

**BALANCING RIGHTS IN A DEMOCRACY: THE
PROBLEMS WITH LIMITATIONS AND OVERRIDES OF
RIGHTS UNDER THE VICTORIAN *CHARTER OF HUMAN
RIGHTS AND RESPONSIBILITIES ACT 2006***

JULIE DEBELJAK*

[Under the Charter of Human Rights and Responsibilities Act 2006 (Vic) ('Victorian Charter'), the Victorian Parliament protects a range of civil and political rights. The rights are subject to restricting provisions, including a general limitation clause which allows all rights to be subject to such reasonable limits as can be demonstrably justified in a free and democratic society, and an override provision which allows the suspension of the operation of specified Victorian Charter rights in relation to overriding legislation for a renewable period of five years. This article will explore the theoretical underpinnings of the rights-restricting mechanisms before critiquing the mechanisms adopted under the Victorian Charter against comparable international, regional and domestic human rights instruments, and against the underlying objectives of the Victorian Charter — the preservation of parliamentary sovereignty and the creation of an institutional dialogue about rights. This analysis will demonstrate that the rights-restricting mechanisms under the Victorian Charter are flawed devices because they go beyond the restrictions ordinarily accepted under international, regional and domestic human rights law; reach beyond what is needed to establish an institutional dialogue; and tend to unnecessarily promote parliamentary sovereignty at the expense of human rights accountability, justification and scrutiny.]

CONTENTS

I	Introduction	423
II	Balancing Rights in a Democracy through the Use of Restrictions	424
	A Methods of Restricting Rights	424
	B The Restrictions under the <i>Victorian Charter</i>	426
	C Institutional Justifications for Restrictions: Parliamentary Sovereignty and Dialogue	427
	1 Motivation to Preserve Parliamentary Sovereignty	427
	2 Institutional Dialogue	429
III	The <i>Victorian Charter</i> and Limitations on Rights	432
	A Relevance of International Human Rights Obligations	433
	B Problems with the General Limitations Power	433
IV	The <i>Victorian Charter</i> and Overriding Rights	436
	A Non-Derogable Rights under International, Regional and Comparative Domestic Human Rights Law	437
	B Conditioning the Use of Derogations/Overrides under International, Regional and Comparative Domestic Human Rights Law	441
	1 The Circumstances Justifying a Derogation	441
	2 Regulation of the Effects of a Derogation	447
	C Underlying Objectives of the <i>Victorian Charter</i> and the Override	453

* BEc, LLB (Hons) (Monash), LLM (Hons) (Cantab), PhD (Monash); Senior Lecturer, Faculty of Law, Monash University; Foundational Deputy Director, Castan Centre for Human Rights Law, Monash University. The author would like to thank Professor Sarah Joseph and Simon McGregor for their insightful comments on an earlier draft of this article, and the anonymous referees for reviewing this article. She would also like to thank Katie Mitchell for her research assistance.

1	Preservation of Parliamentary Sovereignty	453
2	Establishing an Institutional Dialogue.....	455
D	Conclusion.....	457
V	Comparative Domestic Human Rights Instruments and Overrides/Derogation.....	458
A	Derogation under the <i>South African Bill of Rights</i>	458
B	Derogation under the <i>UK Human Rights Act</i>	461
C	Overrides under the <i>Canadian Charter</i>	466
D	Conclusion.....	468
VI	Conclusion	469

I INTRODUCTION

Under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Victorian Charter*), the Victorian Parliament protects and promotes a range of civil and political rights,¹ based largely on the rights guaranteed under the *International Covenant on Civil and Political Rights* (*ICCPR*).² Those rights, however, may be subject to restriction. Under the general limitation power in s 7(2), all rights may be subject ‘to such reasonable limits as can be demonstrably justified in a free and democratic society’. Some individual rights may also be subject to internal qualifications or limitations specific to those particular rights. Moreover, all rights may be subject to the s 31 override provision, which allows the suspension of the operation of specified rights — or the entire *Victorian Charter* — in relation to an overriding law for a renewable period of five years.

Allowing rights to be restricted is neither new nor wrong. It is widely acknowledged that not all rights are absolute, that they need to be balanced against other protected rights and that they may conflict with other non-protected values.³ The ability to restrict rights is also a key mechanism for establishing an institutional dialogue about rights between the three arms of government, in contrast to representative or judicial monologues about rights.

This article will explore the theoretical underpinnings of restriction mechanisms, then critique the mechanisms adopted under the *Victorian Charter* against comparable international, regional and domestic human rights instruments, and against the underlying objectives of the *Victorian Charter* — the preservation of parliamentary sovereignty and the creation of an institutional dialogue about rights.⁴ This analysis will demonstrate that the rights-restricting mechanisms

¹ As the *Victorian Charter* only covers civil and political rights (excluding economic, social and cultural rights), this article will refer to the *Victorian Charter* rights as ‘rights’ or ‘protected rights’ to avoid creating the impression that the *Victorian Charter* relates to human rights generally.

² Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³ The power to restrict rights is acknowledged in international, regional and domestic human rights instruments: see, eg, *ibid* arts 12, 18–19, 21–2; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, arts 8–11 (entered into force 3 September 1953) (commonly known as the *European Convention on Human Rights*) (*ECHR*); *Canadian Charter of Rights and Freedoms 1982* ss 1, 33 (*Canadian Charter*).

⁴ The term ‘parliamentary sovereignty’ is not used in its strict or absolute sense throughout this article. The Victorian Parliament (and, for that matter, the Commonwealth Parliament and other Australian Parliaments) is subject to constitutional documents, including, primarily, the *Constitution Act 1975* (Vic). In a strict legal sense, the Victorian polity has constitutional supremacy, not parliamentary supremacy. Accordingly, the term ‘parliamentary sovereignty’ is used throughout

under the *Victorian Charter* are flawed devices. These mechanisms go beyond the level of rights restriction ordinarily incorporated in international, regional and domestic human rights instruments and do not contain the corresponding safeguards built into such instruments. Moreover, the override provision, which is not necessary to preserve parliamentary sovereignty, threatens to undermine the institutional dialogue that the Victorian Parliament sought to secure under the *Victorian Charter* and compromises human rights accountability, justificatory decision-making and scrutiny under the *Victorian Charter*.

II BALANCING RIGHTS IN A DEMOCRACY THROUGH THE USE OF RESTRICTIONS

It is a myth that rights are ‘absolute trumps’ over majority preferences, aspirations or desires. In fact, most rights are not absolute.⁵ Under human rights instruments, rights are balanced against and limited by other protected rights, and other non-protected values and communal needs. A plurality of values is accommodated, not just rights.⁶ Moreover, in jurisdictions with human rights instruments that adopt an institutional dialogue model (such as Victoria), the specific balance of the pluralistic values is assessed from a plurality of institutional perspectives — usually the executive, the legislative and the judicial.

A Methods of Restricting Rights

Rights can be restricted in various ways under human rights instruments. Many rights are *internally qualified*. For example, under the *ICCPR* and the *Convention for the Protection of Human Rights and Fundamental Freedoms* (commonly known as the *European Convention on Human Rights*) (*‘ECHR’*),⁷ every person has the right to liberty and security of the person, but this right may be qualified in specified circumstances such as lawful detention after conviction by a competent court or the detention of a minor for the lawful purpose of educational supervision.⁸

this article because of its political significance rather than legal accuracy. Politically, the term ‘parliamentary sovereignty’ was heavily relied upon in ‘selling’ the policy decision to enact the *Victorian Charter*.

⁵ See, eg, Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) 31. According to customary international law, the only rights that are absolute are the right to be free from genocide, slavery and servitude, and from systematic racial discrimination: see, eg, *Restatement (Third) of the Foreign Relations Law of the United States* § 702 (1987).

⁶ See, eg, *Canadian Charter* s 1, which recognises that the needs of a free and democratic society ‘are numerous, covering the guarantees enumerated in the *Charter* and more’: *R v Keegstra* [1990] 3 SCR 697, 737 (Dickson CJ) (emphasis added).

⁷ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

⁸ See *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976); *ibid* art 5. For other internally qualified rights, see, eg, *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, arts 8(3), 9(1), 14(1) (entered into force 23 March 1976); *Canadian Charter* ss 7, 11(f), 13, 15. The terms of most qualifications mean that the assessment of the qualification usually proceeds in a similar manner to that of limitations: see further below Part II(B) (discussion of *Victorian Charter* s 7(2)), n 18 (discussion of internal limitations). Prescription by law, rationality and reasonableness are the elements that usually need to be satisfied for a qualification to be lawful.

Rights can also be *internally limited*. For example, the rights contained in arts 12, 18–19 and 21–2 of the *ICCPR* and arts 8–11 of the *ECHR* are guaranteed, subject to limitations that can be justified by reference to particular objectives such as the protection of public health, order or morals; the national interest; national security, public safety or the wellbeing of the country; public order; the prevention of disorder or crime; or the protection of the rights and freedoms of others.⁹ Such internal limitations must be in accordance with law¹⁰ and necessary in a democratic society.

Further, rights can be *externally limited*. For example, s 1 of the *Canadian Charter of Rights and Freedoms 1982* ('*Canadian Charter*') guarantees enumerated rights, subject to any reasonable limits that are prescribed by law and that can be demonstrably justified in a free and democratic society.¹¹ This is a global limitations clause which applies to all of the guaranteed rights. Similar wording has been adopted in the South Africa,¹² New Zealand¹³ and Australian Capital Territory models.¹⁴

Finally, rights can be temporarily suspended in exceptional circumstances. In international and regional settings, this is referred to as *derogation*. For example, under art 4 of the *ICCPR*:

in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, [states] may take measures derogating from their obligations under the [*ICCPR*] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.¹⁵

⁹ See, eg, *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, art 22(2) (entered into force 23 March 1976), which states that

[n]o restrictions may be placed on the exercise of [the right to freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Similarly, art 9(2) of the *ECHR*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) states that

[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

¹⁰ Alternatively, these internal limitations must be in accordance with some equivalent requirement, such as 'prescribed by law'.

¹¹ See also *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 4 (entered into force 3 January 1976).

¹² *South African Constitution* s 36. In South Africa, the human rights guarantees are found in ch 2 of the *South African Constitution* and are commonly referred to as the 'Bill of Rights'. In this article, *South African Constitution* ch 2 will be referred to as the '*South African Bill of Rights*'. 'The principal model for the *South African Bill of Rights* is the *Canadian Charter of Rights and Freedoms* which contains a list of rights and a general limitation clause governing the limitation of those rights': Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5th ed, 2005) 165.

¹³ *New Zealand Bill of Rights Act 1990* (NZ) s 5.

¹⁴ *Human Rights Act 2004* (ACT) s 28.

¹⁵ Opened for signature 19 December 1966, 999 UNTS 171, art 4(1) (entered into force 23 March 1976).

In the domestic setting, temporary suspension is more commonly referred to as *overriding* rights. Section 33 of the *Canadian Charter* was the first articulation of the concept of derogation in a domestic setting; it provides that Parliament can expressly declare in legislation that the legislation shall operate *notwithstanding* a provision of the *Canadian Charter* for a (renewable) five-year period.

B *The Restrictions under the Victorian Charter*

The *Victorian Charter* has adopted all four methods of restricting rights.

First, the main limitation power in the *Victorian Charter* is the external general limitation power contained in s 7(2), which provides that the protected rights may be subject ‘to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’. Section 7(2) lists the following factors to be balanced when assessing limits: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (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 — a minimum impairment test. The global limitation test is borrowed from s 1 of the *Canadian Charter*, whilst the factors are borrowed from s 36 of the *South African Bill of Rights*, which itself is modelled on the jurisprudence developed under the *Canadian Charter*.¹⁶

Secondly, some individual rights in the *Victorian Charter*, such as the freedom from forced labour under s 11(2) and the right to liberty and security of the person under s 21, contain specific internal qualifications to the breadth of the right.

Thirdly, some individual rights contain internal limitations as specific articulations of limitations relevant to that right. For example, the freedom of expression under s 15 of the *Victorian Charter* may be subject to restrictions necessary to protect the reputation of others, and for the protection of national security, public order, public health or public morality.¹⁷ The tests for internal qualifications and limitations are not dissimilar to the general limitations test,¹⁸ and the latter still

¹⁶ Oddly, the Explanatory Memorandum notes that the general limitations clause is based on the *New Zealand Bill of Rights Act 1990* (NZ) s 5 and the *South African Bill of Rights* s 36: Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9. However, it is more honest to acknowledge the influence of the *Canadian Charter*, which predates the New Zealand legislation by eight years and provided the basis for the New Zealand legislation.

¹⁷ *Victorian Charter* s 15 contains a specific articulation of the legislative purposes that may justifiably limit a right — that is, in s 7(2) terms, it specifies what is reasonable.

¹⁸ For example, under the *ECHR* and thus the *Human Rights Act 1998* (UK) c 42, an internal limit is valid if it is: first, prescribed by law; secondly, intended to achieve a legitimate objective, as listed within the article itself; and thirdly, necessary in a democratic society. There are two elements to assessing necessity in a democratic society. The first is necessity, which comes down to a pressing social need: see *The Sunday Times Case* (1979) 30 Eur Court HR (ser A) 35–7; *Handyside Case* (1976) 24 Eur Court HR (ser A) 22; *Goodwin v United Kingdom* (1996) 2 Eur Court HR 483, 498–500. And the second is proportionality: *R v A [No 2]* [2002] 1 AC 45, 65 (Lord Steyn); *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 546–8 (Lord Steyn); *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391, 1416–17 (Lord Phillips); *R v Shayler* [2003] 1 AC 247, 281 (Lord Hope); *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 789 (Jonathan Parker LJ); *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 254 (Lord

applies to rights that are subject to specific internal qualifications or limitations.¹⁹

Fourthly, Victoria adopted an override provision based on s 33 of the *Canadian Charter*. Under s 31, Parliament can override the application of any or all of the protected rights. This power may be used when enacting legislation for the first time, or in response to a judicial ruling. Use of the override means that the overriding legislation operates notwithstanding the *Victorian Charter*; in other words, both the s 32 interpretative obligation and the s 36 declaration power will not apply to that legislation.²⁰ Given the extraordinary nature of an override, a number of safeguards have been incorporated. First, such declarations are to be made only in exceptional circumstances.²¹ ‘Exceptional circumstances’ include ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria’.²² Secondly, override declarations are subject to a renewable five-year sunset clause.²³

C Institutional Justifications for Restrictions: Parliamentary Sovereignty and Dialogue

The Victorian government made it clear from the beginning of its community consultation that any changes to the methods of rights protection would be subject to the preservation of parliamentary sovereignty.²⁴ This preservation of parliamentary sovereignty has been achieved by the institutional arrangements and processes enacted as a result of the community consultation and embodied in the *Victorian Charter*. This Part will explore the motivation for preserving parliamentary sovereignty, the precise manner in which it has been preserved and the role that restrictions on rights have in such preservation.

1 Motivation to Preserve Parliamentary Sovereignty

The motivation to retain parliamentary sovereignty is linked to traditional rights instruments, such as the United States model, which allow the judiciary to

Walker). Assessing the lawfulness of qualifications to rights usually proceeds in a similar manner as that for limitations, with prescription by law, rationality and reasonableness being the elements that need to be satisfied.

¹⁹ See, eg, Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 14.

²⁰ *Victorian Charter* s 31(6).

²¹ *Victorian Charter* ss 31(3)–(4).

²² Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21.

²³ *Victorian Charter* ss 31(7)–(8).

²⁴ See Department of Justice, Victoria, *Human Rights in Victoria: Statement of Intent* (2005); Human Rights Consultation Committee, Department of Justice, Victoria (‘Consultation Committee’), *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 15, 20–2; Office of the Attorney-General, Victorian Government, ‘Victoria Leads the Way on Human Rights’ (Media Release, 20 December 2005); Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290, 1292–3 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 1984 (Lily D’Ambrosio), 1993 (Richard Wynne); Victoria, *Parliamentary Debates*, Legislative Assembly, 15 June 2006, 2196 (Joanne Duncan); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554, 2556–7 (Justin Madden, Minister for Sport and Recreation); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos), 2643 (John Geoffrey Hilton).

invalidate legislation that is inconsistent with guaranteed rights.²⁵ In short, it is often asserted that democracy requires parliamentary sovereignty. It is argued that if the judiciary was empowered to review and invalidate legislative and executive actions under a rights instrument (which occurs under the *United States Constitution*), we would have a system of judicial sovereignty. Given that the judiciary is not elected, judicial sovereignty is undemocratic. Therefore, to preserve democracy, the representative arms must retain sovereign power over rights.²⁶

More modern human rights instruments address this supposed anti-democratic tension by ensuring that the judiciary does not have the final say about rights. In these instruments, judicial review is simply one element of an institutional dialogue about rights between the executive, legislature and the judiciary. This contrasts with a parliamentary monologue in jurisdictions with no formal protection of human rights (such as the Australian model), or a judicial monologue under a fully-fledged constitutional human rights instrument (such as the US model).²⁷ In order to establish the institutional dialogue, modern rights instruments use various mechanisms which are designed to guard against judicial supremacy while simultaneously ensuring enhanced rights accountability of the representative arms. The *Victorian Charter* was enacted with the explicit aim of establishing an institutional dialogue about rights²⁸ and adopts the approach of these modern human rights instruments.

²⁵ Indeed, the Victorian government, the Consultation Committee and the Victorian Parliament were at pains to distance themselves from that model: see Department of Justice, above n 24; Consultation Committee, above n 24, 15, 20–1; Office of the Attorney-General, above n 24; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 15 June 2006, 2196 (Joanne Duncan); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554 (Justin Madden, Minister for Sport and Recreation); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos), 2646 (Johan Scheffer).

²⁶ See, eg, Martin Loughlin, 'Rights, Democracy, and Law' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 41, 47; Dennis Davis, Matthew Chaskalson and Johan de Waal, 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in Dawid van Wyk et al (eds), *Rights and Constitutionalism: The New South African Legal Order* (1995) 1, 6; Peter H Russell, 'The Paradox of Judicial Power' (1987) 12 *Queen's Law Journal* 421, 428–9. Cf Burt Neuborne, 'The Origin of Rights: Constitutionalism, the Stork and the Democratic Dilemma' in Shimon Shetreet (ed), *The Role of Courts in Society* (1988) 187, 188–90.

