

## OF PAROLE AND PUBLIC EMERGENCIES: WHY THE VICTORIAN *CHARTER* OVERRIDE PROVISION SHOULD BE REPEALED

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*This article examines the override provision under the Victorian Charter. Relevantly, Parliament has used the override on two occasions regarding laws enacted to prevent parole being granted to prisoners except in extremely limited circumstances. Conversely, Parliament responded to the COVID-19 threat without resorting to temporarily suspending the Charter via an override. This article analyses the parole-setting uses of the override within the international context of the temporary suspension of rights, against the Charter mechanisms that allow for restrictions on rights, and against the principles underlying the Charter – the retention of parliamentary sovereignty and the creation of an inter-institutional dialogue about rights. These uses test the transparency of and accountability for rights-limiting decision-making, and the culture of justification the dialogue is supposed to engender. By way of contrast and conclusion, the article highlights the curiosity between the use of the override with parole legislation and the non-use of the override with COVID-19 legislation, and revisits the case to repeal the override.*

### I INTRODUCTION

In times of unprecedented health emergencies, when the executive is exercising extraordinary powers in order to protect the lives, health and livelihoods of people, with limited parliamentary oversight, it is opportune to reflect on how the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*'Charter'*) accommodates such crises. Like the international and comparative instruments from which the *Charter* is modelled, and other sub-national rights instruments in Australia, rights

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under the *Charter* are able to be restricted in numerous ways. The scope of rights may be restricted by ‘qualifying’ the breadth of the rights. The protection of rights may be ‘limited’, allowing rights to be balanced against each other where rights conflict, and against other pressing societal interests and issues as they arise. Rights may be temporarily suspended to allow Parliament and the executive scope to respond to emergencies and/or exceptional circumstances. In international and regional rights instruments, this is known as ‘derogation’.<sup>1</sup> In domestic rights instruments, such as the *Charter* and the *Human Rights Act 2019* (Qld), this is known as an ‘override’ or ‘notwithstanding’ provision.<sup>2</sup>

Although analysis of qualifications and limitations to rights is relevant when responding to emergencies, this article focuses on the override provision. Parliament has used the override power on three occasions, two of which will be studied.<sup>3</sup> They relate to laws enacted to prevent parole being granted, except in limited circumstances (where death is imminent and the prisoner does not pose a risk to the community). The first occasion involves two named prisoners, and the second, a category of prisoner (‘police-killers’). These examples demonstrate the interaction of the *Charter* provisions; illustrate the inter-institutional interactions between

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1 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4 (‘ICCPR’); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 15 (commonly known as the *European Convention on Human Rights*) (‘ECHR’).

2 Override provisions are contained within the rights instruments in Victoria (*Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31 (‘Charter’)), and Queensland (*Human Rights Act 2019* (Qld) ss 43–7), but not the Australian Capital Territory (*Human Rights Act 2004* (ACT) (‘ACTHRA’)). These provisions are modelled on the notwithstanding provision under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) s 33 (‘Canadian Charter’) – see also below n 74. In the domestic setting, override provisions preserve parliamentary sovereignty in nuanced ways that differ to derogation. To be sure, the override can be used by Parliament where challenged legislation may be found to be rights-incompatible in the sense of not reasonably and justifiably limiting a right. However, it also serves to reinforce that the judiciary is not the final arbiter on rights-compatibility, that the legislature has a legitimate role in arbitrating rights-compatibility, and that the override is one mechanism of resolution where the judiciary and legislature disagree about rights-compatibility. As discussed below in Part II(C), dialogue models of rights instruments adopt various mechanisms designed to protect against the tendency toward judicial supremacy that is often associated with rights instruments.

