).

[181] Ibid 246 [105] (Elias CJ).

express power, it was nevertheless consistent with the scheme of the *NZ BORA*.[182] Implying a declaration power into the *NZ BORA* met its purposes. Their Honours also referred to the importance of human rights and the obligation on States Parties under the *ICCPR* to ensure that persons have an effective remedy.[183]

Further, a declaration was an exercise of judicial power in the New Zealand context and not 'without consequence'.[184] It provided 'formal'[185] and 'authoritative'[186] confirmation that legislation is incompatible with a litigant's human rights. It 'will be of value should the matter come to be examined' by the United Nations Human Rights Committee.[187] The declaration was 'another means of vindicating the [human] right in the sense of marking and upholding the value and importance of the right'.[188] *Momcilovic* was readily dispatched based on Australia's constitutional arrangements.[189]

The minority, William Young and O'Regan JJ, queried the extent to which a declaration provided vindication, given its non-binding nature and that it has 'no impact' on a litigant's position.[190] Nevertheless, their dissent was not because a declaration would go beyond judicial power.[191] They were in agreement with the majority on that point. Instead, their Honours emphasised the lack of an express declaration power as the very reason against implying such a power into the *NZ BORA*.[192]

Following the *Taylor* proceedings, the New Zealand Government introduced the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020. The Bill seeks to impose an obligation on the Attorney-General to report to Parliament on a declaration of inconsistency having been made.

[182] Ibid 232 [40], 233–4 [46], 234 [48]–[51] (Ellen France J for Glazebrook and Ellen France JJ). See also at 245 [105], 248–9 [117]–[118] (Elias CJ).

[183] Ibid 232–3 [41] (Ellen France J for Glazebrook and Ellen France JJ, Elias CJ agreeing at 243 [95]).

[184] Ibid 235 [55] (Ellen France J for Glazebrook and Ellen France JJ). See also 245–6 [105] (Elias CJ).

[185] Ibid 235 [53] (Ellen France J for Glazebrook and Ellen France JJ, Elias CJ agreeing at 244 [101]).

[186] Ibid 244 [101].

[187] Ibid 235 [55] (Ellen France J for Glazebrook and Ellen France JJ, Elias CJ agreeing at 244 [101]), quoting *Moonen* (n 175) 17 [20].

[188] *Taylor* (n 113) 236 [56] (Ellen France J for Glazebrook and Ellen France JJ, Elias CJ agreeing at 244 [101]).

[189] Ibid 236–7 [60]–[63] (Ellen France J for Glazebrook and Ellen France JJ), 246–7 [108]–[111] (Elias CJ).

[190] Ibid 254 [138]–[139].

[191] Ibid 252 [131].

[192] Ibid 251–2 [127]–[131].

This clarifies by implication that there is an implied declaration power under the *NZ BORA*. The Bill does not go as far as the *Victorian Charter* in requiring the executive to respond.

D *Australia and Victoria Revisited*

The making of declarations under the *UK HRA* and *NZ BORA* ultimately trace back to a requirement to comply with international human rights standards — the *ECHR* and *ICCPR*, respectively. However, Australia's human rights obligations are not subject to any court forum like the European Court of Human Rights, and so there are stronger compliance mechanisms under the *UK HRA* and *ECHR*. One might argue that New Zealand is a closer analogue to Australia, in light of its treaty arrangements.

In *Momcilovic*, members of the High Court of Australia were uncomfortable with the notion of dialogue under the *Victorian Charter*. In *Taylor*, the majority of the New Zealand Supreme Court avoided adopting the notion of dialogue under the *NZ BORA*.[193] Yet there remains a difference in the significance and value attributed to a declaration power. Whilst the New Zealand courts have made best efforts to read in an *unexpressed* declaration power, the High Court and Victorian Courts have made best efforts to read out an *express* declaration power. The reasons for this are arguably not only legal, but also cultural and political. Australia's constitutional settings do not explain all. Culturally amongst the judiciary, it is difficult to imagine the High Court drawing much strength from the *ICCPR* to justify the existence and exercise of the declaration power,[194] in contrast to the *Taylor* majority. The declaration power's perceived lack of utility in *Momcilovic* was not a view shared by the majority in *Taylor*, who raised compliance with *ICCPR* obligations, the significance of vindication, and the need for some kind of remedy. Politically, Australia's engagement with the *ICCPR* and the Human Rights Committee is remarkably poor.[195] Australia

[193] Cf *A-G (NZ) v Taylor* [2017] 3 NZLR 24, 64–5 [149]–[156] (Wild and Miller JJ for the Court), discussed in Claudia Geiringer, 'The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*' (2017) 48(4) *Victoria University of Wellington Law Review* 547.