²⁷ Even in the US, various theories and approaches to judicial review have been developed to make judicial review more democratically palatable: see Janet L Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (1996) 89–103. One example is the approach of Ronald Dworkin, which is summarised (but ultimately rejected) by Jeremy Waldron, 'Judicial Review and the Conditions of Democracy' (1998) 6 *Journal of Political Philosophy* 335. Another example is the dialogue theory: Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, 1986).

²⁸ Department of Justice, above n 24; Consultation Committee, above n 24, 66–8, 85–6; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290, 1293, 1295 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554, 2556–8 (Justin Madden, Minister for Sport and Recreation); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos). There is only one express reference to dialogue in the Explanatory Memorandum, where 'the [Victorian Equal Opportunity and Human Rights] Commission's annual report is expected to focus on key aspects of the Charter's operation as a conduit for institutional dialogue': Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 30.

2 Institutional Dialogue

In order to contextualise the discussion of restrictions, it is pertinent to briefly explore the four institutional dialogue mechanisms employed by modern human rights instruments and the *Victorian Charter*.²⁹

The first institutional dialogue mechanism relates to the articulation of rights. Modern human rights instruments, including the *Victorian Charter*, deliberately articulate the protected rights in broad and open-textured terms. This accommodates the uncertainty associated with unforeseeable situations and needs, and manages the (often irreducible)³⁰ diversity and disagreement within pluralistic communities. Open-textured rights, however, need to be refined in their concrete application. Institutional dialogue is about securing the most broad and diverse input from each of the differently situated and motivated arms of government into this process of refinement.

The second institutional dialogue mechanism is the non-absoluteness of rights. Under the *Victorian Charter* and other modern human rights instruments, rights are balanced against, and limited by, other protected rights, and non-protected values and communal needs. This ensures that a plurality of values is accommodated through the protection of rights. Moreover, an institutional dialogue approach ensures that the specific resolution of conflicts between rights, and between rights and other non-protected values, will be assessed by a plurality of institutional perspectives. All arms of government are able to provide an assessment of the appropriate balance to be struck when conflicts over rights arise, based on each arm's divergent motivations, strengths, skills and tools.

In terms of the first and second institutional dialogue mechanisms, the executive through policy formulation and legislative drafting,³¹ the legislature through its constitutional roles of legislative scrutineer and law-maker,³² and the judiciary through adjudicating disputes and applying the law all contribute to the debate about the refinement of the rights and the justifiability of their limitations. The balance struck between rights and justifiable limitations is a 'process of careful

²⁹ For an in-depth analysis, see Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9; Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* (PhD Thesis, Monash University, 2004) especially ch 3.

³⁰ There will always be an 'irreducible element of reasonable disagreement' within a polity, and these will be 'disagreements for which there will be good but non-decisive reasons on each side': James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204, 207.

³¹ The contribution of the executive to the dialogue is formally recognised through the s 28 statement of (in)compatibility, with additional contributions being made through other executive communication tools such as public discussion papers, exposure drafts of legislation, explanatory memorandum and the like. A s 28 statement must either state that, in the member's opinion, the Bill is compatible with protected rights and how it is so, or that the Bill is incompatible and the nature and extent of the incompatibility: *Victorian Charter* s 28(3). Section 29 provides that a failure to comply with s 28 does not affect the validity, operation or enforcement of the Act.

³² The contribution of Parliament to the debate is also bolstered by the expanded role of the Scrutiny of Acts and Regulations Committee ('SARC'). Under s 30 of the *Victorian Charter*, the SARC must scrutinise all proposed legislation against the *Charter* rights, including assessing the scope of the rights and the justifiability of any limitations placed on rights, and report to Parliament.

adaptation ... carried out by all three branches of government'.³³ The 'maximum participation by [the] different sectors'³⁴ of government is vital to ensuring the educative promise of institutional dialogue, which

allows courts to educate legislatures and society by providing principled and robust articulations of the values of the *Charter* ... while allowing legislatures to educate courts and society about their regulatory and majoritarian objectives and the practical difficulties in implementing those objectives.³⁵

The contribution of each arm is informed by distinct institutional motivations, responsibilities and concerns. The representative arms will bring to bear *their* unique understanding of the requirements of, and balance between, democracy and rights. These perspectives will be informed by their distinct role in mediating between different interests and values within society; their responsibilities to their representatives; their motivation to stay in power; and their distinctive institutional strengths. These are all legitimate and proper influences in the representative arms' decision matrix. The analysis of the judiciary will proceed from its distinct institutional perspective, which is informed by its unique non-majoritarian role and its particular concern about principle, reason, rationality, proportionality and fairness. The judiciary must not be timid and must not simply defer to the executive and legislative viewpoints. Rather, the judiciary must acknowledge, consider and be open to the influence of the executive and legislative contributions, whilst still making an independent assessment of the rights implications of the legislation.

The third institutional dialogue mechanism is the limited powers conferred on the judiciary under the *Victorian Charter*. Section 32(1) imposes an obligation on the judiciary which requires all statutory provisions to be interpreted in a way that is compatible with protected rights, so far as it is possible to do so consistently with the statutory purpose.³⁶ However, the judiciary is not authorised to invalidate legislation that is not amenable to a s 32 rights-compatible interpretation. Rather, under s 36, the Supreme Court of Victoria or the Victorian Court of Appeal are empowered to make a 'declaration of inconsistent interpretation'.³⁷ A declaration does not affect the 'validity, operation or enforcement' of the legislation, or 'create in any person any legal right or give rise to any civil cause

³³ Lord Lester of Herne Hill, 'Developing Constitutional Principles of Public Law' [2001] *Public Law* 684, 684.

³⁴ Andrew Clapham, 'The *European Convention on Human Rights* in the British Courts: Problems Associated with the Incorporation of International Human Rights' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999) 95, 157.

³⁵ Kent Roach, 'Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures' (2001) 80 *Canadian Bar Review* 481, 485.

³⁶ Section 32 is primarily based on the *Human Rights Act 1998* (UK) c 42, s 3, but with an additional explicit reference to 'consistently with their purpose': *Victorian Charter* s 32(1).

³⁷ For the position of subordinate legislation, see *Victorian Charter* s 32(3)(b); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 24. For a discussion on how declarations of incompatibility in the United Kingdom impact on the prerogative powers as exercised under Orders in Council, see Peter Billings and Ben Pontin, 'Prerogative Powers and the *Human Rights Act*: Elevating the Status of Orders in Council' [2001] *Public Law* 21.

of action.³⁸ In terms of institutional dialogue, the judiciary may deliver one of three outcomes under the third mechanism. First, the law may be upheld as rights-compatible because it does *not* impose unjustifiable limitations on the protected rights. Secondly, s 32 may be used to produce a rights-compatible interpretation of the otherwise rights-incompatible legislation.³⁹ Thirdly, a s 36 declaration may be issued where a rights-compatible interpretation pursuant to s 32 is impossible and/or inconsistent with the statutory purpose. These judicial outputs feed back into the dialogue loop via the fourth mechanism.

The fourth institutional dialogue mechanism is the representative response mechanism(s) to the judicial outputs. The representative arms may respond to s 32 judicial interpretations and must respond to s 36 judicial declarations.⁴⁰ First, Parliament may decide to do nothing, leaving the s 32 judicially-assessed interpretation in place or the s 36 judicially-assessed incompatible law in operation.⁴¹ In relation to the latter, the retention of the judicially-assessed, rights-incompatible legislation is consistent with the preservation of parliamentary sovereignty⁴² and demonstrates that dialogue models are not designed to necessarily produce consensus.⁴³

Secondly, Parliament may decide to pass ordinary legislation.⁴⁴ A legislative response to s 36 declarations would presumably be aimed at removing a judicially-assessed rights-incompatibility. A legislative response to s 32 judicial interpretations may be aimed at clarifying the judicial interpretation, addressing an unforeseen consequence arising from that interpretation, or emphasising a competing right or other non-protected value. Conversely, Parliament may disagree with the judiciary's rights-compatible interpretation and legislate to reinstate its initial rights-incompatible legislation using express language and/or an incompatible statutory purpose in order to avoid any possibility of a future s 32 rights-compatible interpretation. This latter response is consistent with the preservation of parliamentary sovereignty and accommodation of disagreement.

Thirdly, under s 31 Parliament may choose to override the *Charter*, thereby avoiding the rights issue altogether. The s 32 interpretative obligation and the s 36 declaration power do not apply to legislation which is subject to an override declaration.⁴⁵ This effectively 'mutes' the judicial voice on the matter for a period of five years. This is still consistent with dialogue, however, because the

³⁸ *Victorian Charter* s 36(5). In other words, a declaration will not affect the outcome of the case in which it is issued, with the judge compelled to apply the incompatible law; nor does it impact on any future applications of the incompatible law.

³⁹ This refers to legislation that the judiciary assesses as rights-incompatible because it imposes an unjustifiable limitation on protected rights.

⁴⁰ *Victorian Charter* s 37.

⁴¹ For a discussion of examples of the first response mechanism under the *Human Rights Act 1998* (UK) c 42, see Debeljak, *Human Rights and Institutional Dialogue*, above n 29, 382–4.

⁴² Indeed, the very reason for excluding Parliament from the definition of public authority was to allow incompatible legislation to stand: see *Victorian Charter* s 4(1)(i); Consultation Committee, above n 24, 57.

⁴³ Janet L Hiebert, 'A Relational Approach to Constitutional Interpretation: Shared Legislative Responsibilities and Judicial Responsibilities' (2001) 35 *Journal of Canadian Studies* 161, 170.

⁴⁴ For a discussion of examples under the *Human Rights Act 1998* (UK) c 42, see Debeljak, *Human Rights and Institutional Dialogue*, above n 29, 384–94.

⁴⁵ See legislative note to *Victorian Charter* s 31(6).

judicial viewpoint revives when the dialogue continues at the expiration of the override provision. Where new or amended legislation is part of the representative response, the dialogue cycle begins again. The four institutional dialogue mechanisms thus lock the arms of government into a relationship of ongoing dialogue about rights and democracy.

These four institutional dialogue mechanisms ensure that each arm of government shares the responsibility for assessing governmental actions against rights — the executive and legislature make an initial assessment of legislation against the protected rights and justifiable limits (the first and second mechanisms); the judiciary then contributes its perspective (the first, second and third mechanisms); and the executive and legislature can then respond (the fourth mechanism). There are strong incentives for the representative arms of government to engage in a constructive and educative dialogue with the judiciary: an unexpected s 32 judicial rights-compatible interpretation of legislation may compromise the legislative objectives and/or means; and a s 36 judicial declaration ‘impl[ies] a degree of legal impropriety in what Parliament has done even if it does not amount to illegality.’⁴⁶ The initial views of the executive and legislature, however, do not necessarily trump because the judiciary can review their actions. Conversely, the judicial view does not necessarily trump, given the representative response mechanisms. Rights accountability is increased through the institutional dialogue about the extent to which governmental activity impacts on rights and the justifications for this. Ultimately, however, parliamentary sovereignty is preserved. Although the judiciary’s contribution should prompt a response by the representative arms, it cannot dictate the nature or content of the response, with Parliament being free to retain rights-*inconsistent* outcomes.

III THE *VICTORIAN CHARTER* AND LIMITATIONS ON RIGHTS

The above analysis highlights that restrictions on rights are an inherent part of the protection of rights and help to establish an institutional dialogue amongst the arms of government about the legitimacy of governmental actions. The rights-restricting powers contained in the *Victorian Charter*, however, go beyond those ordinarily accepted in international, regional and comparable domestic human rights law, do not contain the corresponding safeguards built into such instruments, and reach beyond what is needed to establish an institutional dialogue. First, the general limitation power is broader than the equivalent limitation powers under international human rights law (discussed in this Part). Secondly, there are numerous problems with the override provision (discussed below in Parts IV and V). The inclusion of an override power is unnecessary given the preservation of parliamentary sovereignty by the substantial circumscription of judicial powers and the establishment of an institutional dialogue. Moreover, the application of the override to all rights is too broad. Further, the

⁴⁶ David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Public Law* 323, 324. The threat of a declaration ‘serves as a political and perhaps moral disincentive to legislate incompatibly’: Lord Irvine of Lairg, ‘The Impact of the *Human Rights Act*: Parliament, the Courts and the Executive’ [2003] *Public Law* 308, 310.

safeguards included to regulate the use of the override fall far short of those contained in international, regional and comparable domestic human rights instruments.

A *Relevance of International Human Rights Obligations*

Before exploring these shortcomings, it is worth briefly considering whether or not it matters if the *Victorian Charter* conforms to international human rights law standards. Unlike the United Kingdom, the *Victorian Charter* was not enacted with the explicit intention of ‘bringing rights home’ — that is, of ensuring that international and regional human rights could be enforced within the domestic jurisdiction.⁴⁷ However, this does not mean that conformity with international human rights law is irrelevant under the *Victorian Charter*. First, by adopting the essence of the *ICCPR* rights, the *Victorian Charter* implicitly ‘brings rights home’ for Victorians. Secondly, ‘international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision’ under s 32(2) of the *Victorian Charter*, thereby making international human rights norms relevant. Thirdly, Victorians still retain their right of individual communication to the Human Rights Committee (the treaty monitoring body) for alleged violations of the *ICCPR* where, inter alia, all domestic remedies (now including the *Victorian Charter*) have been exhausted.⁴⁸ Finally, where the *Victorian Charter* obligations are less rigorous than the minimum protections guaranteed under international human rights law, the Commonwealth may still be held to account internationally for any violations of Australia’s international human rights obligations.⁴⁹

B *Problems with the General Limitations Power*

According to international human rights law, it is permissible to place qualifications and limitations on certain individual rights. Moreover, there is nothing in international human rights law to suggest that qualifications and limitations are

⁴⁷ United Kingdom, *Rights Brought Home: The Human Rights Bill*, Cm 3782 (1997).

⁴⁸ The *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, art 2 (entered into force 23 March 1976) (*First Optional Protocol*) allows individual complaints to be made under the *ICCPR*. Australia ratified the *First Optional Protocol* in December 1991: *J L v Australia*, Human Rights Committee, Communication No 491/1992, [1], UN Doc CCPR/C/45/D/491/1992 (1992). Individual communications can also be made to the Committee on the Elimination of Racial Discrimination (*CERD* Committee) and Committee against Torture. Article 14 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) (*CERD*) allows states to submit to the individual complaints jurisdiction of the *CERD* Committee, which Australia did in January 1993: *Barbaro v Australia*, *CERD* Committee, Communication No 7/1995, [1], UN Doc CERD/C/51/D/7/1995 (1997). Article 22 of *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (*CAT*) also allows states to submit to the individual complaints jurisdiction of the Committee against Torture. Australia did this in 1993: Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [51], UN Doc A/56/44 (2000).

⁴⁹ The Commonwealth of Australia has international legal personality and is thus the legal entity recognised at international law and held responsible for any violations of international law that may occur within its constituent components.

more effectively imposed by specifically-worded internal qualifications or internal limitations than by a generally-worded external limitations power. However, a generally-worded external limitations clause that applies to all protected rights is problematic as not all rights may be lawfully subject to qualification, limitation, override or derogation in international human rights law — some rights are absolute. To the extent that s 7(2) of the *Victorian Charter* applies to so-called absolute rights, it does not conform to international human rights law.⁵⁰

Under international human rights law, absolute rights cannot be derogated from (or overridden) and no circumstance justifies a qualification or limitation of such rights.⁵¹ Absolute rights in the *ICCPR*⁵² include the prohibition on genocide (art 6(3)); the prohibition on torture or cruel, inhuman and degrading treatment or punishment (art 7); the prohibition on slavery and servitude (arts 8(1) and (2)); the prohibition on prolonged arbitrary detention (elements of art 9(1)); the prohibition on imprisonment for a failure to fulfil a contractual obligation (art 11); the prohibition on the retrospective operation of criminal laws (art 15); the right of everyone to recognition everywhere as a person before the law (art 16); and the right to freedom from systematic racial discrimination (elements of arts 2(1) and 26).⁵³

The solution to this problem is to retain the generally-worded external limitation provision embodied in s 7(2) of the *Victorian Charter*, but to exclude it from applying to ss 8, 10, 11(1)–(2), 21(2), (8) and 27. This outcome should be achieved by legislative amendment to the *Victorian Charter*. It may also be achieved through judicial interpretation: given that s 32(2) allows for the influence of international jurisprudence in s 32(1) interpretation, and that the *Victorian Charter* itself should be interpreted in light of the s 32 rights-compatible interpretation obligation, the general limitations power in s 7(2) should be read down so as not to apply to those rights which are viewed as absolute under international law.

⁵⁰ To the extent that other domestic human rights instruments have general limitations powers that do not account for absolute rights, they too do not conform to international human rights law: see, eg, *Canadian Charter* s 1; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

⁵¹ The treaty monitoring bodies have some room to manoeuvre vis-a-vis purported restrictions on absolute rights when considering the scope of the right. That is, when considering the scope of a right (in relation to the definitional question as opposed to the justifiability of limitations question), whether a right is given a broad or narrow meaning will impact on whether a law, policy or practice violates the right. In the context of absolute rights, a treaty monitoring body may use the definitional question to give narrow protection to a right and thereby allow greater room for governmental behaviour that, in effect, restricts a right. However, the fact that absolute rights may be given a narrow rather than a broad definition does not alter the fact that absolute rights (whether defined narrowly or broadly) allow no limitation. Indeed, the very fact that the treaty monitoring bodies structure their analysis as a definitional question rather than a limitation question reinforces the fact that absolute rights admit of no qualification or limitation.

⁵² This is a relevant comparator because, inter alia, the rights guaranteed in the *Victorian Charter* are modelled on the rights guaranteed in the *ICCPR*.

⁵³ The Human Rights Committee describes the prohibitions against the taking of hostages, abductions and unacknowledged detention as non-derogable. 'The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law': Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, [13], UN Doc CCPR/C/21/Rev.1/Add.11 (2001).