3 The first use of the override related to the *Legal Profession Uniform Law Application Act 2014* (Vic). The legislation addressed the consistent regulation of the legal profession across Australia. Because Victoria operates within a federal system, and most other jurisdictions did not (and still do not) have statutory rights instruments, there were perceived difficulties with the *Charter* applying to the law. The override was considered by Parliament ‘as necessary to ensure interjurisdictional consistency in the application of the law and to prevent the extrajurisdictional application of the Charter’: Explanatory Memorandum, *Legal Profession Uniform Law Application Bill 2013* (Vic) 4, 160 cited in Victorian Equal Opportunity and Human Rights Commission, *2013 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, June 2014) 39 (‘2013 Report on Charter Operation’). Although this is an unusual use of the override, it will not be considered in this article, given that its impetus was based on issues relating to federalism rather than rights. For further analysis of the operation of the *Charter* within national schemes, see Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 203–9; Jeremy Gans, ‘Scrutiny of a Federal Co-operative Law’ in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 599.

the judiciary, executive and parliament through dialogue-based instruments; test the transparency of and accountability for public decision-making that explicitly denies rights, and the culture of justification the *Charter* dialogue is supposed to engender; and exemplify the preservation of parliamentary sovereignty.

Conversely, Parliament did not override the *Charter* in its response to the COVID-19 pandemic. Responding to the health and consequential economic crises precipitated by COVID-19 qualifies as a ‘state of emergency which threatens the safety, security and welfare of the people of Victoria’ (override) and a ‘public emergency threatening the life of the nation’ (derogation).<sup>4</sup> Yet the executive and Parliament navigated the COVID-19 threat *without* resorting to temporarily suspending rights via an override declaration when enacting its main legislative response to the crisis – the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) (*‘Omnibus Act’*). The executive-designed and Parliament-enacted temporary measures that relied on qualifications to and limitations on rights that, in the executive’s estimation, are rights-*compatible*.<sup>5</sup> It is curious that the executive and Parliament have twice used the override mechanism when exceptional circumstances were seemingly absent (parole), yet did not use the override mechanism where the circumstances were apparent (pandemics).

This article analyses the parole-setting uses of the *Charter* override within the broader context of the temporary suspension of rights, against the *Charter* mechanisms that allow for restrictions on rights, and against the principles underlying the *Charter*. By way of contrast and conclusion, it highlights the curiosity between the use of the override with parole legislation and the non-use of the override with the pandemic legislation, and revisits the case for repeal of the override. Firstly, the article will provide an overview of the *Charter*, including discussion of its preservation of parliamentary sovereignty and establishment of an inter-institutional dialogue. It will also analyse how the override compares with international and comparative rights instruments, and how it interacts with parliamentary sovereignty and dialogue. Secondly, the article examines the two parole-related occasions of *Charter* override, and assesses the uses of the override against the *Charter* itself, against the minimum standards for temporary suspension of rights, and in relation to parliamentary sovereignty and dialogue. Thirdly, by way of contrast and conclusion, the article considers how the pandemic-response legislation of the executive and Parliament was enacted without recourse to the override, and offers the case studies as compelling evidence in support of the recommendation of the eight-year review of the *Charter* to repeal the override provision.<sup>6</sup>

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4 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21; *ECHR* (n 1) art 15. See also below n 54 and accompanying text in the article.

5 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 April 2020, 1178 (Daniel Andrews) (*‘Parliamentary Debates, 23 April 2020’*).

6 Brett Young (n 3) 198.

## II VICTORIAN CHARTER

### A Restricting Rights

The *Charter* is a statutory rights instrument. Section 7(1) provides that Parliament ‘specifically seeks to protect and promote’ the rights listed in sections 8 to 27,<sup>7</sup> being civil and political rights based primarily on the *International Covenant on Civil and Political Rights* (‘*ICCPR*’) rights.<sup>8</sup>

The *Charter* recognises that rights are not absolute,<sup>9</sup> and it contains numerous mechanisms for restricting rights. First, the scope of some rights is *qualified*. For example, under section 21(1), everyone has a right to liberty and security, but this is qualified by section 21(2) which states that ‘a person must not be subjected to arbitrary arrest and detention’. Accordingly, non-arbitrary arrest or detention does not violate the right to liberty, and would not be considered to engage the right.