[194] Cf former Chief Justice of the High Court of Australia, speaking on the New Zealand context: Mason, 'Human Rights' (n 24) 11.

[195] Kate Eastman, 'Australia's Engagement with the United Nations' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 97, 111–15; Sarah Joseph, 'The Howard Government's Record of Engagement with the International Human Rights System' (2008) 27(1) *Australian Yearbook of International Law* 45, 49–53; Madelaine Chiam, 'International Human Rights Treaties and Institutions in the Protection of Human Rights in Australia' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 229, 238–44.

has failed to rectify findings of human rights violations on successive occasions.[196] Thus, not only does the *Victorian Charter* operate 'in the shadow of scepticism' cast by the lack of a national domestic bill of rights,[197] but also the lack of political traction when it comes to international human rights law obligations.

There have been no opportunities for the Victorian Parliament to demonstrate its willingness to rectify incompatible legislation following a declaration (since the declaration in *R v Momcilovic* was set aside). Ironically, a kind of 'inverse dialogue' has on occasion taken place in Victoria. There are instances of the Victorian Parliament legislating *against* human rights, in response to the courts finding for a human rights-*compatible* (or more compatible) interpretation — whether pursuant to s 32(1) or other principles of statutory interpretation.

For example, in *RJE v Secretary to the Department of Justice* ('*RJE*'), the interpretive issue related to the relevant threshold before a post-sentence supervision scheme could apply to serious sex offenders.[198] The legislation provided that a court could only make an 'extended supervision order' if the offender is *likely* to commit a relevant offence if released in the community. The Court of Appeal found in favour of a higher threshold, overturning earlier precedent. 'Likely' did not mean a potentially less than 50% chance; rather it meant 'more likely than not'.[199] Justice Nettle decided the issue on *Victorian Charter* grounds — adopting the latter construction, and finding the former construction was incompatible with the offender's right to freedom of movement (s 12), right to privacy (s 13(a)), and potentially right to liberty (s 21).[200] Yet less than two months after this decision, *RJE* was overruled by legislative amendment[201] and the 'less than 50 percent chance' position reinstated.[202]

[196] See Ben Doherty, '"Unacceptable": UN Committee Damns Australia's Record on Human Rights', *The Guardian* (Web Page, 18 October 2017) <https://www.theguardian.com/australia-news/2017/oct/19/unacceptable-un-committee-damns-australias-record-on-human-rights>, archived at <https://perma.cc/6H5V-2DB7>.

[197] Gardbaum (n 10) 221.

[198] (2008) 21 VR 526.

[199] Ibid 541 [53] (Maxwell P and Weinberg JA), 552 [97] (Nettle J).

[200] Ibid 556 [113], 557 [117]. The other Justices reached the same outcome but on other principles of statutory interpretation: at 539–40 [42]–[48].

[201] *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic).

[202] Ibid s 4. See also Gardbaum (n 10) 216–17; Debeljak, 'Rights Dialogue' (n 142) 283–92 [9.100]–[9.140].

This and other case studies potentially say two things about the state of the dialogue model in Victoria.[203] First, based on the Victorian Parliament's demonstrated willingness to at times override *compatible* (or more compatible) interpretations, there is no guarantee we can expect a favourable response to declarations for *incompatible* interpretations. In fact, '[i]f the courts' powers survive to be used, the main question is whether legislatures will override them too routinely.'[204] This would stand in contrast to the UK experience. Second, while no formal notification mechanism exists for facilitating dialogue when the courts adopt a human rights-compatible (or more compatible) interpretation, an informal dialogue might still be taking place.[205]

VIII Eight-Year *Victorian Charter* Review

The *Victorian Charter* mandates that a review take place after four[206] and eight[207] years of operation. Despite some calls for repeal, no legislative amendments to the *Victorian Charter* resulted from the four-year review, undertaken in 2011.[208]

The eight-year review of the *Victorian Charter* was undertaken in 2015 and made certain observations and recommendations relevant to the declaration power. Its report noted that: 'The High Court result in *Momcilovic* may be one reason why the Supreme Court has not readily used the power to make declarations.'[209] The report observed that:

> Without the express power in the [*Victorian Charter*] to make a declaration of inconsistent interpretation, the Court could still find a statutory provision

[203] See *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, discussed in Debeljak, 'Rights Dialogue' (n 142) 292–300 [9.150]–[9.180]; *Minogue v Victoria* (2018) 264 CLR 252, discussed in Debeljak, 'Rights Dialogue' (n 142) 310–20 [9.250]–[9.280]; Julie Debeljak, 'Statutory Interpretation, the *Victorian Charter* and Parole: *Minogue v Victoria*' (Speech, 2019 Constitutional Law Conference, Gilbert + Tobin Centre of Public Law, 15 February 2019) 0:27:27–0:50:58 <https://www.youtube.com/watch?v=wjVwxwzTXb8>.

[204] Gardbaum (n 10) 229.

[205] There are also analogous instances beyond Victoria, where the court reaches a construction applying the presumption against interference with fundamental common law rights, freedoms, immunities and principles, and departures from the general system of law (the 'principle of legality'), which Parliament then legislates to overturn: see *X7 v Australian Crime Commission* (2013) 248 CLR 92 and the subsequent *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth).

[206] *Victorian Charter* (n 6) s 44.

[207] Ibid s 45.

[208] Young (n 112) 7.

[209] Ibid 160.

> cannot be interpreted compatibly with a [*Victorian Charter*] right, and then state this finding in its reasons. But sections 36 and 37 of the [*Victorian Charter*] trigger ministerial and parliamentary examination of the offending provision that would not otherwise occur in this formal and public way. This examination closes the circle in a model under which the Court cannot invalidate statutory provisions.[210]

The report recommended no significant changes to the declaration power and process for ministerial response[211] — aside from a sensible (albeit mainly cosmetic) change that would re-label a 'declaration of inconsistent interpretation'[212] as a 'declaration of incompatible interpretation'.[213]

The report also recommended that the proper methodology for s 32(1) and s 7(2) be clarified, so that s 7(2) clearly applied to the interpretive process.[214] It further recommended that the s 31 override declaration be repealed,[215] because 'it does not serve the policy purpose of acting as a brake on limitations of human rights' and 'it is not necessary to preserve parliamentary sovereignty' and ensure Parliament's ability to 'enact human rights incompatible legislation'.[216]

The Victorian Government responded by saying that the recommendation on renaming the declaration power as a 'declaration of incompatible interpretation' was 'supported', and the proposals to amend ss 32(1) and 7(2) were 'supported in principle'.[217] The implementation of these recommendations remain 'pending'.[218] However, the recommendation to repeal the override declaration power was rejected.[219]

If implemented, it remains to be seen what impact the accepted recommendations might have on the making of declarations. The answer would seem to

[210] Ibid 161.

[211] As to the notice requirements and intervention rights, see ibid 169 (recommendations 33 and 34).

[212] As to the initial rationale for this, see Williams, 'Origins and Scope' (n 141) 902–3.

[213] Young (n 112) 162 (recommendation 32).

[214] Ibid 146–8 (recommendation 28).

[215] Ibid 200 (recommendation 46).

[216] Ibid 198.

[217] 'Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act', *Department of Justice and Regulation (Vic)* (Web Page) <https://www.justice.vic.gov.au/justice-system/laws-and-regulation/human-rights-legislation/government-response-to-the-2015-review>, archived at <https://perma.cc/X6B3-CQ8Z> ('Government Response to the 2015 Review').

[218] Victorian Equal Opportunity and Human Rights Commission, *2018 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, November 2019) 103–4.

[219] Government Response to the 2015 Review (n 217).

be: very little. Aside from clarifying the role of s 7(2), the remaining issues discussed in this article would persist. The recommendations do not seek to strengthen the declaration power. However, given that several of the issues discussed stem from the *Victorian Charter* being situated in a broader federal constitutional system, this would have, in any event, limited the impact of any amendments to facilitate the use of the declaration power.

IX Future Directions?

This article has identified and analysed several likely reasons for the quiet demise of the declaration power under the *Victorian Charter*. These relate to lingering doubts from *Momcilovic* (as to the validity of ss 36 and 7(2), reduced effect of s 32(1), uncertain role of s 7(2), appropriateness in criminal proceedings, and ability to be raised without a constructional issue); other potentially inhibiting features of the *Victorian Charter* (notice requirements, intervention rights, and the override declaration in s 31); and Australia's exceptionalist approach to human rights in both the national and international spheres (contrasted to the UK and New Zealand). In light of this, where to from here?