The Solicitor-General of Victoria, Pamela Tate SC, has acknowledged that the *Victorian Charter* does not create any absolute rights, although most of its rights are based on the *ICCPR* which does contain absolute rights.⁵⁴ She argues that '[t]he status of a right at international law, as absolute or not, will be a relevant consideration in determining whether the limitation upon the right ... is reasonable.'⁵⁵ Presumably, the logic of Tate's argument is that limits on absolute rights will rarely be reasonable and demonstrably justified, and accordingly not lawful. Whether a right is absolute, and thereby admits no limitation, or whether the right is non-absolute but in practice would never admit a justifiable limitation, is inconsequential on this logic because the ultimate result is the same — that is, the right is not limited in that instance. This is not a sufficient answer to the problem created by applying s 7(2) to all of the protected rights.

First, this argument incorrectly suggests that absolute rights are negotiable — that there will be instances, albeit rare, in which an absolute right can be limited. Secondly, it introduces the relatively subjective assessment of proportionality into an area where proportionality assessments are usually excluded.⁵⁶ Thirdly, it means that the representative arms will be encouraged to enact laws that violate absolute rights and 'argue the toss' if they are challenged, rather than recognise that certain rights are non-negotiable. Fourthly, this is relatively uncharted territory. There is no international or regional guidance, and little domestic guidance,⁵⁷ on how to assess the reasonableness and demonstrable justifiability of a limitation placed on an absolute right. Finally, assessing whether a limitation should be placed on an absolute right via the general limitations power in s 7(2) is therefore unsatisfactory and will amount to a violation of international human rights law. Limiting an absolute right is a serious matter. At a minimum, it should be classified as an extraordinary step and subject to an extraordinary process of enactment and assessment. The tool of derogation or override could be a good template for this, although the preconditions and safeguards adopted for its use under s 31 of the *Victorian Charter* fall far short of the minimum standards for equivalent provisions in international, regional and domestic comparative instruments.⁵⁸ As a matter of urgency, all arms of government should reassess the applicability of s 7(2) to absolute rights with the aim of ensuring their special status.

⁵⁴ Pamela Tate, 'A Practical Introduction to the *Charter of Human Rights and Responsibilities*' (Speech delivered at the Solicitor-General Seminar Program, Victorian Government Solicitor's Office, Melbourne, 29 March 2007) [66] <<http://www.hrlrc.org.au/files/Z7ZP35LVSS/Tate%20-%20Practical%20Guide%20to%20Charter.pdf>>. Tate confuses the concepts of absolute rights and non-derogable rights: at [66]. For clarification of this distinction, see below n 65.

⁵⁵ *Ibid.*

⁵⁶ This criticism is not about subjectivity in judicial decision-making per se. It is acknowledged that there is a certain element of subjective decision-making in adjudicating the scope of protected rights (whether absolute or non-absolute rights), just as there is in adjudicating the justifiability of a limitation or qualification of a non-absolute right. The point made here is just that with respect to absolute rights, a proportionality analysis inherent in justifying limitations, with its associated subjectivity, ought to be excluded.

⁵⁷ See, eg, *United States v Burns* [2001] 1 SCR 283.

⁵⁸ See below Part IV.

IV THE VICTORIAN CHARTER AND OVERRIDING RIGHTS

The balance of this article is dedicated to considering the numerous difficulties with the override provision.⁵⁹ This Part begins with an assessment of the *Victorian Charter* against the international and regional human rights law equivalent of derogation⁶⁰ and comparable domestic jurisdictional equivalents.⁶¹

⁵⁹ Such lengthy analysis is necessary given the frequency with which overrides and derogations have occurred in other comparable domestic jurisdictions. For example, in Canada the s 33 override has been invoked on 16 occasions between 1982 and 2001 — 13 occasions in Quebec, once in the Yukon, once in Saskatchewan and once in Alberta. On another occasion, the Albertan government tabled a Bill that included a notwithstanding clause, but it was withdrawn before it was enacted. Four of the 16 notwithstanding provisions have been repealed or expired without re-enactment, covering three Quebec uses and the Saskatchewan use. The 10 remaining invocations of the override in Quebec have been renewed on numerous occasions: see Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter' (2001) 44 *Canadian Public Administration* 255, 257–67. As at 2001, eight uses of the notwithstanding clause were still in operation: F L Morton, 'Can Judicial Supremacy Be Stopped?' (2003) 24(9) *Policy Options* 25, 27. The fact that on each of these occasions the override was invoked by a provincial government is of especial importance in the Victorian context. Moreover, the UK has been willing to use its derogation provisions on numerous occasions: see further below Parts IV(B), V(B).

⁶⁰ The *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) is the chosen comparator from an international human rights law perspective: see above Part III(A) and above n 52). The *ECHR*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) is the chosen comparator from a regional human rights law perspective. The *ECHR* is relevant in its own right because it contains limitations provisions and a derogation provision, both of which have produced significant guiding jurisprudence. It is also relevant because of its link to the *Human Rights Act 1998* (UK) c 42. That is, the *Human Rights Act 1998* (UK) c 42 adopts the rights protected in the *ECHR*, and the 'application'/enforcement provisions of the *Victorian Charter* are modelled primarily on the *Human Rights Act 1998* (UK) c 42: the statement of compatibility requirement under s 28 of the *Victorian Charter* is modelled on s 19 of the *Human Rights Act 1998* (UK) c 42; the s 32 interpretative obligation under the *Victorian Charter* is modelled on s 3 of the *Human Rights Act 1998* (UK) c 42; the s 36 declaration of inconsistent interpretation provision under the *Victorian Charter* is modelled on s 4 of the *Human Rights Act 1998* (UK) c 42; and the obligations on public authorities to act lawfully under s 38 of the *Victorian Charter* are modelled on s 6 of the *Human Rights Act 1998* (UK) c 42.

⁶¹ Three jurisdictions were chosen for the purposes of comparison — the UK, Canada and South Africa. The *Human Rights Act 1998* (UK) c 42 is of great comparative relevance given that the particular mode of applying and enforcing the protected rights under the *Victorian Charter* is derived predominantly from the UK Act. Canada is highly relevant given that the general limitations power and override provision under ss 7 and 31 of the *Victorian Charter* are modelled on ss 1 and 33 of the *Canadian Charter* respectively. South Africa is of comparative relevance because s 7(2) of the *Victorian Charter* is modelled on the *South African Bill of Rights*, and because, rather than including a domestic override provision modelled on the *Canadian Charter*, South Africa chose to adopt a derogation provision domestically (this latter point being all the more significant given the large extent to which the *South African Bill of Rights* was modelled on the *Canadian Charter*: see above n 12). To focus on the 'constitutional' standing of the *Canadian Charter* and the *South African Bill of Rights* on the one hand, and the 'quasi-constitutionality' of the *Victorian Charter* on the other, is misplaced. Neither the South African nor the Canadian model can be considered a supreme law and a full constraint on the plenary power of legislatures and governments in the traditional sense because of the override/derogation provisions — that is, parliamentary supremacy outweighs any traditional concept of constitutionality. Accordingly, the true points of comparison between South Africa, Canada and Victoria relate to the fact that none of these models are 'constitutional' in the traditional sense; each model adopts an override/derogation provision of some sort (with the South African provision being preferable to the Canadian and Victorian provisions: see below Part V). The *Human Rights Act 2004* (ACT) was not chosen as an instrument for the purposes of comparison here because there is not enough experience to draw from it yet. It is, however, referred to throughout the article where relevant. The *New Zealand Bill of Rights Act* (1990) (NZ) was not chosen as an instrument for the purposes of comparison here because it does not contain a comparative institutional design/modus operandi — that is, it does not contain an equivalent to ss 32

Then the override will be considered in the context of the Victorian government's stated desires to retain parliamentary sovereignty⁶² and to establish an institutional dialogue on rights.⁶³

A Non-Derogable Rights under International, Regional and Comparable Domestic Human Rights Law

In international human rights law, the ability to override the operation of rights is recognised through the power of derogation. Derogation allows a state party to temporarily suspend human rights guarantees that it otherwise recognises due to extraordinary, temporary circumstances. The power of derogation is recognised as an exceptional necessity, albeit an unfortunate one. Derogations are not ends in themselves, but rather a means to rights-respecting ends: 'The restoration of a state of normalcy where full respect for the [ICCPR] can again be secured must be the predominant objective of a State party derogating from the [ICCPR].'⁶⁴ Because of its exceptional nature, and because of the scope for abuse, the power to derogate is carefully circumscribed. This is where the *Victorian Charter's* equivalent override mechanism is left wanting: the safeguards circumscribing the use of s 31 under the *Victorian Charter* do not meet the minimum standards required by international human rights law when exercising the equivalent power of derogation.

Under international human rights law, some rights are non-derogable.⁶⁵ Article 4(2) of the *ICCPR* excludes certain rights from the power of derogation. There can be no derogation from the right to life (art 6); freedom from torture or cruel, inhuman and degrading treatment or punishment, and freedom from

and 36 of the *Victorian Charter*. This article is not concerned with limits and overrides/derogations per se. Rather, it considers the manner in which limits and overrides/derogations operate given the institutional design/modus operandi of the human rights instrument.

⁶² See Department of Justice, above n 24; Consultation Committee, above n 24, 66, 74–5; Office of the Attorney-General, above n 24; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290, 1292–3 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 1984 (Lily D'Ambrosio), 1993 (Richard Wynne); Victoria, *Parliamentary Debates*, Legislative Assembly, 15 June 2006, 2196 (Joanne Duncan); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554, 2556–7 (Justin Madden, Minister for Sport and Recreation); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos), 2643 (John Geoffrey Hilton). The desire to retain parliamentary sovereignty is also reflected in the institutional arrangements and processes enacted in the *Victorian Charter*.

⁶³ See above n 28.

⁶⁴ Human Rights Committee, *General Comment No 29*, above n 53, [1].

⁶⁵ Non-derogable rights differ from absolute rights in that non-derogable rights that are not also absolute rights may be subject to justifiable qualifications and limitations: Human Rights Committee, *General Comment No 29*, above n 53, [7]. For example, art 18 of the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), which is non-derogable under art 4(2), includes a specific clause on restrictions in art 18(3): Human Rights Committee, *General Comment No 29*, above n 53, [7]. Moreover, non-derogable rights and peremptory norms of international law (or *jus cogens* norms) are linked but not identical. Some peremptory norms are non-derogable (for example, *ICCPR* arts 6 and 7), but peremptory norms extend beyond those that are non-derogable in art 4(2): Human Rights Committee, *General Comment No 29*, above n 53, [11]; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed, 1992) vol 1, 7–8; *Restatement (Third) of the Foreign Relations Law of the United States* § 702 (1987); Oscar Schachter, *International Law in Theory and Practice* (1991) 338.

medical or scientific experimentation without consent (art 7); freedom from slavery and servitude (arts 8(1) and (2)); the right to not be imprisoned because of an inability to pay a contractual debt (art 11); the prohibition on the retrospective operation of criminal laws (art 15); the right of everyone to recognition everywhere as a person before the law (art 16); and the freedom of thought, conscience and religion (art 18).⁶⁶

The Human Rights Committee,⁶⁷ in its *General Comment 29*, has expanded the list of non-derogable rights beyond those stated in art 4(2) of the *ICCPR*.⁶⁸ First, the Human Rights Committee expressed its opinion that the following rights cannot be lawfully derogated from: the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art 10(1));⁶⁹ elements of the rights of persons belonging to ethnic, religious or linguistic minorities (art 27);⁷⁰ the prohibition on propaganda for war, and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (art 20);⁷¹ and the obligation to provide effective remedies for violations of the protected rights (art 2(3)).⁷²

Secondly, the Human Rights Committee is of the opinion that the power to derogate under art 4 cannot be used in such a way that results in an indirect derogation from a non-derogable right. The Human Rights Committee focuses on procedural safeguards, such that procedural safeguards cannot be subject to derogating measures that undermine the protection of non-derogable rights. It gives the example of the right to life in art 6. Given that art 6 is non-derogable, any trial resulting in the imposition of the death penalty during a state of

⁶⁶ Moreover, art 6 of the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 June 1991), to which Australia is a party, states that the prohibition on capital punishment is non-derogable for states that are parties to the Protocol.

⁶⁷ The Human Rights Committee is established under the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, pt IV (entered into force 23 March 1976).

⁶⁸ The Human Rights Committee gives three reasons for classifying rights as non-derogable: (a) some rights are non-derogable 'because their suspension is irrelevant to the legitimate control of the state of national emergency' — for example, the prohibition on imprisonment for inability to fulfil a contractual obligation under art 11; (b) other rights are non-derogable because 'derogation may indeed be impossible' — for example, the freedom of conscience under art 18; and (c) 'some provisions are non-derogable exactly because without them there would be no rule of law': see Human Rights Committee, *General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, [10], UN Doc CCPR/C/21/Rev.1/Add.6 (1994).

⁶⁹ The rationale behind this is that art 10(1) reflects a norm of general international law (a *jus cogens* norm) that is non-derogable. This is bolstered by the close connection between art 10(1) and art 7, that latter article being non-derogable. The prohibition on taking hostages, abductions or unacknowledged detention is also considered non-derogable; and derogations from art 12 to allow forced population transfers or deportations are unlawful, with the latter constituting crimes against humanity: see Human Rights Committee, *General Comment No 29*, above n 53, [13].

⁷⁰ The rationale behind this is the non-derogable nature of the prohibition against genocide (art 6(3)), the inclusion of non-discrimination on certain grounds in art 4(1), and the non-derogable nature of the right to freedom of conscience, thought and religion (art 18): Human Rights Committee, *General Comment No 29*, above n 53, [13(c)].

⁷¹ Human Rights Committee, *General Comment No 29*, above n 53, [13(e)].

⁷² Although a state of emergency may justify a state party introducing 'adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation ... to provide a remedy that is effective': *ibid* [14].

emergency would have to respect the right to a fair trial in art 14 and the prohibition on the retrospective application of the criminal law in art 15.⁷³

Thirdly, the Human Rights Committee considers certain elements of the right to a fair trial under art 14 to be non-derogable. The Human Rights Committee has adopted this view on the basis that international humanitarian law guarantees certain elements of the right to a fair trial even in times of armed conflict and the Committee ‘finds no justification for derogation from these guarantees during other emergency situations’, and due to ‘the principles of legality and the rule of law.’⁷⁴ The fundamental, non-derogable elements of a fair trial include: the rule that only a court of law may try and convict a person for a criminal offence; the right to the presumption of innocence; and the right to come before a court without delay to test the lawfulness of detention.⁷⁵ In its *General Comment 29*, the Human Rights Committee has dramatically expanded the category of rights it considers to be non-derogable.⁷⁶

The *ECHR* (which is the basis for the *Human Rights Act 1998* (UK) c 42) also recognises non-derogability. Article 15(1) confers the power of derogation.⁷⁷ However, art 15(2) states that there can be no derogation from the right to life except in respect of deaths arising from lawful acts of war (art 2); the prohibition on torture (art 3); the prohibition on slavery and servitude (art 4(1)); and the prohibition on retrospective criminal punishment (art 7).

⁷³ Ibid [15].

⁷⁴ Ibid [16].

⁷⁵ Ibid. This position is supported by the UN Sub-Commission for the Protection and Promotion of Human Rights in its final report on the right to a fair trial: Stanislav Chernichenko and William Treat, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees — The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening*, UN ESCOR, 46th sess, 52, UN Doc E/CN.4/Sub.2/1994/24 (1994). This report recommends that three provisions linked to the right to fair trial be made non-derogable pursuant to a new optional protocol to the *ICCPR*: (a) the right to an effective remedy under art 2(3); (b) the right of anyone arrested or detained on criminal charge to be brought promptly before a judge or other officer authorised by law to exercise judicial power, and be entitled to trial in reasonable time or release under art 9(3); and (c) the right of anyone deprived of their liberty by arrest or detention to take the matter before a court so that the court can decide lawfulness of the arrest or detention and order release if it is unlawful under art 9(4) (the habeas corpus provision): at 51–2. See also the *Draft Third Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at Guaranteeing under All Circumstances the Right to a Fair Trial and a Remedy*, which now exists and states, under art 1, that there is to be no derogation from arts 2(3), 9(3)–(4) and 14 of the *ICCPR*: at Annex I.

⁷⁶ Joseph, Schultz and Castan, above n 5, 831 argue that the Human Rights Committee’s ‘speculation in paragraphs 11–14 regarding possible further non-derogable elements of the Covenant is probably the most controversial aspect of the General Comment.’ They go on to suggest that the Human Rights Committee may be exercising its authority to comment on what ‘other international obligations’ exist under art 4(1) (such as peremptory norms protected by *jus cogens* or rights recognised under customary or general international law), or to comment on derogations that it considers would never be proportionate under the art 4(1) requirement that derogating measures be only ‘to the extent strictly required by the exigencies of the situation’: at 831. See further Sarah Joseph, ‘Human Rights Committee: General Comment 29’ (2002) 2 *Human Rights Law Review* 81, 89–95.

⁷⁷ *ECHR*, opened for signature 4 November 1950, 213 UNTS 221, art 15(1) (entered into force 3 September 1953) states that:

In times of war or other public emergency threatening the life of the nation any [state party] may take measures derogating from its obligations under this Convention to the extent strictly required by exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Similarly, the concept that some rights are non-derogable is recognised in other domestic jurisdictions which adopt an override mechanism. Section 33 of the *Canadian Charter* is the prototype for override provisions. Section 33 cannot be used to override democratic rights (ss 3–5), mobility rights (s 6) and language rights (ss 16–23).⁷⁸ The non-applicability of the override power to these provisions is the equivalent of non-derogability under international human rights law.