Secondly, rights may be *limited* in order to accommodate clashes between the protected rights themselves, or to accommodate competing non-protected societal interests and issues. Section 7(2) contains a *general limitations* provision, which provides that rights may be subject ‘to such reasonable limits as can be demonstrably justified in a free and democratic society’, and is assessed against an inclusive list of factors equating to a proportionality test.<sup>10</sup> The general limitations provision sits externally to the provisions guaranteeing the rights and applies to all of the guaranteed rights.<sup>11</sup>

Rights may also be limited *internally*, with the purposes justifying a limitation specifically articulated within the statement of the right. The *Charter* contains one internal limitation: the section 15 freedom of expression may be subject to ‘lawful restrictions reasonably necessary (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality’.<sup>12</sup> The lawfulness of internal limitations is adjudged against factors

7 *Charter* (n 2) s 7(1). See also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.

8 *ICCPR* (n 1).

9 There are very few absolute rights under customary international law – the right to be free from genocide, slavery and servitude, and systematic racial discrimination: see Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*’ (2008) 32(2) *Melbourne University Law Review* 422, 424 n 5 (‘Balancing Rights in a Democracy’), citing American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States* (1987) vol 2, 161.

10 The inclusive list of factors specified in section 7(2) are: (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. This list of factors is based on the *Canadian Charter* test in *R v Oakes* [1986] 1 SCR 103 and its codification in the *Constitution of the Republic of South Africa 1996* (South Africa) s 36 (commonly known as the ‘*South African Bill of Rights*’).

11 The limitations provision is in section 7(2) and applies to the rights which are provided for from sections 8 to 27.

12 *Charter* (n 2) s 15(3).

similar to general limitations,<sup>13</sup> but internal limitations identify and thereby confine the types of legislative objectives that may be pursued when limiting a right – that is, section 15 lists the legislative objectives that may qualify as ‘reasonable’ limits. The general limitations test still applies to rights that are internally limitable.<sup>14</sup>

Thirdly, Parliament can *override* the rights. Section 31(1) provides that Parliament can declare that an Act or provision of an Act ‘has effect despite being incompatible with one or more of the human rights or despite anything else set out in this *Charter*’.<sup>15</sup> When introducing legislation into Parliament containing an override declaration, the parliamentarian ‘must make a statement ... explaining the exceptional circumstances that justify the inclusion of the override declaration’ (section 31(3)),<sup>16</sup> with the *Charter*-enacting Parliament intending ‘that an override declaration will only be made in exceptional circumstances’ (section 31(4)). However, section 31(9) states that failure to comply with section 31(3) ‘does not affect the validity, operation or enforcement’ of any Bill that becomes an Act.<sup>17</sup> Section 31(6) provides that where an override declaration is made, ‘to the extent of the declaration this *Charter* has no application to that provision’, with the legislative note clarifying that sections 32 and 36 of the *Charter* do not apply.<sup>18</sup>

There are various safeguards to protect against abuse of the *Charter* override. Override declarations can only be issued in exceptional circumstances (sections 31(3)–(4)), which include ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria’.<sup>19</sup> Moreover, override declarations expire after five years of operation, although they may be re-enacted (sections 31(7)–(8)).<sup>20</sup>

13 Rights in the *ICCPR* (n 1) are restricted via an internal limitation mechanism. The following articles are internally limited: the article 12 right to freedom of movement; the article 18 right to freedom of thought, conscience and religion; the article 19 right to freedom of expression; the article 21 right to peaceful assembly; and the article 22 right to freedom of association. Each right outlines the various objectives that may be pursued through a limitation, such as, the protection of public health, order or morals; national security, public safety or the well-being of the country; or the protection of the rights and freedoms of others: see arts 12(3), 18(3), 19(3), 21 and 22(2). Each internal limit must be provided by law (articles 12(3), 19(3)), be prescribed by law (articles 18(3), 22(2)) or in conformity with the law (article 21), and/or ‘necessary in a democratic society’ (articles 21, 22(2)).