One might argue that the declaration power is not a necessity to the *Victorian Charter* model, and its lack of exercise is not fatal. That may be true; an informal dialogue can still take place.[220] As the eight-year *Victorian Charter* review noted, a Victorian court might still make a finding (or give an 'indication')[221] that legislation is incompatible or inconsistent with human rights. That has been the approach taken in New Zealand, prior to confirmation of the implied declaration power in *Taylor*.[222] Such a finding would still arise 'in the course of [the Victorian Court's] judgment resolving an issue which arises for determination in the course of an action or other legal proceeding between the parties' (particularly if s 7(2) is considered to apply to interpretation pursuant to s 32(1)).[223] The difference is that rather than a finding being contained in its reasons, the Victorian Courts would 'take the extra step of … issuing a formal declaration that there has been a rights breach'.[224]

[220] As demonstrated by the inverse situation — the Victorian Parliament overriding court findings which were in favour of a human rights-compatible (or more compatible) interpretation: see above Part VII(D).

[221] This is referred to as a '*Hansen* indication' from the *NZ BORA* (n 79) jurisprudence: see *R v Hansen* [2007] 3 NZLR 1, 80 [253], 82 [259] (McGrath J) ('*Hansen*').

[222] No issue was taken with *Hansen* indications in *Taylor* (n 113) 230 [31]–[32] (Ellen France J for Glazebrook and Ellen France JJ, William Young and O'Regan JJ agreeing at 250 [125]).

[223] Sir Anthony Mason, 'Human Rights: Issues to Be Resolved' (Speech, Law Institute of Victoria, 24 August 2009) [61].

[224] Nicholas Petrie, 'Indications of Inconsistency' (2019) 78(3) *Cambridge Law Journal* 612, 613.

However, the advantage of 'regularising'[225] the declaration power is to ensure transparency and accountability, with 'clear boundaries in terms of when it may be issued and … a structured process by which the Executive and Parliament must reconsider the rights-infringing legislation'.[226] Without a formal declaration, Parliament may simply choose not to respond.[227] That is not to assume that incompatible Victorian legislation identified by a declaration would necessarily be rectified, as per the UK experience.[228] Rather, without the Victorian Courts exercising the declaration power and triggering the response process, the litigant (and other potentially affected persons) may be none the wiser as to why incompatible legislation is being retained. A declaration contributes to a more 'robust rights culture',[229] with 'the greater formality mean[ing] a declaration is more effective'.[230]

While the ongoing issues from *Momcilovic* are not of their own making, the lack of willingness of the Victorian Courts to consider making declarations goes against Parliament's clear intention to create a process for dialogue, and establish a role for the courts as part of that dialogue. As Gardbaum has put it, the Australian and Victorian Courts 'appear set on handing back the powers their parliaments bestowed on them'[231] and '[t]here is clear evidence of reversion' towards the pre-*Victorian Charter* status quo.[232] Issues surrounding the declaration power will not be fully resolved by the legislative amendments proposed by the eight-year *Victorian Charter* review, and will require revisitation by the High Court. Whilst there are admittedly significant risks involved in exercising the declaration power, it forms part of a broader trend in which the Victorian Courts have retreated post-*Momcilovic* on the *Victorian Charter*[233] — even in this instance, for a power so modest that it is facilitative, non-binding, and unenforceable.

225 Geiringer, 'On a Road to Nowhere' (n 122) 616.

226 Petrie (n 224) 624.

227 Kirkness (n 113) 15.

228 *Responding to Human Rights Judgments* (n 164) 37.

229 Joseph, 'Declarations of Inconsistency' (n 27) 11. See also Geiringer, 'On a Road to Nowhere' (n 122) 647.

230 *Taylor* (n 113) 236 [58] (Ellen France J for Glazebrook and Ellen France JJ).

231 Gardbaum (n 10) 225, citing Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power over Human Rights that Parliament Intended It to Have' (2011) 22(1) *Public Law Review* 15.

232 Gardbaum (n 10) 243.

233 As to the weakening of s 32 of the *Victorian Charter* (n 6), see Chen, 'Revisiting Section 32(1)' (n 66).