The *South African Bill of Rights* also recognises non-derogability by adopting a derogation mechanism that closely resembles art 4 of the *ICCPR*, appropriately adapted for a domestic jurisdiction. Under s 37, derogations are permitted in certain circumstances, but with s 37(5)(c) prohibiting derogation from the right to equality with respect to unfair discrimination solely on proscribed grounds (s 9);⁷⁹ the right to human dignity (s 10); the right to life (s 11); the prohibition on torture, or cruel, inhuman or degrading treatment or punishment (ss 12(1)(d) and (e)); the right not to be subjected to medical and scientific experimentation without providing informed consent (s 12(2)(c)); the prohibition on slavery and servitude (s 13); various children's rights (s 28);⁸⁰ and various rights relating to arrest, detention and fair trial (s 35).⁸¹

The *Victorian Charter* compares unfavourably with international, regional and comparable domestic human rights instruments. The s 31 override power is stated in unlimited terms. On a literal reading of s 31, all rights may be subject to an override declaration despite the non-derogable status of some rights in international, regional and comparative domestic human rights law. However, the scope of s 31 is yet to be established in practice. Given that the *Victorian Charter* itself is subject to the s 32(1) interpretative obligation, and that international law and the judgments of domestic courts may be considered in interpreting a statutory provision under s 32(2), the concept of non-derogability may be incorporated into s 31 through s 32 interpretation. If not, the *Victorian Charter* will be inconsistent with Australia's international human rights law obligations, and out of step with regional and domestic human rights instruments. If left uncorrected through s 32 interpretation, this problem should be addressed by Parliament by express amendment of the scope of s 31. Due to the seriousness of the issue, this ideally would happen immediately, rather than waiting until the four or eight year review of the *Victorian Charter*.⁸²

⁷⁸ *Canadian Charter* s 33(1). See, eg, *A-G (Quebec) v Quebec Protestant School Boards* [1984] 2 SCR 66. See also Peter W Hogg and Allison A Bushell, 'The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 94–5.

⁷⁹ The proscribed grounds of discrimination are race, colour, ethnic or social origin, sex, religion, or language: *South African Bill of Rights* s 37(5)(c).

⁸⁰ This includes the right to be protected from maltreatment, neglect, abuse, degradation and exploitative labour practices: see *South African Bill of Rights* ss 28(1)(d)–(e).

⁸¹ This includes the right to silence, the right against self-incrimination, the right to challenge the lawfulness of detention, the right to the presumption of innocence, and the prohibition on retrospective application of the criminal law: see *South African Bill of Rights* ss 35(1)(a)–(c), (2)(d), (3)(h), (j), (l).

⁸² *Victorian Charter* ss 44–5.

B *Conditioning the Use of Derogations/Overrides under International, Regional and Comparable Domestic Human Rights Law*

The second way in which the power to derogate is circumscribed in international and regional human rights law is in its application. International and regional human rights treaties that allow derogation place conditions upon its exercise. The power to derogate is limited in time (the derogating measures must be temporary); limited by circumstances (there must be a public emergency threatening the life of the nation); and limited in effect (the derogating measures must be no more than is strictly required by the exigencies of the situation, must not violate other obligations under international law, and must not involve discrimination). In contrast, the *Victorian Charter* does not contain sufficient safeguards. The *Victorian Charter* does provide that overrides are temporary by imposing a five-year sunset clause under s 31(7) (although, it must be noted that the power to override is continuously renewable).⁸³ However, the *Victorian Charter* fails in two important respects: the circumstances justifying an override, and the regulation of the effects of an override, do not reach the high standards set by international and regional human rights law with respect to the equivalent derogation powers.

1 *The Circumstances Justifying a Derogation*

Focusing on the first failure, to justify use of the override provision under the *Victorian Charter*, Parliament must demonstrate that ‘exceptional circumstances’⁸⁴ exist which, according to the Explanatory Memorandum, include ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.’⁸⁵ These circumstances fall far short of the international and regional requirement that there be a ‘public emergency which threatens the life of the nation’. Indeed, the list of ‘exceptional circumstances’ is not ‘exceptional’ at all. The ‘exceptional circumstances’ more closely resemble the justifications offered for ordinary limitations provisions under international and regional human rights law, not for the exercise of the *exceptional* power to derogate.

Let us focus first on the circumstances that justify derogation in international and regional human rights law. The *ICCPR* requires there to be a ‘public emergency which threatens the life of the nation’.⁸⁶ Circumstances that satisfy

⁸³ This is based on the *Canadian Charter*. The notwithstanding provisions are subject to a sunset clause of five years, after which date the Parliament or legislature can re-enact the declaration, with every subsequent re-enactment being subject to the five-year sunset clause: *Canadian Charter* ss 33(3)–(5).

⁸⁴ *Victorian Charter* ss 31(3)–(4).

⁸⁵ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21.

⁸⁶ *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, art 4(1) (entered into force 23 March 1976). The *ICCPR* also requires the public emergency to be ‘officially proclaimed’: art 4(1). Article 4(3) requires a derogating party to notify the international community ‘of the provisions from which it has derogated and of the reasons by which it was actuated.’ The Human Rights Committee, *General Comment No 29*, above n 53, [5] has indicated that derogating states must ‘provide careful justification ... for their decision to proclaim a state of emergency’. Although the Human Rights Committee notification requirements ‘[mirror] the general requirement for permissible limitations to *ICCPR* rights to be “prescribed by law”’, very few derogation notices have satisfied this standard: Joseph, Schultz and Castan, above n 5, 833–4. This ‘simply

this requirement include ‘a war, a terrorist emergency, or a severe natural disaster, such as a major flood or earthquake.’⁸⁷ The Human Rights Committee has indicated, however, that not all disturbances and catastrophes qualify; indeed, ‘even during an armed conflict measures derogating from the [ICCPR] are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.’⁸⁸

The *ECHR* requires there to be a ‘war or other public emergency threatening the life of the nation.’⁸⁹ The European Court of Human Rights (‘European Court’)⁹⁰ has had numerous opportunities to elaborate on this requirement. In the *Lawless Case (Merits)* (‘*Lawless Case*’), the European Court had to consider the lawfulness of a derogation by the UK with respect to legislation that permitted the detention of suspected terrorists in the context of the situation in Northern Ireland.⁹¹ It held that a ‘public emergency threatening the life of the nation’ required an ‘exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’.⁹² The European Court found that a public emergency did exist in the UK, given that a secret army existed in Irish territory, that the army was engaged in unconstitutional activities and used violence to secure its ends, and that the army’s operations outside of the Irish Territory seriously jeopardised the UK’s relations with the Republic of Ireland.⁹³ The European Court also noted that there had been a consistent and alarming increase in terrorism,⁹⁴ and that ‘the application of ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland’.⁹⁵ In the later case of *Brannigan and McBride v United Kingdom* (‘*Brannigan*’), which also

confirms the inferior quality of extant notices of derogation. Most have been only a few lines long, containing little explanation of the exact nature of the measures of derogation’: at 834.

⁸⁷ Joseph, Schultz and Castan, above n 5, 824–5.

⁸⁸ Human Rights Committee, *General Comment No 29*, above n 53, [3]. In *Landinelli Silva v Uruguay*, the Human Rights Committee had to review a decree of the Government of Uruguay prohibiting classes of people engaging in activities of political nature for 15 years: Human Rights Committee, Communication No 34/1978, UN Doc CCPR/C/12/D/34/1978 (1981). In effect, Marxist and pro-Marxist party candidates from the last two elections could not engage in political activities. The Human Rights Committee was of the opinion that a public emergency did not exist. Although the government referred to an emergency situation which was legally recognised in a number of ‘Institutional Acts’ and alleged that the emergency situation was ‘a matter of universal knowledge’, the Human Rights Committee did not accept this because the claims were not supported by factual details or information: at [8.2]. Uruguay also failed the notice requirements under *ICCPR* art 4(3): at [8.2]–[8.3].

⁸⁹ *ECHR*, opened for signature 4 November 1950, 213 UNTS 221, art 15(1) (entered into force 3 September 1953).

⁹⁰ The European Court is established under the *ECHR*, and its functions include deciding the merits of applications from individuals who claim to be the victim of a violation of the *ECHR*: *ibid* arts 19, 29, 34.

⁹¹ (1961) 3 Eur Court HR (ser A).

⁹² *Ibid* 56.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* 58. See also *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A); *Brannigan and McBride v United Kingdom* (1993) 258-B Eur Court HR (ser A) (‘*Brannigan*’). In *Brannigan*, the UK defended further derogations for others aspects of its counter-terrorism legislation. In both cases, the European Court held that a public emergency threatening the life of the nation did exist.

addressed UK counter-terrorism laws, the European Court indicated that it considers ‘the nature of rights affected by the derogation, [and] the circumstances leading to, and the duration of, the emergency situation.’⁹⁶

In the *Greek Case*, the European Commission of Human Rights considered the lawfulness of a derogation that, inter alia, suspended provisions of the *Greek Constitution* and allowed the detention of persons without court order.⁹⁷ The European Commission found that a ‘public emergency that threatens the life of the nation’ is characterised as follows:

- (1) It must be actual or imminent.
- (2) Its effects must involve the whole nation.
- (3) The continuance of the organised life of the community must be threatened.
- (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.⁹⁸

In that case, there was no relevant public emergency because there was no evidence that the civil unrest adduced as justification was so significant that the displacement of the lawful government was imminent.⁹⁹ The street demonstrations, strikes and work stoppages were not of the magnitude of a public emergency; in fact, the police force was not near the limit of its capacity, demonstrations held in university buildings were cleared within a few minutes and the situation had been easily neutralised.¹⁰⁰

Quite correctly, the circumstances justifying *derogation* under the *ICCPR* and *ECHR* are significantly more dire than those justifying *limitations* or *qualifications*. The circumstances justifying an internal limitation under the *ICCPR* include the protection of national security; public safety, public order, and public health or public morals; the rights and reputations of others; or the fundamental rights and freedoms of others.¹⁰¹ Under the *ECHR*, circumstances justifying an internal limitation include interests of national security, territorial integrity, public safety, and the economic wellbeing of the country; the prevention of disorder or crime; public order, health, or morals; the reputation of others; the prevention of disclosure of information received in confidence; maintenance of the authority and impartiality of the judiciary; and the rights and freedoms of others.¹⁰²

⁹⁶ (1993) 258-B Eur Court HR (ser A) 49.

⁹⁷ European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights: The Greek Case 1969* (1972) vol 12.

⁹⁸ *Ibid* 72. This decision is consistent with the judgment in the *Lawless Case*. However, the definition appears to have been relaxed in *Brannigan* (1993) 258-B Eur Court HR (ser A).

⁹⁹ European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights: The Greek Case 1969* (1972) vol 12, 73–4.

¹⁰⁰ *Ibid* 74. Moreover, the formation of a communist government (‘Popular Front’) was not certain or likely after the election that was due in May 1967: at 75–6.

¹⁰¹ *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, arts 12, 18–19, 21–2 (entered into force 23 March 1976).

¹⁰² *ECHR*, opened for signature 4 November 1950, 213 UNTS 221, arts 8–11 (entered into force 3 September 1953).

In comparison, the ‘exceptional circumstances’ justifying an override under the *Victorian Charter* are ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.’¹⁰³ These circumstances are similar to the public interests that justify an *ordinary* limitation on rights under the *ICCPR* and the *ECHR*. They do not resemble an *extraordinary* situation of crisis which threatens the continued existence of the organised life of a community, as is required for derogation under art 4 of the *ICCPR* or art 15 of the *ECHR*. Thus the ‘exceptional circumstances’ under the *Victorian Charter* are more akin to the ordinary limitations circumstances under the *ICCPR* and *ECHR*, yet the *Victorian Charter* override is more akin to the exceptional derogation power. Does it matter that an extraordinary override provision is utilising factors that are usually used in an ordinary limitations context?

There are three answers to this question. The first relates to oversight. When the executive and Parliament decide that circumstances exist to justify limiting a right, this decision can be subject to judicial review. Under the *Victorian Charter*, the executive and Parliament must publicly articulate why the limit is reasonable and demonstrably justified in a free and democratic society generally, and assess the limit against the specific list of balancing factors in s 7(2).¹⁰⁴ If the legislation is challenged, the judiciary then contributes its opinion as to whether the limitation is justified. If the judiciary opines that the limitation is not justified, the judiciary can then exercise its s 32 power to achieve a rights-compatible interpretation to ensure the limitation is justified, or issue a s 36 declaration of inconsistent interpretation where a rights-compatible interpretation is impossible. The representative arms can then respond.¹⁰⁵

This process serves two fundamental purposes under the *Victorian Charter*.¹⁰⁶ First, it ensures that there is increased human rights accountability in public decision-making. Although the retention of parliamentary sovereignty under the *Victorian Charter* (and the *Human Rights Act 1998* (UK) c 42) permits Parliament to legislate incompatibly with rights, there *are* political constraints on power: ‘the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.’¹⁰⁷ Secondly, it reinforces the justificatory aspects of the *Victorian Charter*. The *Victorian Charter*, like the *Human Rights Act 1998* (UK) c 42 upon which it is based, ensures that a ‘culture of justification now prevails ... it requires constitutional arrangements which diverge from fundamental constitutional principle to be justified pragmatically as being in the public interest.’¹⁰⁸

¹⁰³ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21.

¹⁰⁴ *Victorian Charter* s 28.

¹⁰⁵ The executive must respond to a declaration of inconsistent interpretation: *Victorian Charter* s 37. However, there is no required response to an interpretation under s 32 of the *Victorian Charter*.

¹⁰⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2556 (Justin Madden, Minister for Sport and Recreation).

¹⁰⁷ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).

¹⁰⁸ Lord Steyn, ‘The New Legal Landscape’ [2000] *European Human Rights Law Review* 549, 552.

Under the *Victorian Charter*, however, these requirements of accountability and justification are at risk. If Parliament uses the extraordinary override provision to achieve what, according to international and regional human rights law, can and ought to be achieved via an ordinary limitation on rights, the judiciary is excluded from the picture. An override in effect means that the s 32 interpretation and the s 36 declaration powers do not apply to the legislation for a renewable five-year period. Moreover, the judicial oversight in relation to the conduct of public authorities under ss 38 and 39 is removed because conduct that would ordinarily be considered unlawful under s 38 would no longer be considered so where a valid override declaration was in operation. The main judicial oversight tools are not available for overrides of rights (as compared to limitations on rights), such that human rights accountability and justification are severely compromised. Given that s 32 is the primary remedial mechanism under the *Victorian Charter*, and the relative weakness of the ss 38 and 39 remedies compared to analogous provisions in the *Human Rights Act 1998* (UK) c 42,¹⁰⁹ further erosion in the enforceability of the *Victorian Charter* via override declarations is inexcusable.

The procedural aspects of the override reinforce this conclusion. Sections 31(3) and (5) set out various legislative procedures requiring an explanation of the justifying ‘exceptional circumstances’ when enacting overriding legislation.¹¹⁰ However, s 31(9) states that a failure to comply with ss 31(3) and (5) does not affect the validity, operation or enforcement of that Act. Not only do the requisite circumstances justifying an override fall below the accepted minimum human rights standards, there is no consequence if the responsible Member of

¹⁰⁹ *Human Rights Act 1998* (UK) c 42, ss 6–9. Although modelled on the public authority provisions under the *Human Rights Act 1998* (UK) c 42, the *Victorian Charter* offers significantly weaker protection. Three major differences are responsible for this. First, the definition of public authorities in the *Human Rights Act 1998* (UK) c 42 includes courts and tribunals (s 6(1)), unlike the definition of public authorities under the *Victorian Charter* (s 4(1)(j)). The UK definition imposes an express obligation on UK courts and tribunals to develop the common law in a manner consistent with the protected rights, which is absent under the Victorian instrument. Secondly, s 7 of the *Human Rights Act 1998* (UK) c 42 creates a freestanding cause of action where a public authority acts unlawfully by acting in a manner incompatible with the protected rights (being breach of statutory duty, with the statute being the *Human Rights Act 1998* (UK) c 42). This remedy is in addition to such unlawfulness being a new ground of judicial review for administrative actions and such unlawfulness being able to be relied upon in any legal proceeding (whether as a defence to proceedings brought by public authorities, or as the basis for an appeal against a decision of a court or tribunal). The *Victorian Charter* does not create a freestanding cause of action for unlawfulness by public authorities. Rather, under s 39(1), relief for unlawfulness depends on the pre-existence of some other relief or remedy — that is, if, *Victorian Charter* aside, a person may seek any relief or remedy in respect of an act or decision of a public authority on the basis that it was unlawful, that person may seek that relief or remedy, on a ground of unlawfulness arising under the *Victorian Charter*. Thirdly, under s 8 of the *Human Rights Act 1998* (UK) c 42, a court may grant such relief or remedy or make such order, within its power, as it considers just and appropriate, including the power to award damages. In contrast, s 39(3) expressly states that a person is not entitled to damages for breach of the *Victorian Charter*. Rather, under s 39(4), damages will only be available if a person has a pre-existing right to damages.

¹¹⁰ Section 31(3) of the *Victorian Charter* requires a Member of Parliament introducing a Bill containing an override declaration to make a statement ‘explaining the exceptional circumstances that justify the inclusion of the override declaration.’ Section 31(5) states that the s 31(3) statement must be made: (a) during the second reading speech of the relevant Bill; or (b) with 24 hours notice and before the third reading; or (c) with the leave of the relevant house of Parliament, at any time before the third reading.

Parliament fails to make the requisite statements in Parliament. This may bolster parliamentary sovereignty but significantly undermines human rights accountability and justifiability.

The second answer to the question posed is that human rights are undermined. Setting the standard for overriding ‘exceptional circumstances’ too low places rights in a precarious position. It becomes too easy to justify a suspension of guaranteed rights which, in turn, compromises the status of rights and results in the under-enforcement of the rights. Such a relaxed standard for override declarations may promote parliamentary sovereignty, but the cost is a substantial undermining of the protected rights.