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

15 Section 31(2) of the *Charter* (n 2) extends the effect of the override declaration to ‘any subordinate instrument made under or for the purpose of that Act or provision’.

16 Section 31(5) of the *Charter* (n 2) lists the three scenarios when an override statement may to be read: during the second reading, prior to the third reading or during the third reading of the proposed legislation.

17 Section 31(9) of the *Charter* (n 2) also applies to a failure to comply with section 31(5).

18 Specifically, the legislative note states that ‘the Supreme Court cannot make a declaration of inconsistent interpretation in respect of that statutory provision’ and that ‘the requirement under section 32 to interpret that provision in a way that is compatible with human rights does not apply’: *Charter* (n 2) s 31(6).

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

20 A renewable sunset clause for override declarations originated in the *Canadian Charter: Canadian Charter* (n 2) s 33(3)–(5).

## B Mechanisms regarding Legislation

The *Charter* contains numerous mechanisms concerning the development, enactment and interpretation of legislation.<sup>21</sup> In developing legislation, the executive must consider rights in formulating policy and drafting legislation. Section 28 requires parliamentarians introducing legislation into Parliament to make a statement of compatibility ('SOC'), or statement of incompatibility ('SOIC'). The SOC/SOIC 'must state whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible'; and if 'any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility'.<sup>22</sup>

In scrutinising and enacting legislation, Parliament has rights-focused obligations. Under section 30, the parliamentary Scrutiny of Acts and Regulations Committee ('SARC') must scrutinise all proposed legislation and accompanying SOCs/SOICs against the *Charter*, and report its findings to Parliament. Ideally, Parliament considers SARC's findings, debates the proposed legislation and decides whether to enact it. However, nothing prevents Parliament enacting legislation before SARC reports or without considering SARC reports.

When interpreting legislation, section 32(1) states 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. Where legislation cannot be interpreted compatibly with rights, the judiciary is *not* empowered to invalidate it; rather, the superior courts may issue an unenforceable 'declaration of inconsistent interpretation' under section 36(2).<sup>23</sup> Such declarations do not '(a) affect ... the validity, operation or enforcement of the statutory provision ...; or (b) create in any person any legal right or give rise to any civil cause of action' (section 36(5)). Rather, section 36(2) declarations notify the executive and Parliament that legislation is inconsistent with the judiciary's understanding of rights, and prompts them to review their rights-assessment of the legislation. Under section 37, the responsible minister must table written responses to section 36(2) declarations in Parliament within six months.<sup>24</sup>

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- 21 The *Charter* contains two 'enforcement' mechanisms, or 'remedies', which operate to protect and promote the guaranteed rights. The first mechanism relates to legislation, is where the dialogue primarily occurs, and is the focus of this article: see *Charter* (n 2) ss 32–7. The second mechanism relates to rights obligations that are placed on 'public authorities', which is beyond the scope of this article: see *Charter* (n 2) ss 38–9.
- 22 *Charter* (n 2) s 28(3). Statements of (in)compatibility do not bind the judiciary: at s 28(4). These provisions are modeled on the New Zealand and British models: *Bill of Rights Act 1990* (NZ) s 7 ('NZ BORA'); *Human Rights Act 1998* (UK) s 19 ('UK HRA') respectively. Similar provisions have been enacted in Canada: *Department of Justice Act*, RSC 1985, c J-2, s 4; *Statutory Instruments Act*, RSC 1985, c S-22, s 2(c).
- 23 The superior courts are the Supreme Court of Victoria ('SCV') or the Victorian Court of Appeal ('VCA').
- 24 Although section 37 of the *Charter* (n 2) requires a written response, it does not dictate the substance of the response – that is, inconsistent legislation need not be repealed or amended. Accordingly, Parliament remains sovereign, in the sense that Parliament decides whether or not to amend the impugned legislation.