The third answer is that override provisions undermine the institutional dialogue that the *Victorian Charter* was designed to create. A pre-emptive override — when Parliament attaches an override declaration to legislation when it is first enacted, and before the judiciary has an opportunity to consider it under the *Victorian Charter* — entirely suppresses the contribution the judiciary may make to the dialogue in relation to the scope of the relevant protected rights, the justifiability of any limitation, the possible s 32 rights-compatible interpretations and the need for a s 36 declaration of inconsistent interpretation.¹¹¹ The institutional dialogue sought after is therefore replaced with a legislative monologue about rights. Where a limitation is used to restrict rights in preference to an override, all four institutional dialogue mechanisms can be engaged — including

¹¹¹ The *Canadian Charter* does not regulate when the override is used, such that the override may be used pre-emptively or in response to a judicial ruling. From 1982 to 2001, the Canadian override had only been used twice as a direct response to a judicial ruling. This means that the other 16 uses were, in effect, pre-emptive uses of the override: see further above n 59. The first use in response to a judicial ruling was in Saskatchewan, where the provincial legislature used s 33 to re-enact back-to-work legislation that was invalidated by the Saskatchewan Court of Appeal in *RWDSU v Saskatchewan* (1985) 19 DLR (4th) 609 for violating freedom of association under s 2(d) of the *Canadian Charter*. The law affected was *The Dairy Workers (Maintenance of Operations) Act*, SS 1983–84, c D-1.1 and the overriding legislation was *The SGEU Dispute Settlement Act*, SS 1984–85–86, c 111. The use of the override proved to be unnecessary as, on appeal, the Supreme Court of Canada ruled the original legislation to be constitutional: *RWDSU v Saskatchewan* [1987] 1 SCR 460. Given that the override was used whilst the case was still on appeal may, in fact, make this case more of a pre-emptive use in any event. The second use of the override as a direct response to a judicial ruling was in Quebec, where the provincial legislature used s 33 to re-enact unilingual public signs legislation invalidated by the Supreme Court of Canada in *Ford v A-G (Quebec)* [1988] 2 SCR 712 (*‘Ford’*) for violating freedom of expression under s 2(b) of the *Canadian Charter*. The law affected was the *Charter of the French Language*, RSQ 1977, c C-11 and the override legislation was *An Act to Amend the Charter of the French Language*, SQ 1988, c 54. Following an individual communication to the Human Rights Committee, in which the Human Rights Committee was of the view that the legislation violated the *ICCPR*, the provincial legislature amended the legislation to allow bilingual public signs on the proviso that French was present and predominant: see *An Act to Amend the Charter of the French Language*, SQ 1993, c 40. An override was not attached to the 1993 legislation. See generally Hogg and Bushell, above n 78, 83, 85–6, 114–15; Kahana, above n 59, 264–5, 269–71. An example of a pre-emptive use of the override is the *Albertan Marriage Amendment Act*, SA 2000, c 3. Section 5 defines ‘marriage’ as the union between a man and a woman, in order to exclude same-sex marriage under the *Albertan Marriage Act*, RSA 2000, c M-5. The amending legislation contained an override provision, pre-emptively protecting the legislation from *Canadian Charter* challenge. The constitutionality of this legislation is questionable, given that the Federal Government has jurisdiction over marriage under the *Canadian Constitution* and that s 33 does not apply to those provisions of the *Canadian Constitution: Constitution Act 1867* (UK) 30 & 31 Vict, c 3, s 91(26). See Kahana, above n 59, 268–9; Janet L Hiebert, *Charter Conflicts: What Is Parliament’s Role?* (2002) 197–8.

the (advisedly amended) override after an adverse judicial decision, whether that be a s 32 rights-compatible interpretation or a s 36 declaration.¹¹²

It is unclear whether or not this shortcoming of s 31 can be rectified other than by amendment to the *Victorian Charter*. Given the explicit proviso in s 31(9) that a failure to comply with the legislative procedural aspects does not affect the validity, operation or enforcement of that Act to which the override applies, it seems that both the s 32(1) interpretative obligation and the s 32(2) power to refer to international and regional comparative jurisprudence may not be available to secure a greater level of substantive accountability for override declarations via a procedural requirement. The only way to ensure that the *Victorian Charter* reflects international and regional minimum human rights standards may be by legislative amendment.

Another possible solution may be found in s 31(4), which states that '[i]t is the intention of Parliament that an override declaration will only be made in exceptional circumstances.' If Victoria follows the lead of Canada,¹¹³ such a provision will not be given any substantive content, meaning that the existence of 'exceptional circumstances' will not operate as a precondition to the exercise of overrides.¹¹⁴ Professor George Williams, Chair of the Human Rights Consultation Committee, has reinforced this view, classifying the requirements of s 31(4) as 'non-justiciable'.¹¹⁵

Conversely, if s 31(4) is given substantive content by injecting the higher international and regional standards of justifying circumstances, it could conceivably act as a more effective hurdle for justifying exceptional departures from protected rights. The s 32(1) interpretative obligation, coupled with the s 32(2) power to consider international and regional human rights law, may encourage the judiciary to require a substantive content similar to those circumstances that justify extraordinary derogations rather than those that justify ordinary limitations on rights. On the other hand, the judiciary may limit the substantive content to that outlined in the Explanatory Memorandum, which falls far short of accepted minimum human rights standards.

2 Regulation of the Effects of a Derogation

Turning to the second shortcoming, the regulation of the effects of an overriding measure under the *Victorian Charter* does not reach the minimum standards set by international and regional human rights law with respect to the equivalent derogation power. Indeed, such regulation is non-existent under the *Victorian Charter* — there is no limit placed on the effects of the override provision; no requirement of proportionality between the exigencies of the emergency situation and the overriding measures; and nothing preventing Parliament from utilising the override power in a way that unjustifiably violates other international law norms, such as the prohibition against discrimination. This is in stark contrast to

¹¹² Moreover, compared with the *Canadian Charter*, an override is not needed to establish an institutional dialogue in Victoria: see further below Part IV(C)(2).

¹¹³ See further below Part V(C), n 204.

¹¹⁴ *Ford* [1988] 2 SCR 712.

¹¹⁵ George Williams, 'The *Victorian Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 900.

the equivalent international and regional (and some comparable domestic)¹¹⁶ human rights standards in relation to derogation.

Article 4 of the *ICCPR* permits only measures derogating from *ICCPR* obligations 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law and do not involve discrimination' based on listed prohibited grounds.¹¹⁷ The Human Rights Committee has expanded upon this condition in its *General Comment 29*,¹¹⁸ stating that '[t]his requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.'¹¹⁹ Having recognised the distinction between derogation on the one hand, and qualification and limitation on the other, it states that 'the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers.'¹²⁰ Moreover, it expects state parties to 'provide careful justification' for the specific derogating measures adopted.¹²¹ By way of example, the Human Rights Committee suggests that a natural catastrophe, mass demonstration or major industrial accident may be sufficiently addressed by *limits* to the freedoms of movement or assembly, rather than by *derogation*.¹²²

Professor Sarah Joseph, Jenny Schultz and Melissa Castan argue that, given the broad scope to impose justifiable limitations to most *ICCPR* rights, 'it is difficult to see how measures beyond those allowable limits would ever satisfy a strict test of proportionality [under derogation], even in the most serious emergency.'¹²³ By way of example, the commentators ask how an arbitrary interference with privacy, which would fall foul of the limitations power, could ever be considered proportionate in the context of derogation given that the definition of 'arbitrary' itself contains a proportionality test. Or, by way of another example,

¹¹⁶ The comparable domestic instruments will be considered further in Part V.

¹¹⁷ The listed grounds of prohibited discrimination under art 4(1) are race, colour, sex, language, religion or social origin. This is narrower than the non-discrimination protections in arts 2(1) and 26 in two ways. First, art 4(1) does not explicitly list as prohibited grounds of discrimination: political or other opinion, national origin, property or birth. Secondly, art 4(1) is written in exhaustive language, whereas arts 2(1) and 26 are written in inclusive language ('or other status'). This indicates two matters: (a) that the prohibited grounds under art 4(1) were intended to exclude the additional prohibited grounds listed in arts 2(1) and 26; and (b) that art 4(1) was not designed to be expanded as the circumstances require due to the omission of 'or other status'. A further restriction has been highlighted by Rosalyn Higgins, a former member of the Human Rights Committee. She argues that 'the use of the word "solely" in [art 4] means that only deliberate discrimination rather than inadvertent discrimination, is prohibited': Joseph, Schultz and Castan, above n 5, 829.

¹¹⁸ The Human Rights Committee confirmed that art 4 cannot justify a 'derogation from the [*ICCPR*] if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law': Human Rights Committee, *General Comment No 29*, above n 53, [9]. Examples of such 'international obligations' include the *Geneva Conventions*, the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), and other human rights treaties: see further Joseph, Schultz and Castan, above n 5, 828; Joseph, above n 76, 89.

¹¹⁹ Human Rights Committee, *General Comment No 29*, above n 53, [4].

¹²⁰ *Ibid.*

¹²¹ *Ibid* [5].

¹²² *Ibid.*

¹²³ Joseph, Schultz and Castan, above n 5, 826.

Joseph, Schultz and Castan ask how could it ever be proportionate in an emergency situation to restrict freedom of movement beyond the need to protect national security, public order, public health or morals, or the rights and freedoms of others, as permitted under art 12(3)?¹²⁴ Indeed, the requirement of proportionality may, in practice, expand the categories of non-derogable rights, such that derogable rights are only those rights expressed in absolute terms, such as art 9(3).¹²⁵

In *Landinelli Silva v Uruguay*, the Human Rights Committee reviewed a decree of the Government of Uruguay prohibiting classes of people from engaging in activities of a political nature for 15 years.¹²⁶ In effect, Marxist and pro-Marxist party candidates from the last two elections could not engage in political activities. The Human Rights Committee believed that there was no attempt to prove that the derogating measures were 'strictly required'. In terms of proportionality, the Committee found the restriction to be unlawful because it applied to all members of certain political parties who had been candidates in previous elections, with no distinction being made between those promoting political ideas by peaceful means and those resorting to violence.¹²⁷

These points highlight the flaws in the override provision of the *Victorian Charter*. Under the *ICCPR*, a much stricter justification test is imposed for derogating measures as compared to limitations on rights, and both tests require there to be some level of proportionality between the derogating measures or limitation on rights, and the impact on rights. In stark contrast, under the *Victorian Charter* the representative arms must satisfy proportionality requirements before an ordinary limitation will be justified, whereas Parliament has no such restriction whatsoever when it enacts legislation subject to an extraordinary override. Why would the preconditions and safeguards placed on exercising restrictions on rights be far less demanding (indeed, non-existent) when Parliament exercises an extraordinary power, which imposes far greater encroachments on protected rights, than when Parliament places ordinary limitations on protected rights? At best, this could be justified as an anomaly in order to preserve the unduly venerated sovereignty of Parliament; at worst, it can be seen as a blatant undermining of an effective system of human rights protection, scrutiny and accountability.

To further illustrate the regulation of the effects of derogating measures, let us return to the *ECHR*. Article 15 permits a state to take derogating measures 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' In the *Lawless Case*, the emergency measures that permitted the detention of

¹²⁴ Ibid; Joseph, above n 76, 97.

¹²⁵ Joseph, above n 76, 97. Article 9(3) of the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) guarantees that '[a]nyone arrested or detained on criminal charge shall be brought promptly before a judge'.

¹²⁶ Human Rights Committee, *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights: Communication No 34/1978*, 12th sess, UN Doc CCPR/C/12/D/34/1978 (1981).

¹²⁷ Ibid [8.4]. For further discussion of the application of the proportionality principle under the *ICCPR*, see Joseph, above n 76, 86–8.

suspected terrorists satisfied this test. The European Court admitted that the detention of suspected terrorists seemed grave, but it found that such measures were required in the circumstances because, inter alia: (a) the ordinary law had proved to be ineffective; (b) the criminal and military courts were unable to restore peace and order; and (c) the gathering of evidence was difficult because of the militant, secret and terrorist character of the activities, and the fear engendered in the public by the Irish Republican Army.¹²⁸ The European Court was also persuaded by the safeguards contained in the relevant emergency legislation, which included: (a) parliamentary supervision of the application of the legislation; (b) the establishment of a 'Detention Commission', consisting of one officer of the defence force and two judges, who could review cases of detention and whose decisions were binding on government; and (c) the public statement by Parliament that anyone detained would be released if they gave an undertaking to observe the law and refrain from terrorist activities, with the additional promise that those arrested would be informed immediately about the option of the undertaking.¹²⁹

In *Ireland v United Kingdom*, the derogating measures allowed the arrest and detention of persons not because they were suspected of committing a crime, but to obtain information from them.¹³⁰ These measures did not provide for any administrative or judicial remedies. In the circumstances, the European Court upheld these derogating measures.¹³¹ The Court accepted that witnesses were not able to give evidence freely without running great risks, and therefore had to be arrested in order to be questioned in conditions of relative security and not exposed to reprisals. It was also swayed by the fact that the deprivation of liberty was for a maximum of 48 hours.¹³²

In *Aksoy v Turkey*, the applicant was detained for 14 days without being brought before a court, purportedly under emergency legislation relating to PKK ('Workers' Party of Kurdistan') terrorist activity.¹³³ The previous jurisprudence on art 5(3) allowed a maximum detention period of approximately four days, such that the emergency legislation clearly violated art 5(3). The issue was whether the violation was excused because of a lawful derogation. The European Court held that the derogating measures were not 'strictly required by the exigencies of the situation' because detention for 14 days was far beyond the

¹²⁸ *Lawless Case* (1961) 3 Eur Court HR (ser A) 56–8.

¹²⁹ *Ibid* 58–9.

¹³⁰ (1978) 25 Eur Court HR (ser A) 80–1.

¹³¹ The fact that the government later abandoned this measure because it was ineffectual did not mean it was not 'strictly required by the exigencies of the situation'. The European Court held that it must consider the circumstances when steps were originally taken, not with hindsight. In *Ireland v United Kingdom*, the Court said (at *ibid* 83):

When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards ... The interpretation of Article 15 must leave a place for progressive adaptations.

¹³² *Ibid* 80–1. See also *Brannigan* (1993) 258-B Eur Court HR (ser A) 54, where the European Court was swayed by the 'special difficulties' involved in combating terrorism, recognising the necessity of extended periods of detention which can occur without charge and are not judicially controlled.

¹³³ (1996) 6 Eur Court HR 2260.

acceptable norm of four days, and the legislation did not contain any safeguards for detainees: the detention was incommunicado; the state was not required to inform anyone of the applicant's detention; and habeas corpus was not available.¹³⁴

The European Court often finds that derogating measures satisfy this test. This does not mean that the safeguards regulating the effects of derogating measures are meaningless. Many benefits flow from the processes triggered by regulating the effects of derogation, even where the end result is a lawful derogating measure. First, there is value in independent oversight of executive actions, especially in times of emergency. During purported public emergencies, the executive tends to expand its power at the expense of the judiciary. The control of crime (usually an executive task) and due process (usually a judicial task) often merge in emergency situations, with the executive taking control of both. The merging of the tasks of investigation, prosecution and adjudication creates vast scope for human rights violations.¹³⁵ Supervision of executive actions, particularly the independent supervision that courts or treaty monitoring bodies can offer, is vital in such a context.

Secondly, there is value in requiring the executive and legislature to publicly articulate a full justification for the derogating measures, including the articulation of the competing interests at stake, the balance they seek to achieve between the competing interests, the legislative or other measures they claim achieve this balance, and the proportionality between the harm done to protected rights and the benefit secured for the common good. This bolsters human rights accountability.

Another factor to consider is the problem of emergency measures becoming the norm — emergency measures 'become a way of deferring normality [or] rather, they often *become* normality.'¹³⁶ An example is when the derogating measures in emergency legislation become part of the ordinary criminal law. This phenomenon occurs due to the perceived effectiveness of the emergency legislation,¹³⁷ such that it becomes the model for the regulation of non-emergency related behaviours. There is evidence of this occurring within

¹³⁴ Ibid 2283.

¹³⁵ Indeed, public emergencies 'have all too often acted as veils for gross abuses of human rights': Joseph, Schultz and Castan, above n 5, 836. See also Currie and de Waal, above n 12, 801, 801 fn 3; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) 301; P R Ghandhi, 'The Human Rights Committee and Derogation in Public Emergencies' (1989) 32 *German Yearbook of International Law* 323.

¹³⁶ Susan Marks, 'Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights' (1995) 15 *Oxford Journal of Legal Studies* 69, 86. See also Currie and de Waal, above n 12, 802.

¹³⁷ This comes as no surprise. The emergency measures usually take away the rights of the accused and various safeguards within the criminal system. Without these rights and safeguards, it is much easier to secure convictions, making the administration of criminal justice much more efficient but not necessarily more accurate and reliable. A recent example of 'mission creep' in the UK is the possible extension of the 'control order' system introduced under the *Prevention of Terrorism Act 2005* (UK) ('*PoTA*'). The control order provisions 'were passed with the spectre of the 11 September 2001 terrorist attacks in the United States in mind. However, ministers have confirmed that their use in Northern Ireland is under consideration': Roger Smith, 'Rights and Wrongs: A Hasty Measure' (2005) 102(14) *Law Society Gazette* 13.

Australia.¹³⁸ Another example is when the state of emergency becomes the norm, such is likely to be the case with the current ‘War on Terror’, and which occurred in Northern Ireland where the situation continued for at least 30 years. It is arguable that at some point the situation could no longer be characterised as exceptional or extraordinary and that the emergency legislative measures could no longer be characterised as extraordinary, but rather subsumed as part of the ordinary body of law.¹³⁹ Given these tendencies, one could expect even greater scrutiny of emergency measures — at the very least, one could expect a strict application of the minimum human rights safeguards in place in international and regional law.

Instead, the *Victorian Charter* offers very little. It does not regulate the overriding measures in the same way derogations are regulated, and it fails to impose any judicial oversight, any requirements of justifiability, or any rights accountability with respect to overrides. Where does this leave Victorians if and when the emergency situation becomes the normal situation and/or the emergency overriding measures become part of the ordinary general law? There will be major encroachments on protected rights without any serious human rights regulation, oversight, justification or accountability. It is lamentable that in the ordinary course of affairs derogations become the norm, even when internationally and regionally recognised minimum human rights safeguards are in place and operating; but it is quite extraordinary that, under the *Victorian Charter*, overrides may become the norm in the absence of any safeguards other than a continually renewable sunset provision. And to reiterate, under the *Victorian Charter*, more serious safeguards apply to the less serious power to place limitations on rights, whilst less adequate (indeed, arguably inadequate) safeguards apply to the more serious power to override rights.