### C Parliamentary Sovereignty and Dialogue

Although the *Charter* enhances the protection and promotion of rights, it is intended and designed to preserve parliamentary sovereignty.<sup>25</sup> Parliamentary sovereignty is preserved in two ways. First, the *Charter* is a statutory instrument. It is an ordinary Act of Parliament, and can be altered or repealed by a later ordinary Act of Parliament. It is not an entrenched fetter on the law-making power of Parliament in the manner a constitutional instrument would be.

Secondly, the *Charter* is designed to create an inter-institutional dialogue about rights between the executive, parliament and judiciary,<sup>26</sup> without giving the judiciary the final say over rights. Dialogue models deny judicial supremacy, but increase the transparency of and accountability for, and develop a culture of justification around, the rights-impacts of representative decision-making. Dialogue models are distinct from parliamentary monologues where human rights instruments are absent (such as, the national and many sub-national jurisdictions in Australia) or judicial monologues under fully constitutional rights instruments (such as, the United States model).<sup>27</sup>

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- 25 See Victorian Government, 'Human Rights in Victoria: Statement of Intent' (Statement, May 2005) ('Victorian Government Statement of Intent') <[https://web.archive.org/web/20091002153017/http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb980c4a89e4179/statement\\_intent.pdf](https://web.archive.org/web/20091002153017/http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb980c4a89e4179/statement_intent.pdf)>; Human Rights Consultation Committee, Parliament of Victoria, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (Report, November 2005) 15, 20–2 ('*Rights, Responsibilities and Respect*'); Office of the Attorney-General, 'Victoria Leads the Way On Human Rights' (Media Release, 20 December 2005) <<https://web.archive.org/web/20091024185355/http://acthra.anu.edu.au/media/VHRCC%20media%20release1.pdf>>; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290, 1292, 1293 (Rob Hulls, Attorney-General) ('*Parliamentary Debates*, 4 May 2006'); Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 1984 (Lily D'Ambrosio), 1993 (Richard Wynne); Victoria, *Parliamentary Debates*, Legislative Assembly, 15 June 2006, 2197 (Joanne Duncan) ('*Parliamentary Debates*, 15 June 2006'); Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554, 2556–7 (John Lenders, Minister for Finance) ('*Parliamentary Debates*, 19 July 2006'); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos), 2643 (John Hilton) ('*Parliamentary Debates*, 20 July 2006').
- 26 Victorian Government Statement of Intent (n 25). See especially *Rights, Responsibilities and Respect* (n 25) 66–9, 85–6; *Parliamentary Debates*, 4 May 2006 (n 25) 1290, 1293, 1295 (Rob Hulls, Attorney-General); *Parliamentary Debates*, 19 July 2006 (n 25) 2554, 2556–8 (John Lenders); *Parliamentary Debates*, 20 July 2006 (n 25) 2639 (Jenny Mikakos), 2643 (John Hilton), 2658 (Johan Scheffer). One parliamentarian notes the creation of a rights dialogue between the government and the community: *Parliamentary Debates*, 15 June 2006 (n 25) 2199 (Rosalyn Buchanan). The Explanatory Memorandum notes that '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.
- 27 Many authors have explored the tensions between the finality of judicial review under constitutional rights instruments on the one hand, and parliamentary sovereignty and democracy on the other, and developed theories and approaches to reconcile the two: see generally Janet L Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queen's University Press, 1996) 89–103; Jeremy Waldron, 'Judicial Review and the Conditions of Democracy' (1998) 6(4) *Journal of Political Philosophy* 335 <<https://doi.org/10.1111/1467-9760.00058>>; Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 2<sup>nd</sup> ed, 1986).

Various features of the *Charter* create the dialogue. The way rights are guaranteed encourages a dialogue. The scope of rights is (often irreducibly)<sup>28</sup> contested and open to debate and reasonable disagreement – as are the legislative objectives that justify limiting rights and the legislative means used to achieve limitations. The *Charter* recognises the former through the open-textured nature of the statement of rights in sections 8 to 27. It recognises the latter through the capacity to impose restrictions on rights via qualifications, internal or external limitations, and overrides. In developing policy and law, in scrutinising and enacting laws, and in interpreting laws, each arm of government contributes *its understanding* of the scope of rights, and the lawfulness of restrictions thereto.