In conclusion, it is worth considering the rationale behind allowing derogations and overrides. Derogations and overrides in times of public emergencies are certainly aimed at assisting the executive government in difficult situations. The

¹³⁸ Tom Allard, ‘Police to Get Unlimited Powers’, *The Age* (Melbourne), 1 August 2007, 1. Proposed Commonwealth legislation introduces ‘delayed notification warrants’ under which law enforcement bodies may search, seize equipment from, and plant listening devices in a person’s home or business. This is done without the person’s knowledge (that is, initially there is a six month delay in notifying a person, with a potential 18 month delay if the warrant is extended) and without court approval. It also provides for ‘controlled operations’ which allow federal law enforcement agents to participate in criminal activity to further their investigations. These powers will apply to all crimes that are liable to a penalty of 10 years’ imprisonment or more. See further Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 (Cth) especially sch 2. A Senate Committee’s recommendation that these laws be restricted to terrorism offences, organised crime offences and offences involving death or a term of life imprisonment was rejected: see Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006* (2007) especially 11–16.

¹³⁹ Consideration should be given to the situations in Algeria, which has had derogations in place since 1991, Israel since 1991, El Salvador since 1983, Nicaragua since 1980, and Peru since 1983: see Joseph, above n 76, 82 fn 9. Also, the *Brannigan* derogation was in force for 17 years. The *Prevention of Terrorism (Temporary Provisions) Act 1989* (UK) c 4 introduced the derogation in 1989, whilst *The Human Rights Act (Amendment) Order 2001* (UK), amending *Human Rights Act 1998* (UK) c 42, effected the withdrawal of the derogation from art 5(3), effective as of 26 February 2001. The withdrawal was considered possible following the implementation of sch 8 of the *Terrorism Act 2000* (UK) c 11.

constitutional arrangements of most states allow for an increase in executive power, and a marginalisation of judicial power, in order to give the executive greater leeway in responding to public emergencies. Conversely, emergency powers also protect the individual in situations of public emergency by ensuring that there is an established framework in place within which executive governments must operate. In the *Victorian Charter* context, the override power seems solely concerned with buttressing state power and not sufficiently concerned with the counterbalancing rationale of protecting the human rights of the individual.

C Underlying Objectives of the Victorian Charter and the Override

The fact that the override does not meet internationally and regionally accepted minimum human rights standards is problematic in and of itself. It becomes even more problematic when the override is considered in the context of the underlying objectives of the *Victorian Charter*. If one could point to a convincing rationale under the *Victorian Charter* that explained the need for the override, one may accept the technical violation of international human rights law as expedient (even if not human rights respecting). However, when the twin objectives of preserving parliamentary sovereignty and establishing an institutional dialogue are considered, the arguments against the override in its current form are reinforced. Each objective will be considered in turn.

1 Preservation of Parliamentary Sovereignty

In relation to preserving parliamentary sovereignty, it is unclear why an override provision was included in the *Victorian Charter*. The override is borrowed from the *Canadian Charter*, which is a ‘constitutional’¹⁴⁰ document that empowers the judiciary to invalidate legislation that unjustifiably limits a right.¹⁴¹ In order to preserve parliamentary sovereignty, it was necessary to empower Parliament to re-enact legislation that had been invalidated by the judiciary according to the latter’s assessment of rights-incompatibility. Indeed, adoption of the override was *the* vital political compromise that ensured the enactment of the *Canadian Charter*: ‘section 33 broke the impasse on entrenchment by tempering judicial review of rights claims with a legislative escape.’¹⁴²

¹⁴⁰ The term ‘constitutional’ is used loosely. Because of the override provision, the *Canadian Charter* is not ‘constitutional’ in the traditional sense: see above n 61.

¹⁴¹ *Constitution Act 1982*, being sch B to the *Canada Act 1982* (UK) c 11, s 52(1): ‘The *Constitution* of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect.’

¹⁴² Lorraine Eisenstat Weinrib, ‘Learning to Live with the Override’ (1990) 35 *McGill Law Journal* 541, 563. Section 33 provides ‘a structural check on judicial power that better balances “the principle of constitutionalism with active popular sovereignty”’: Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed, 2001) 195. ‘For those who see judicial review as another form of fallible policy-making, the override is a prudent fail-safe device’: Peter H Russell, ‘Canadian Constraints on Judicialization from Without’ in C Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (1995) 137, 138. For more detail on the history of s 33, see Howard Leeson, ‘Section 33, the Notwithstanding Clause: A Paper Tiger?’ (2000) 6(4) *Choices* 1, 7–15; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed, 2001) 181, 184–8.

The parliamentary sovereignty rationale for the override under the *Canadian Charter*, however, does not apply under the *Victorian Charter*. The *Victorian Charter* differs from the *Canadian Charter* in two important respects: (a) the *Victorian Charter* is not a ‘constitutional’ document; and (b) the judiciary is not empowered to invalidate legislation. Under the *Victorian Charter*, use of the override will *never be necessary* to preserve parliamentary sovereignty because judicially-assessed, rights-incompatible legislation cannot be invalidated, unwanted or undesirable s 32 judicial rights-compatible reinterpretations can be altered by ordinary legislation, and s 36 judicial declarations of inconsistent interpretation are unenforceable. In other words, the Victorian Parliament need only enact explicit rights-*incompatible* legislation with an *incompatible* statutory purpose to avoid a rights-compatible judicial interpretation. Admittedly, an override may be used to avoid the controversy of Parliament ignoring a s 36 judicial declaration which impugns legislation. However, use of the override itself would surely result in equal, if not more, controversy than Parliament refusing to alter legislation in light of a s 36 declaration.

Perhaps the answer lies in the *Human Rights Act 1998* (UK) c 42. That legislation empowers Parliament to derogate from Convention rights, which is the override equivalent.¹⁴³ Domestically in the UK, as in Victoria, a derogation serves no purpose — judicially-assessed, rights-incompatible legislation cannot be invalidated, unwanted or undesirable s 3 judicial rights-compatible reinterpretations can be altered by ordinary legislation, and s 4 judicial declarations of incompatibility are unenforceable. Internationally, however, derogation does serve a purpose.¹⁴⁴ Where UK law potentially violates international or regional human rights obligations, derogation is necessary to alter the UK’s international and regional legal obligations. This is especially important in relation to the *ECHR* because decisions of the European Court are enforceable,¹⁴⁵ such that altering the human rights obligations via derogation is necessary to ensure that domestic grievances do not succeed before the European Court.

The international rationale for derogation under the *Human Rights Act 1998* (UK) c 42, however, does not apply to the *Victorian Charter*. First, the State of Victoria does not have international legal personality and therefore does not have obligations under international law. Rather, it is the Commonwealth of Australia that has international legal personality and international legal obligations. Secondly, the enforcement mechanisms under the international human rights treaties to which Australia is a party are weaker than the *ECHR* mechanisms. The

¹⁴³ As the *Human Rights Act 1998* (UK) c 42 was based on the *ECHR*, it adopted the regional and international human rights instrument terminology of ‘derogation’, rather than the domestic human rights instrument terminology of ‘override’.

¹⁴⁴ Indeed, this point was recognised by Lord Scott in *A v Secretary of State for the Home Department* [2005] 2 AC 68, 147 (‘*Case of A*’):

It seems to me somewhat of a puzzle why section 14 [of the *Human Rights Act 1998* (UK) c 42] was necessary at all. The [*Human Rights Act 1998* (UK) c 42] does not assume to restrict Parliament’s power to enact legislation inconsistent with the *ECHR*. So what was the purpose of the designated derogation section? The purpose was, perhaps, simply to enable it to be made clear that the inconsistency was deliberate and not inadvertent, and thereby to constitute an aid to the courts in construing the statutory provision.

¹⁴⁵ *ECHR*, opened for signature 4 November 1950, 213 UNTS 221, art 46 (entered into force 3 September 1953).

decisions of the European Court are enforceable. In comparison, the views and opinions of the treaty monitoring bodies under the relevant treaties to which Australia is a party are, at best, only of influence, as they are not strictly enforceable at the international or domestic level.¹⁴⁶ Because of this difference in enforceability, the same rationale does not apply in the Victorian jurisdiction. Finally, even if the international rationale were to apply in the State of Victoria, the override provision does not meet the minimum international human rights standards relating to derogation. Therefore, use of the override would most likely be a technical violation of those standards.

Williams confirms that '[a]s a matter of law the override clause ... is unnecessary.'¹⁴⁷ He argues that the override provides an alternative means to the amendment of the *Victorian Charter* itself: 'use of s 31 is preferable to a permanent amendment of the [*Victorian Charter*] enacted at a time of crisis that might damage the legitimacy of the instrument.'¹⁴⁸ This is not a sufficient justification for the inclusion of the override. First, the override provision itself damages the 'legitimacy of the instrument' by undermining the minimum accepted human rights standards associated with derogation. Secondly, the potential for continuous renewal of override provisions every five years will, in effect, equate to permanent changes to the protected rights in Victoria by stealth. Thirdly, it also fails to recognise the way in which temporary measures adopted in emergency situations creep into the permanent legal system. Finally, the argument fails to acknowledge the political cost of amending or repealing a human rights instrument. Once conferred, individuals are reluctant to have their rights abrogated and are suspicious of moves to do so. Williams' argument overestimates the ease with which the representative arms could amend or repeal the *Victorian Charter*, even in times of emergency.¹⁴⁹

Overall, the *Victorian Charter* preserves parliamentary sovereignty by limiting the powers of the judiciary to interpretation and declaration, and denying the judiciary the power to invalidate legislation. The override power is not required to preserve parliamentary sovereignty; rather, it serves to undermine the level of protection of human rights in Victoria.¹⁵⁰

2 Establishing an Institutional Dialogue

The aim of establishing an institutional dialogue about rights under the *Victorian Charter* does not provide any underlying justification for the override clause either. Again, it is worth considering how the override device within the *Can-*

¹⁴⁶ See, eg, *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, art 40 (entered into force 23 March 1976); *First Optional Protocol*, opened for signature 16 December 1966, 999 UNTS 302, art 5(4) (entered into force 23 March 1976).

¹⁴⁷ Williams, above n 115, 899.

¹⁴⁸ *Ibid.*

¹⁴⁹ See, eg, Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000) 170: 'Repealing [the *Human Rights Act 1998* (UK) c 42] is almost inconceivable in the foreseeable future. It is fair to say that enforcement of human rights standards through the courts is here to stay.'

¹⁵⁰ It should be noted that the *Human Rights Act 2004* (ACT), which is also modelled on the *Human Rights Act 1998* (UK) c 42, does not contain an additional override/derogation provision. The *Human Rights Act 2004* (ACT) implicitly recognises that the retention of parliamentary sovereignty is achieved by limiting the powers of the judiciary to interpretation and declaration alone.

dian Charter facilitates an institutional dialogue. Under the *Canadian Charter*, the judiciary is empowered to invalidate legislation that, from its institutional perspective, unjustifiably limits rights. However, the legislature has multiple response mechanisms, which facilitate an institutional dialogue (that is, the equivalent of the fourth institutional dialogue mechanism discussed above). Two situations commonly arise. The first is where the *legislative means* fall foul of the *Canadian Charter*, while the second occurs where the *legislative objectives* do so.

First, where the legislative means are impugned, the legislature can respond by enacting ordinary legislation in a second attempt to achieve its legitimate legislative objectives. This involves refining the s 1 limitation in some way. Rights-limiting legislative means that unjustifiably violate the *Canadian Charter* generally do so because the legislative means are not the least rights-restrictive way to achieve the legitimate legislative objective; or, the legislative means do not have a rational connection to the legitimate legislative objective.¹⁵¹ Accordingly, the legislature usually needs to adjust its legislative means to ensure that it is less rights-restrictive and more rationally connected to the legitimate legislative objective. It is the s 1 general limitations power that structures the dialogue here.¹⁵²

In the second situation, where the legislative objectives are impugned, the legislature must resort to the override power in s 33. Exercise of the override power is only necessary where the judiciary impugns the legislative objectives.¹⁵³ This is a rare occurrence, with only three per cent of legislation being invalidated because of unreasonable legislative objectives.¹⁵⁴ From a dialogue perspective, when there is irresolvable institutional disagreement over the reasonableness of the legislative objectives behind rights-limiting legislation, 'section 33 provides a carefully structured outlet for the extraordinary dialogue'.¹⁵⁵ Although the use of s 33 indicates a temporary suspension of the institutional dialogue between the judiciary and the legislature, 'the Court's point

¹⁵¹ Under the *Victorian Charter*, we can expect the minimum impairment factor in s 7(2)(e) to be the most difficult to achieve, followed by the rationality factor in s 7(2)(d). For statistics on unjustifiable limitations on rights under the *Canadian Charter*, see Leon E Trakman, William Cole-Hamilton and Sean Gatién, 'R v Oakes 1986-1997: Back to the Drawing Board' (1998) 36 *Osgoode Hall Law Journal* 83, 140-6; Hogg and Bushell, above n 78, 107-24. For similar discussions under the *Human Rights Act 1998* (UK) c 42, see Nicholas Blake, 'Importing Proportionality: Clarification or Confusion' (2002) 7 *European Human Rights Law Review* 19, 23.

¹⁵² Resort to the s 33 structural dialogue mechanisms is not necessary, unless the representative arms insist on re-enacting precisely the impugned legislative means.

¹⁵³ The Parliament may choose to use s 33 to override a judicial ruling where it is determined to re-enact the precise impugned legislative means, although the less confrontational s 1 structural mechanism is available.

¹⁵⁴ Trakman, Cole-Hamilton and Gatién, above n 151, 95. 'From 1986 to the time of writing (autumn, 1997), a majority of the Supreme Court considered eighty-seven violations under s 1, eighty-four of which were held to have pressing and substantial objectives': at 95 fn 37. Note that 1986 was the year of *R v Oakes* [1986] 1 SCR 103. Examples where the objectives were found not to be reasonable include *R v Big M Drug Mart Ltd* [1985] 1 SCR 295; *Somerville v A-G (Canada)* (1996) 136 DLR (4th) 203; *A-G (Quebec) v Quebec Protestant School Boards* [1984] 2 SCR 66; *R v Zundel* [1992] 2 SCR 731.

¹⁵⁵ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001) 264-5. See also Peter H Russell, 'Standing Up for Notwithstanding' (1991) 29 *Alberta Law Review* 293, 295, 298.

of principle [is preserved], to be reconsidered in calmer times when the override expires after five years.¹⁵⁶ Moreover, the dialogue between the represented and the legislature continues, with the represented being ‘clearly warned about what is being done in [their] name’.¹⁵⁷ In an institutional dialogue framework under a ‘constitutional’ human rights instrument, s 33 is a legitimate temporary assertion of the voice of the representative arms. If s 33 did not exist and the judiciary impugned legislative objectives, the institutional dialogue would more closely resemble a judicial monologue.

In Victoria, the override mechanism is *not* needed to establish a dialogue. Unlike the *Canadian Charter*, the *Victorian Charter* does not empower the Victorian judiciary to invalidate legislation where the legislative objective behind the rights-limiting legislation is unreasonable. Moreover, unwanted s 32 rights-compatible interpretations of the legislative objectives are unlikely if the statutory provisions and statutory purpose clearly prevent such an exercise of the s 32 interpretation power. Further, any unwanted or undesirable s 32 rights-compatible judicial interpretations of legislative objectives can be altered by ordinary legislation, and s 36 judicial declarations of inconsistent interpretation based on an unreasonable legislative objective are unenforceable. The legislature does not need ‘a legislative counter-weight to judicial power’¹⁵⁸ in the form of an override power because the *Victorian Charter* does not give the Victorian judiciary the same ‘weight’ in the form of the power to invalidate as the *Canadian Charter* gives the Canadian judiciary. Nor does the legislature need the override to ensure its voice in an ongoing institutional dialogue because the *Charter* provides no scope for a judicial monologue.

Finally, not only is the override unnecessary to facilitate an institutional dialogue under the *Victorian Charter*, but its inclusion may in fact promote a representative monologue. There is nothing in the *Victorian Charter* to prevent the use of the override ‘pre-emptively’.¹⁵⁹ Parliament is able to use an override when first enacting legislation to shield the legislation from judicial review, rather than only using it as a response to the contribution of the judiciary to the dialogue. Recall that the s 32 interpretative and s 36 declaratory powers do not apply to overriding legislation.¹⁶⁰ Such pre-emptive uses of the override have the potential to suppress the judicial contribution to the debate about rights and democracy, taking us from an institutional dialogue to a representative monologue.

D Conclusion

The s 31 override power in the *Victorian Charter* is problematic. It does not contain the minimum safeguards of equivalent override and derogation provisions in international, regional or comparative domestic human rights instruments. Nor does it promote the underlying objectives of the *Victorian Charter*. It

¹⁵⁶ Roach, *The Supreme Court on Trial*, above n 155, 265.

¹⁵⁷ *Ibid.*

¹⁵⁸ Russell, ‘Standing Up for Notwithstanding’, above n 155, 301.

¹⁵⁹ This is also true of the *Canadian Charter*: see above n 111.

¹⁶⁰ *Victorian Charter* s 31(6).

seems that the drafters of the *Victorian Charter* satisfied the political imperative to give the representative arms of government as many tools as possible for reducing the impact of rights protections on democratic decision-making. In doing so, the drafters have compromised rights protection and the notion of institutional dialogue, and disingenuously relied on the need to preserve parliamentary sovereignty to deny individuals meaningful human rights accountability. A full review of the need for and contours of s 31 must be undertaken.

V COMPARABLE DOMESTIC HUMAN RIGHTS INSTRUMENTS AND OVERRIDES/DEROGATION

The Victorian concerns about the preservation of parliamentary sovereignty and the creation of an institutional dialogue do not dictate the need for and content of s 31 of the *Victorian Charter* in addition to the other methods of restricting rights that are available therein. Comparable domestic human rights instruments demonstrate that parliamentary sovereignty can be preserved and an institutional dialogue can be created, whilst ensuring that internationally and regionally recognised minimum human rights standards are respected vis-a-vis restricting rights in extraordinary times. The South African, UK and Canadian experiences with overrides and derogations hold lessons for Victoria.

A *Derogation under the South African Bill of Rights*

The *South African Bill of Rights* recognises that exceptional measures may need to be taken in times of war or where there is a threat to the life of the nation, and that it is better to permit and regulate this under the *Constitution* rather than rely on extra-constitutional power, prerogative powers or martial law. Indeed, South Africa experienced many extra-constitutional states of emergency in the apartheid era, which ‘resulted in gross violations of human rights.’¹⁶¹ Accordingly, the domestic *South African Bill of Rights* contains a power of derogation mimicking the international and regional human rights standards, with limits in time, circumstance and effect.

In terms of limits in time and circumstance, s 37(1) permits a state of emergency to be declared only ‘in terms of an Act of Parliament’, with the relevant Act requiring a state of emergency to be officially proclaimed by the President.¹⁶² Moreover, such a declaration can only be made when ‘(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.’¹⁶³ Under s 37(2), a declaration of a state of emergency, and any legislation enacted in consequence, must be prospective and will be effective for

¹⁶¹ Currie and de Waal, above n 12, 801.

¹⁶² The relevant Act of Parliament is the *State of Emergency Act 1997* (RSA). Section 1 of this Act states that the ‘President may by Proclamation in the *Gazette* declare a state of emergency in the Republic or in any area within the Republic.’ The reasons for the state of emergency must be included in the Proclamation, and the public must be informed about the existence of the emergency and the measures taken to respond to it: ss 1(2), 2(1)(b), 3(1). See Currie and de Waal, above n 12, 803–4.

¹⁶³ *South African Bill of Rights* s 37(1) (emphasis added).

no more than 21 days from the date of the declaration unless the Parliament extends it. Parliament is able to grant extensions of the declaration and legislation, but they only operate for a renewable three-month period.¹⁶⁴ Under s 37(3), the judiciary is empowered to decide on the validity of a declaration of a state of emergency, any extension thereof, and any legislation enacted or other action taken as a consequence thereof. In terms of the declaration of the state of emergency itself, the s 37(1)(b) requirement that a declaration is necessary to restore peace and order introduces a justiciable element of proportionality into the equation.¹⁶⁵

These provisions go beyond that required by the minimum international and regional human rights standards, and highlight the deficiencies of the override provision in the *Victorian Charter*. First, the power to derogate under the *South African Bill of Rights* is subject to strict time limits. Indeed, the initial derogation is only in place for 21 days, and Parliament is obliged to continuously appraise the situation via a three-month review obligation. This is far more rigorous than the *Victorian Charter*, which imposes a five-yearly review obligation for legislation that overrides the protected rights.

Secondly, the limits on the requisite circumstances justifying extraordinary derogation reflect the international minimum human rights standards. Importantly, they differ from the justifying circumstances under the *Victorian Charter*, which are little more than the circumstances that would justify imposing an ordinary limitation on protected rights. The circumstances listed in s 37(1) are of a different ilk — they envisage something that threatens the life of the nation, going well beyond the safety, security and welfare of Victorians. Moreover, s 37(1) permits a declaration of a state of emergency and consequential legislative measures only where the threat is so grave that exceptional measures are necessary to restore peace and order. ‘If peace and order can be restored or maintained under the ordinary law ... s 37 cannot be invoked.’¹⁶⁶ The ability to limit rights, and the circumstances justifying a limit, are part of the application of human rights within the ordinary law. Section 37 highlights that exceptional derogating/overriding measures can only be justified where ordinary limitations on rights under ordinary law are an insufficient response.¹⁶⁷ The opposite is true under the *Victorian Charter* — the preconditions for exercising the override

¹⁶⁴ The first extension of the state of emergency must be carried with a vote of the majority of the National Assembly, with subsequent extensions being carried with a vote of at least 60 per cent of the members of the National Assembly. Public debate in the National Assembly must precede these votes. See *South African Bill of Rights* s 37(2)(b).

¹⁶⁵ Currie and de Waal, above n 12, 804, 804 fn 20. ‘[A] declaration of an emergency must be a proportionate response to the threat that is faced’: at 804 fn 20.

¹⁶⁶ Ibid 802. In other words, ‘the “normal” provisions of the law must first be exhausted’: at 802 fn 8.

¹⁶⁷ Ibid 802. Currie and de Waal highlight this difference well with an example. A state of emergency may justify the imposition of a curfew requiring people to stay home during certain hours. Such a derogation from the freedom of movement will be permissible if the circumstances of the emergency require it. In ordinary times, it is highly unlikely that a curfew would be permitted as a justifiable limit on the freedom of movement under a general or specific limitations power.

power more closely resemble the circumstances justifying ordinary limitations on rights rather than extraordinary derogations from rights.¹⁶⁸

Thirdly, s 37 of the *South African Bill of Rights* imposes various institutional limits. States of emergency no longer permit the executive to basically take control of state affairs.¹⁶⁹ Rather, s 37 clearly forces the executive to be answerable to both the legislature and the judiciary. Although the executive has the power to publicly declare a state of emergency for up to 21 days, it is Parliament that has the power to renew such declarations and enact legislation in consequence thereof, not the executive. Moreover, all aspects of the declaration and the consequential measures are justiciable before a competent court. Further, all arms of government have the power to bring a state of emergency to an end.¹⁷⁰ This kind of power sharing — involving checks and balances across the arms of government — protects against the type of human rights abuse that is characteristic in times of emergency.¹⁷¹

In terms of limits in effects, ss 37(4) to (8) place conditions upon the exercise of the power to derogate. First, s 37(4) provides that legislation may only derogate from the *South African Bill of Rights* to the extent that: (a) ‘the derogation is strictly required by the emergency’; (b) the legislation conforms to South Africa’s international law obligations in times of emergency; (c) the legislation is published in the Government Gazette as soon as reasonably possible after being enacted; and (d) the legislation conforms with s 37(5). Secondly, s 37(5) sets out an extensive and detailed list of the non-derogable sections of the *South African Bill of Rights* (as discussed above).¹⁷² Thirdly, s 37(5)(a) does not permit the state of emergency declaration or legislation made thereto to indemnify the state, or any persons, in respect of any unlawful act. Fourthly, s 37(6) sets out various conditions that must be observed whenever any person is detained without trial as a consequence of derogation.¹⁷³ The s 37 restrictions on the effects of derogating measures attain the minimum international human rights standards.¹⁷⁴ All of these safeguards are omitted from the *Victorian Charter*.

¹⁶⁸ There is no strict time limit imposed on derogating measures under the *ICCPR* and *ECHR*. It is, however, explicit in art 4(1) of the *ICCPR* and art 15(1) of the *ECHR* that the measures are temporary and in place only whilst the emergency situation exists. This imposes a temporal limit, although this does not dictate the duration of the derogation.

¹⁶⁹ See Currie and de Waal, above n 12, 801, where it was noted that ‘[t]he uncontrolled power of the executive that characterised states of emergency under apartheid has been curbed.’

¹⁷⁰ See *State of Emergency Act 1997* (RSA) s 1(3) (by proclamation of the President); *South African Bill of Rights* ss 37(2)(b) (Parliament fails to resolve to extend the state of emergency), (3)(a)–(b) (judiciary adjudicates the declaration, or finds an extension of a declaration to be invalid).

¹⁷¹ For a discussion of this under apartheid, see Currie and de Waal, above n 12, 801, 801 fn 3.

¹⁷² See *South African Bill of Rights* s 37(5)(c). For a complete list, see Part IV(A) above. The derogation power itself is ‘entrenched’ under s 37(5)(b), which provides that no derogation is allowed from s 37 itself.

¹⁷³ These conditions include informing a family member or friend of the detention; publication in the *Government Gazette* of the detainee’s name and place of detention; access to a medical and legal practitioner of the detainee’s choice; court review of the detention within 10 days; and further court review where the detainee is not released. Section 37(7) conditions attempts at re-detaining a previous detainee, and s 37(8) excludes the operation of ss 37(6) and (7) for persons detained because of an international armed conflict, displacing the protections offered under binding international humanitarian law.

¹⁷⁴ Indeed, s 37 goes beyond the minimum international human rights standards.

Another major difference in the safeguards available relates to judicial review in times of emergency. Under s 37, the lawfulness of the declaration of a state of emergency and the derogating legislation are justiciable. Under the *Victorian Charter*, it is as yet unclear whether the existence of ‘exceptional circumstances’ is justiciable. In an attempt to impose some regulation on an otherwise totally unregulated power to ignore protected rights, it is hoped that the Victorian judiciary will regard the existence of ‘exceptional circumstances’ as justiciable.¹⁷⁵

The deplorable and regrettable apartheid era of South Africa produced important lessons for the South African people that are reflected in the *South African Bill of Rights*. Although the Victorian Parliament acknowledged the insight of the South Africans in adopting its general limitations power,¹⁷⁶ it is unfortunate that it was unwilling to learn the lessons associated with times of emergency.

B Derogation under the UK Human Rights Act

Not unlike the South African instrument, the *Human Rights Act 1998* (UK) c 42 utilises a power of derogation rather than an override in a domestic setting. The seminal derogation case under the *Human Rights Act 1998* (UK) c 42 illustrates how effective derogation provisions modelled on international and regional human rights instruments can be in securing human rights accountability in times of emergency. That case will also be used to demonstrate the inadequacy of the safeguards and accountability associated with override provisions contained in the *Canadian Charter* and the *Victorian Charter*.

The UK has had a long history with counter-terrorism legislation and derogation from human rights obligations, particularly arising from the situation in Northern Ireland. As the discussion of the *ECHR* jurisprudence above shows, the UK representative arms of government have been willing to enact legislative measures that they believe are necessary in times of emergency; to recognise or accept after court judgment that the legislative measures violate human rights obligations; to derogate from their international and regional human rights obligations accordingly; and to justify the basis for derogation and the derogating measures domestically, regionally and internationally.¹⁷⁷ Whether one agrees with the need for derogation and the derogating measures taken, the UK representative arms must be commended for exposing themselves to such searching human rights scrutiny and accountability.

The UK finally withdrew its derogation from art 5(3) of the *ECHR* in relation to counter-terrorism legislation enacted to deal with the situation in Northern Ireland, effective as of 26 February 2001.¹⁷⁸ The *Terrorism Act 2000* (UK) c 11 superseded the relevant provisions,¹⁷⁹ paving the way for the withdrawal of the

¹⁷⁵ Cf Williams, above n 115, 900.

¹⁷⁶ Primarily, the general limitations power under s 36 of the *South African Bill of Rights*.

¹⁷⁷ See, eg, *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A); *Case of Brogan* (1988) 145-B Eur Court HR (ser A); *Brannigan* (1993) 258-B Eur Court HR (ser A).

¹⁷⁸ The withdrawal of the derogation was done by *The Human Rights Act (Amendment) Order 2001* (UK).

¹⁷⁹ *Terrorism Act 2000* (UK) c 11, sch 8.

derogation. In only a matter of months, as part of its response to the September 11 attacks in the US, the UK representative arms again derogated from art 5 of the *ECHR* in relation to s 23 of the *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24 ('*ATCSA*').¹⁸⁰

Under s 21 of the *ATCSA*, the Home Secretary could issue a certificate in relation to resident non-nationals believed to be a risk to national security and suspected of being international terrorists. Section 23 empowered the Home Secretary to indefinitely detain without trial certified resident non-nationals that could not be criminally prosecuted and could not be deported for practical or legal reasons.¹⁸¹ The UK government analysed the scope of art 5(1)(f) of the *ECHR*, which allows for the lawful detention of a person against whom action is being taken with a view to deportation or extradition. It concluded that continued detention under s 23 may not be consistent with art 5(1)(f) in all circumstances, and accordingly derogated from art 5(1)(f) under art 15 of the *ECHR* and s 14 of the *Human Rights Act 1998* (UK) c 42.¹⁸²

Detainees challenged s 23 in *A v Secretary of State for the Home Department*.¹⁸³ At first instance, the Special Immigration Appeals Commission ('SIAC') held that the s 23 derogating measure did not satisfy the art 15 derogation requirements and it issued a declaration of incompatibility in respect of s 23.¹⁸⁴ The Court of Appeal overruled the decision of SIAC, holding that the three requirements for derogation under art 15 had been satisfied.¹⁸⁵ On further appeal, the House of Lords agreed with SIAC.¹⁸⁶

The House of Lords held that only the first of the three derogation requirements were met. In relation to the first requirement, an overwhelming majority

¹⁸⁰ *The Human Rights Act 1998 (Designated Derogation) Order 2001* (UK) designates the proposed derogation from art 5(1)(f) of the *ECHR* for the purposes of the *Human Rights Act 1998* (UK) c 42, and *The Human Rights Act 1998 (Amendment No 2) Order 2001* (UK) amends sch 3 of the *Human Rights Act 1998* (UK) c 42 so as to incorporate the derogation from art 5(1) which has been lodged with the Council of Europe under art 15 of the *ECHR*.

¹⁸¹ The practical reasons for non-deportation include there being no country that would accept the person, and the legal reasons include the inability to deport a person who was at risk of torture or inhuman or degrading treatment or punishment if deported, in accordance with art 3 of the *ECHR*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). There was disagreement as to whether the domestic criminal law was extensive enough to criminalise activities of non-national suspected terrorists: see Adam Tomkins, 'Legislating against Terror: The *Anti-Terrorism, Crime and Security Act 2001*' [2002] *Public Law* 205, 214.

¹⁸² See *The Human Rights Act 1998 (Designated Derogation) Order 2001* (UK); *The Human Rights Act 1998 (Amendment No 2) Order 2001* (UK).

¹⁸³ [2004] QB 335. Seventeen persons were certified, with 16 of them being detained. Two of those certified voluntarily left the country; one successfully appealed against certification; two had their certifications revoked after the second periodic review by SIAC; the mental health of two was affected, with one being taken to Broadmoor (a secure mental health hospital) and one being granted bail and placed under house arrest: Sangeeta Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish' (2005) 5 *Human Rights Law Review* 403, 405–6.

¹⁸⁴ Essentially, SIAC held that s 23 did not satisfy the third requirement for lawful derogation because it unjustifiably discriminated against suspected terrorists that were non-nationals whom could be arbitrarily detained and those that were nationals whom could not be arbitrarily detained: *A v Secretary of State for the Home Department* [2004] QB 335, 345–8 (Woolf CJ).

¹⁸⁵ *Ibid* 354–5 (Woolf CJ), 371–2, 374, 382 (Brooke LJ), 384, 386–7 (Chadwick LJ).

¹⁸⁶ *Case of A* [2005] 2 AC 68. The House of Lords sat as a bench of nine judges, rather than the usual five judges, 'an occurrence that has only happened once before since World War II': Shah, above n 183, 406.

of Law Lords held that there was an emergency threatening the life of the nation.¹⁸⁷ In relation to the second requirement, an overwhelming majority of Law Lords characterised the s 23 derogating measure as a counter-terrorism measure.¹⁸⁸ When characterised as such, the Law Lords held that s 23 was not strictly required by the exigencies of the circumstances because it was under-inclusive and ineffective for two reasons. First, if the threat to the life of the nation was terrorism, and that threat was posed by both national and non-national suspected terrorists, the measure did not adequately address the threat because s 23 singled out only non-nationals. Why were national suspected terrorists treated differently? If nationals could be dealt with in a manner not requiring derogation, why not use this scheme for non-nationals? Secondly, if the non-national suspects did pose such a danger, this danger was not resolved by sending them to another country to continue their activities.¹⁸⁹

In relation to the third requirement, an overwhelming majority of the Law Lords held that the measures were inconsistent with other obligations under international law to the extent that they were unjustifiably discriminatory between nationals and non-nationals.¹⁹⁰ According to Lord Bingham, there was a difference in treatment between the national suspected terrorists and the non-national suspected terrorists on the proscribed ground of national origin.¹⁹¹ Moreover, the two groups were in an analogous situation, with the relevant comparative circumstances being that nationals and non-nationals alike: (a) were suspected of being international terrorists; (b) could not be successfully prosecuted; and (c) could not be deported or exiled. Further, the difference in treatment was not objectively justified.¹⁹² Lord Bingham acknowledged that states can differentiate between nationals and non-nationals in an immigration context, but that such differentiation is not legitimate in a national security context.¹⁹³ Because the threat facing the UK was not purely from non-nationals, the

¹⁸⁷ Eight of the nine Law Lords so decided: *Case of A* [2005] 2 AC 68, 101–2 (Lord Bingham), 129 (Lord Nicholls), 136–8 (Lord Hope), 148 (Lord Scott), 151–2 (Lord Rodger), 166 (Lord Walker), 172 (Baroness Hale), 175 (Lord Carswell). Lord Hoffmann dissented: at 130–2.

¹⁸⁸ See, eg, *ibid* 104–6, 111 (Lord Bingham), 128 (Lord Nicholls), 133–4 (Lord Hope), 153–4 (Lord Rodger). Lord Walker dissented on this issue: at 166–7. This is in contrast to the Court of Appeal, which characterised s 23 as an immigration measure: see, eg, *A v Secretary of State for the Home Department* [2004] QB 335, 361–2 (Woolf CJ).

¹⁸⁹ See generally *Case of A* [2005] 2 AC 68, 103–11 (Lord Bingham), 142 (Lord Hope), 148–9 (Lord Scott), 153, 159–60 (Lord Rodger).

¹⁹⁰ *Ibid* 124 (Lord Bingham). Again, Lord Walker dissented on this issue: at 166–70. The discrimination issue was also argued in terms of the second requirement — that is, that being discriminatory, the provision could not be strictly required by the exigencies of the situation and was accordingly disproportionate: see, eg, at 112 (Lord Bingham), 138 (Lord Hope).

¹⁹¹ *Ibid* 124.

¹⁹² The government argued that the appropriate comparison was between non-national suspected terrorists who could be deported and non-national suspected terrorists who could not be deported. This argument was rejected. To accept this argument would have allowed the government to maintain an immigration control focus on what was essentially a national security issue (see above n 188). See also Mary Arden, ‘Human Rights in the Age of Terrorism’ (2005) 121 *Law Quarterly Review* 604, 608.