Moreover, the *Charter*'s mechanisms relating to the development, enactment and interpretation of legislation encourage and structure this dialogue. The executive contributes to the dialogue through SOCs/SOICs, whilst the Parliament contributes through its SARC reports, parliamentary debates and the laws it enacts. These pre-legislative rights-scrutiny obligations ensure rights are explicit considerations in policy-making and law-making, and create more transparency regarding, accountability for, and require a justification of, adverse rights-impacts of representative decisions.<sup>29</sup> Through their contributions, the executive and Parliament educate each other and the judiciary on their respective understanding of the scope of rights (including qualifications), whether legislation limits rights, and whether limitations are reasonable and justified under section 7(2).<sup>30</sup>

Judicial decisions under sections 32(1) and 36(2) continue the dialogue, reinforcing transparency, accountability and justification. Through its decisions, the judiciary indicates its understanding of the scope of the rights (including qualifications), whether legislation limits those rights, and the reasonableness and justifiability of any limitations. The judicial focus (on individual cases, legal principle, reason, rationality, proportionality, fairness, absent majoritarian pressures) differs from the representative focus (on the common good, mediating competing public interests, coherent policy and legislative programmes to address public needs, majoritarian sentiment), allowing broader perspectives in adjudging the rights-compatibility of legislation. The judicial contribution is not the final word, however, with the executive and Parliament able to respond – they *may*

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28 James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65(2) *Modern Law Review* 204, 207 <<https://doi.org/10.1111/1468-2230.00375>>.

29 Victorian Government Statement of Intent (n 25).

30 For an assessment of the dialogue between the executive and Parliament, see Chris Humphreys, Jessica Cleaver and Catherine Roberts, 'Considering Human Rights in the Development of Legislation in Victoria' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 209; Sharon Mo, 'Parliamentary Deliberation in the Operation of the Victorian Human Rights Charter' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 229; Joanna Davidson, 'Impact of the Victorian Charter upon Policy and Legislative Development' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 323; James Kelly, 'A Difficult Dialogue: Statements of Compatibility and the Victorian *Charter of Human Rights and Responsibilities Act*' (2011) 46(2) *Australian Journal of Political Science*, 257 <<https://doi.org/10.1080/10361146.2010.517181>>.

respond to section 32(1) judicial interpretations and *must* respond to section 36(2) judicial declarations.

Regarding section 32(1), the representative arms may retain the judicially-assessed rights-compatible interpretation by not responding. Equally, the representative arms may enact legislation in response. Response legislation may clarify the section 32(1) interpretation, or address unforeseen consequences of that interpretation. The representative arms may also refine the legislative objectives being pursued, and/or modify the legislative means for achieving the objectives to better satisfy section 7(2).<sup>31</sup> Alternatively, they may disagree with the judicial assessment and neutralise section 32(1) rights-compatible interpretations by legislatively reinstating rights-incompatible provisions, using express language, incompatible statutory purposes and a SOIC to avoid future section 32(1) rights-compatible interpretations.<sup>32</sup> Regarding section 36(2), the representative arms may accept the judiciary's reasoning and amend the law to ensure rights-compatibility.<sup>33</sup> Conversely, they may retain the judicially-assessed rights-incompatible legislation,<sup>34</sup> and await democratic accountability for their judicially-assessed rights encroachment.

Finally, when enacting legislation or responding to judicial rulings under sections 32 or 36, Parliament can enact legislation subject to section 31 override, allowing the legislation to operate notwithstanding the *Charter*. The five-year

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31 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, rev ed, 2016) (*'The Supreme Court on Trial'*). Limitations provisions allow the representative arms to 'respond to particular court decisions with new legislation that refines its objectives, means, or both, and then defend the new balance': at 393. They can 'defin[e] legislative objectives, [discuss] the alternatives considered and the trade-offs made, and [explain] the practical difficulties of what might appear to be attractive and less rights-invasive alternatives' – that is, 'add new and important points to the debate': at 394–5.