¹⁹³ *Case of A* [2005] 2 AC 68, 116–17 (Lord Bingham). Recall that the Court of Appeal characterised s 23 as an immigration measure (see above n 188), whereas the House of Lords characterised it as a counter-terrorism measure: at 115–16 (Lord Bingham).

different treatment of non-nationals could not be justified.¹⁹⁴ Accordingly, the derogation was unlawful and of no force, and s 23 of the *ATCSA* violated art 5 when read with art 14 of the *ECHR*. The violation could not be remedied by the s 3 power of judicial interpretation,¹⁹⁵ such that the House of Lords issued a declaration of incompatibility.¹⁹⁶

The representative arms respected this decision and returned to the legislative drawing board.¹⁹⁷ The representative response was the *Prevention of Terrorism Act 2005* (UK) c 2 (*PoTA*).¹⁹⁸ The *PoTA* enabled the repeal of ss 21–3 of the *ATCSA*.¹⁹⁹ The *PoTA* empowers the UK government to subject both national and non-national suspected terrorists to ‘control orders’ where it is not possible to criminally prosecute or deport them. Control orders can, inter alia, impose curfews, place geographical restrictions on non-curfew activities, restrict who the controlled person can visit and be visited by, restrict the public meetings they can attend, impose requirements to submit to searches, forbid access to cellular telephone communications or internet, and restrict them to the use of one approved bank account.²⁰⁰ There are two categories of control orders based on the intensity of such restrictions — non-derogating control orders and derogating control orders. Non-derogating control orders are of a less severe degree, for example, where there is interference with the freedom of movement. Derogating control orders are of a more severe degree, for example, where the restrictions amount to a deprivation of liberty.²⁰¹

This case highlights how strong human rights accountability and scrutiny in the context of emergency situations can be balanced against parliamentary sovereignty and institutional dialogue. In terms of accountability, because the UK power of derogation is modelled on the international and regional provisions, the UK government offered detailed justification of the public emergency, the measures to be taken and the legality of the measures. In terms of scrutiny, these justifications were examined by SIAC and two levels of the judiciary, and were ultimately found to be wanting. In terms of parliamentary sovereignty, the declaration of incompatibility did not tie the hands of the representative arms.

¹⁹⁴ See generally *Case of A* [2005] 2 AC 68, 114–24 (Lord Bingham), 129 (Lord Nicholls), 142–4 (Lord Hope), 149–50 (Lord Scott), 159–60 (Lord Rodger).

¹⁹⁵ The House of Lords also quashed the *Human Rights Act 1998 (Designated Derogation) Order 2001* (UK): see, eg, *ibid* 127 (Lord Bingham), 144 (Lord Hope), 150 (Lord Scott), 160 (Lord Rodger).

¹⁹⁶ See *Case of A* [2005] 2 AC 68, 127 (Lord Bingham), 129 (Lord Nicholls), 144 (Lord Hope), 150 (Lord Scott), 160 (Lord Rodger).

¹⁹⁷ See United Kingdom, *Parliamentary Debates*, House of Commons, 26 January 2005, 306 (Charles Clarke, Secretary of State for the Home Department).

¹⁹⁸ The legislation was enacted by the House of Commons, with 62 Labour Members of Parliament crossing the floor to vote against it: see James Button, ‘Blair’s Plan to Detain without Trial Causes Uproar’, *The Age* (Melbourne), 5 March 2005, 20.

¹⁹⁹ These sections were repealed on 14 March 2005 by the *PoTA* s 16(2)(a).

²⁰⁰ For the sorts of controls imposed to date, see Lord Carlile of Berriew, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2006) 13, 33. See also *PoTA* s 1(4).

²⁰¹ No derogating control orders have been issued to date: Carlile, above n 200, 16. But, as the nomenclature indicates, a derogation under art 15 of the *ECHR*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) and s 14 of the *Human Rights Act 1998* (UK) c 42 will be required if and when one is issued.

Rather, it forced the executive and Parliament to reassess the public emergency, the legislative objective and the legislative means by which the objective was to be achieved. Arguably, the resulting legislative changes improved the representative arms' response to the threat posed, by ensuring the measures effectively addressed the threat in its entirety (that is, both the national and non-national threat). In terms of institutional dialogue, the legislative response addressed the concerns of the House of Lords. First, the *PoTA* applies equally to nationals and non-nationals, for domestic and international terrorism alike. Secondly, the controls are individualised according to the threat posed by each subject, ensuring the proportionality that the Law Lords considered to be absent under the *ATCSA*.²⁰² Thirdly, the *PoTA* impairs rights to a lesser extent, whilst still meeting the legislative objectives; for example, rather than subjecting suspected terrorists to indefinite detention without trial, they will be subjected to restrictions on movement at best and house arrest at worst.

Section 31 of the *Victorian Charter* requires none of this. Although s 31(3) requires an explanation in Parliament of the 'exceptional circumstances' justifying the override, this limitation on circumstances is insufficient for a number of reasons — the standard of exceptionalism is not demanding enough; failure to give such an explanation does not affect the validity, operation or enforcement of the override provision;²⁰³ and the justiciability of the issue remains to be decided. Moreover, the *Victorian Charter* does not impose any limitation on the effects of the overriding measures. Accordingly, human rights accountability and scrutiny are virtually absent in Victoria. Without such accountability and scrutiny, the institutional dialogue sought after becomes a representative monologue — at least in times of public emergency, which is precisely the time when institutional dialogue is most needed as a check against abuses of executive power. The only thing that s 31 achieves in common with the derogation provisions of the *Human Rights Act 1998* (UK) c 42 is parliamentary sovereignty, but it does so in a manner that disregards both human rights accountability and an institutional dialogue about human rights.

²⁰² Carlile, above n 200, 13:

The key to the obligations is proportionality. In each case they must be proportional to the risk to national security presented by the controllee. I would urge that in each case the individual risks are examined closely, and the minimum obligations consistent with public safety [be] imposed.

For further discussion of the control order system under the *PoTA*, see Joint Committee on Human Rights, *Prevention of Terrorism Bill: Preliminary Report*, House of Lords Paper No 61, House of Commons Paper No 389, Session 2004–05 (2005); Joint Committee on Human Rights, *Prevention of Terrorism Bill*, House of Lords Paper No 68, House of Commons Paper No 334, Session 2004–05 (2005); Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuation in Force of Sections 1 to 9) Order 2006*, House of Lords Paper No 122, House of Commons Paper No 915, Session 2005–06 (2006); Alvaro Gil-Robles, Office of the Commissioner for Human Rights, Council of Europe, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to the United Kingdom 4–12 November 2004* (2005) [9]–[25].

²⁰³ *Victorian Charter* s 31(9).

C Overrides under the Canadian Charter

Given that s 31 of the *Victorian Charter* is modelled on s 33 of the *Canadian Charter*, the leading Canadian case illustrates how the Victorian override might (unfortunately) operate.²⁰⁴ It also demonstrates the vastly different approaches to override provisions compared to derogation provisions. The case of *Ford v Attorney-General (Quebec)* ('*Ford*') concerned the Government of Quebec's attempt to legislatively require all business signs to be unilingual (French only).²⁰⁵ In the course of its judgment, the Supreme Court had to consider Quebec's blanket use of the s 33 override power, which purported to apply a standard override clause to all pre-*Canadian Charter* legislation in Quebec.²⁰⁶ The standard override clause was also to be included in all post-*Charter* legislation. This omnibus override legislation entered into force three months after the *Canadian Charter* came into effect, such that the standard override clauses were to operate retrospectively to the date that the *Charter* came into force.²⁰⁷

The Supreme Court held that s 33 contains requirements of form only.²⁰⁸ It held that the 'form' required by s 33 was an express declaration of the section, subsection or paragraph number of the legislation to be overridden. It did not require the subordinating legislation to be linked to particular rights that were being subordinated.²⁰⁹ This limited approach was justified on the basis that 'a

²⁰⁴ Carolyn Evans and Simon Evans suggest that s 33 of the *Canadian Charter* is of no help in interpreting s 31 of the *Victorian Charter*. They base this argument on the different purposes behind the overrides, with the Canadian override being used 'to prevent or reverse the *invalidation* of legislation by the Canadian courts', whereas the Victorian override is used 'to prevent the Charter *applying* to the extent set out in the override declaration': Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008) 69–70 (emphasis in original). Although I caution that the jurisprudence arising under the *Canadian Charter* with respect to s 33 should not be followed in Victoria (see argument throughout Part V(C)), I do not agree in principle that the Canadian jurisprudence is of no assistance in Victoria. The argument focuses on form over the substance. To be sure, judicial invalidation under the *Canadian Charter* is different to the non-application of ss 32 and 36 under the *Victorian Charter* (that is, the form). However, the effect of the override under both instruments is the same (that is, the substance). The Canadian and Victorian override provisions ensure that guaranteed rights do not interfere with executive and legislative decision-making, preserve parliamentary sovereignty whilst guarding against judicial supremacy, and provide an additional mechanism of institutional dialogue about rights. Although I advocate for a much more rigorous application of s 31 than that developed under the Canadian jurisprudence, it is too formalistic to assert that 'little benefit can be gained from looking at the Canadian model': at 70.

²⁰⁵ [1988] 2 SCR 712.

²⁰⁶ This was achieved by repealing all pre-*Canadian Charter* legislation, and then re-enacting the legislation with the standard override clause inserted. It stated: 'This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the *Constitution Act*: *An Act Respecting the Constitution Act 1982*, SQ 1982, c 21, s 1. The Supreme Court of Canada case was an appeal from *Alliance des Professeurs de Montreal v A-G (Quebec)* (1985) 21 DLR (4th) 354.

²⁰⁷ The *Canadian Charter* came into force on 17 April 1982 and the omnibus legislation came into force on 23 June 1982: see Weinrib, above n 142, 544–5. For comment on the *Ford* decision and its consequences, see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (revised ed, 1994) 92–6; Kahana, above n 59, 270–1; Morton, above n 59, 25, 27–8.

²⁰⁸ *Ford* [1988] 2 SCR 712, 740 (Dickson CJ, Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ).

²⁰⁹ 'Such a reading would require "a *prima facie* justification of the decision to exercise the override authority rather than merely a certain formal expression of it": Weinrib, above n 142, 552, quoting *Ford* [1988] 2 SCR 712, 740 (Dickson CJ, Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ).

substantive specificity requirement would impose not only an impermissible task on the courts, but an excessively onerous burden on legislatures as well²¹⁰ — the impermissible judicial task being substantive review of the legislative policy motivating the override²¹¹ and the onerous legislative burden being the problematic task of identifying precisely what *Canadian Charter* rights are implicated by the override legislation. Having satisfied itself that the formalities had been met,²¹² the Supreme Court upheld the omnibus use of the override power. However, it held that an override provision cannot be applied retrospectively, such that the three-month retrospective application of the omnibus override legislation was invalidated.²¹³

Thus, there are only three safeguards regulating the use of s 33 in the *Canadian Charter*: first, s 33 does not apply to democratic, linguistic and minority rights;²¹⁴ secondly, there is a five-year (renewable) sunset clause; and thirdly, s 33 cannot be used retrospectively. This falls far short of the safeguards regulating exercises of the power to derogate. Unfortunately, the Victorian override falls even shorter, given that the power to override under s 31 of the *Victorian Charter* applies to all of the protected rights.

The Canadian position has been criticised. Peter Russell supports the inclusion of the override within the Canadian constitutional settlement ‘when it is invoked only after a reasoned debate in the legislature.’²¹⁵ He criticises the formal approach taken by the Supreme Court and argues that, as with other provisions of the *Canadian Charter*, a purposive approach to s 33 is required:

The primary purpose of the override is to provide an opportunity for responsible and accountable public discussion of rights issues, a purpose that may be seriously undermined if legislatures are free to use the override without discussion and deliberation.²¹⁶

In dialogue terms, a formal rather than substantive judicial approach to s 33 promotes a representative monologue about rights.

Professor Lorraine Weinrib laments the Supreme Court’s failure to consider ‘the institutional roles implicit in the [*Canadian*] *Charter*’s structure’, and the absence of ‘references to the modes of [purposive] interpretation established in other [*Canadian*] *Charter* cases.’²¹⁷ She is also perplexed by the failure to acknowledge the many restrictive elements of s 33, such as the exclusion of certain rights from its reach, the requirement for express provision of an over-

²¹⁰ Weinrib, above n 142, 556.

²¹¹ To decide otherwise ‘would lead the judiciary into review of the permissibility of legislative policy as to exercise of the override’: *ibid* 553, commenting on *Ford* [1988] 2 SCR 712, 743 (Dickson CJ, Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ).

²¹² *Ford* [1988] 2 SCR 712, 741 (Dickson CJ, Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ).

²¹³ *Ibid* 744–5.

²¹⁴ Where these rights are at stake, and the legislative objective of invalidated legislation is impugned, the only representative response available is constitutional amendment: see, eg, *Somerville v A-G (Canada)* (1996) 184 AR 241; *A-G (Quebec) v Quebec Protestant School Boards* [1984] 2 SCR 66. See further Hogg and Bushell, above n 78, 93–5.

²¹⁵ Russell, ‘Standing Up for Notwithstanding’, above n 155, 298–9.

²¹⁶ *Ibid* 299.

²¹⁷ Weinrib, above n 142, 553–4.

ride, and the sunset clause: '[t]hese terms ... are restrictive', yet the Supreme Court 'sees no significance in these features and finds in s 33 an easily exercised formality.'²¹⁸ She argues to the contrary, that restrictive elements of s 33 coupled with the title of s 33 — 'Exception where express declaration' — justify a narrow reading of the override power.²¹⁹ Weinrib is also critical about the absence of the requirement to identify the rights subordinated by an exercise of the override: the Supreme Court 'assumes that s 33 permits a legislature to subordinate potential rights claims of which it is unaware or uncertain.'²²⁰

Given that the *Victorian Charter* currently contains an override modelled on the Canadian override, the Victorian judiciary has an opportunity to learn from and improve upon the Canadian experience. In terms of justifying circumstances, the Victorian judiciary has an opportunity to inject some substantive analysis into the 'exceptional circumstances' consistent with the limits in circumstances under the derogation powers. This would entail contrasting the Victorian provision with the Canadian equivalent (which is easily done given the s 31 'exceptional circumstances' rider is absent from s 33 of the *Canadian Charter*), adopting a more purposive analysis allowing for substantive review rather than formal review, and expanding the meaning of 'exceptional' beyond that noted in the Explanatory Memorandum through the use of international and regional jurisprudence under s 32(2). In terms of safeguards as to effect, the judiciary should use s 32 to read into s 31 safeguards similar to the international and regional minimum standards on the exercise of derogation. If this is too much to expect from judicial interpretation, the representative arms must legislatively recast the safeguards of s 31, if indeed s 31 is not entirely repealed.

D Conclusion

The experience of the UK, Canadian and South African jurisdictions not only offer guidance for the purpose of interpreting the override contained in the *Victorian Charter*, but they also allow an evaluation of the effectiveness of the rights-restricting mechanisms adopted under the *Victorian Charter*. In relation to the latter, it has been argued that the adoption of the judicial interpretation and declaration mechanisms of the *Human Rights Act 1998* (UK) c 42, without the addition of the Canadian override, is *legally* sufficient to preserve parliamentary sovereignty and to establish an institutional dialogue about rights within the Victorian jurisdiction.²²¹ If, however, an override or derogation was a necessary part of the *political* settlement surrounding the *Victorian Charter*, the South African and UK derogation models are preferable to the Canadian override.

²¹⁸ Ibid 554.

²¹⁹ See *ibid* 568–9. For a more recent analysis of s 33, see also Leeson, above n 142.

²²⁰ Weinrib, above n 142, 556. She also takes issue with the suggestion that requiring the subordinated rights to be specified will involve judges assessing the merits of the legislative policy: at 555.

²²¹ That is, within a jurisdiction that lacks international law personality such that it is only concerned with domestic ramifications of governmental decision-making, as opposed to a jurisdiction that must be concerned with both domestic and international ramifications of governmental decision-making: see above Part IV(C)(1).

VI CONCLUSION

The methods of restricting rights in the *Victorian Charter* are flawed. First, the general limitations power is over-inclusive because it applies to all rights. Secondly, the override provision lacks the essential safeguards which are built into equivalent provisions in international, regional and comparable domestic human rights instruments. The *Victorian Charter* is lacking because of its failure to recognise non-derogable rights, the relatively unexceptional nature of the circumstances justifying an override, and the total failure to regulate the effects of overriding measures. The international and regional equivalent ‘right of derogation is in fact very narrow.’²²² This was overlooked by the Victorian Parliament when it adopted an extremely broad and relatively unregulated override power; indeed, the supposedly *exceptional* override power has fewer restrictions, safeguards and accountability measures than the *unexceptional* limitations power.

The flaws in the methods of restricting rights — particularly the flaws in the override — will allow the representative arms of government to act beyond the rule of human rights law. The House of Lords decision in *A v Secretary of State for the Home Department* (‘*Case of A*’)²²³ reminds us of ‘what it means to live in a society where the executive is subject to the rule of law. Even the Government, and even in times when there is a threat to national security, must act strictly in accordance with the law.’²²⁴ The *Victorian Charter* does not offer Victorians the confidence that comes with upholding the rule of law.

‘[G]rand narratives’,²²⁵ such as democracy and human rights, ‘offer not harmony, but a practical framework in which a society, if it is sufficiently durable and flexible, can maintain an equilibrium between conflicting interests.’²²⁶ Powers of limitation and derogation/override are part of this framework. However, the precise operation of limitation and derogation/override provisions has the capacity to tip the equilibrium in favour of certain interests. In Victoria, the equilibrium is tipped in favour of parliamentary sovereignty, at the expense of establishing a genuine and robust institutional dialogue about rights and a solid regime of vigorous human rights accountability, justifiability and scrutiny under the *Victorian Charter*.

²²² Joseph, Schultz and Castan, above n 5, 836.

²²³ [2005] 2 AC 68.

²²⁴ Arden, above n 192, 622.

²²⁵ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000) 149.

²²⁶ David Feldman, ‘Whitehall, Westminster and Human Rights’ (2001) 23 *Public Money and Management* 19, 23.