32 Indeed, there are two examples within this category. Following *RJE*, the *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic) was amended (however, note that the principal Act has now been repealed). Following *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 (*'Das'*), the Parliament enacted the *Criminal Organisations Control and Other Acts Amendments Act 2014* (Vic). See *RJE v Secretary to the Department of Justice, Attorney-General, and Victorian Human Rights and Equal Opportunity Commission* (2008) 21 VR 526; *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic) ss 4–6, amending *Serious Sex Offenders Monitoring Act 2005* (Vic); *Das*; *Criminal Organisations Control and Other Acts Amendments Act 2014* (Vic). See also Julie Debeljak, 'Rights Dialogue where there is Disagreement under the Victorian *Charter*', in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020) 267, 283–300.

33 As argued elsewhere, 'the threat of resort to international processes under the *ICCPR* could motivate change, but this is unlikely because of the non-enforceability of international merits assessments within the Australian jurisdiction': Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33(1) *Monash University Law Review* 9, 33 n 141. See also *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) art 5(4) (*'First Optional Protocol'*). Australia ratified the *First Optional Protocol* in September 1991, with the protocol coming into effect on 25 December 1991.

34 The very reason for excluding Parliament from the definition of 'public authority' under section 4(1)(i) of the *Charter* was to allow incompatible legislation to stand: see Victorian Government Statement of Intent (n 25); *Rights, Responsibilities and Respect* (n 25) 54, 57.

renewable sunset provision<sup>35</sup> ensures dialogue continues if the representative arms seek to renew the override.<sup>36</sup>

Dialogue does not envisage a final word on rights. Rather, dialogue exposes each arm of government to the diverse perspectives on rights of those with different institutional strengths, motivations, and forms of reasoning – but disagreement may persist.<sup>37</sup> Disagreement is accommodated, but structured by the culture of justification,<sup>38</sup> transparency and accountability imposed by the *Charter*: qualifications to rights must be lawful; section 7(2) limitations must be reasonable and justified to avoid section 32(1) rights-compatible interpretations; Parliament must be explicit about its rights-limiting intentions through the language of legislation, SOIC, and clear statements of parliamentary intent; section 36(2) declarations force the representative arms to confront judicially-assessed rights-incompatibilities; and section 31 overrides temporarily postpone further debate.<sup>39</sup>

Ultimately, however, the *Charter* preserves parliamentary sovereignty – with the *Charter* override being the definitive manifestation of such sovereignty. Although the *Charter* mechanisms support an inter-institutional dialogue, the representative arms are empowered to enact rights-incompatible legislation.

#### D Problems with Override Declarations

An analysis of section 31 will contextualise the case studies, and the case studies will illuminate the problematic operation of section 31. First, an exploration of how section 31 differs from the minimum standards in international, regional and comparative rights instruments is necessary. The focus will be derogation under

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35 Section 31(7) of the *Charter* imposes the five-year sunset rule. As discussed below, section 31(7) was ignored when the override provision was used to prevent Julian Knight and Craig Minogue from securing parole: see *Corrections Amendment (Parole) Act 2014* (Vic), and *Corrections Amendment (Parole) Act 2018* (Vic), respectively.

36 Where the override is used in response to a judicial decision, the judicial ruling remains a point of principle on the matter, and the electorate can express their (dis)satisfaction with the representative's rights record at election time.

37 As discussed in Melissa Castan and Julie Debeljak, 'Indigenous Peoples' Human Rights and the Victorian *Charter*: A Framework for Reorienting Recordkeeping and Archival Practice' (2012) 12(2) *Archival Science* 213, 226, citing Kent Roach, 'Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures' (2001) 80(1–2) *Canadian Bar Review* 481, 485. See also Roach, *The Supreme Court on Trial* (n 31) 394–5, 399–400, 407–8; Janet L Hiebert, 'A Relational Approach to Constitutional Interpretation: Shared Legislative Responsibilities and Judicial Responsibilities' (2001) 35(4) *Journal of Canadian Studies* 161 <<https://doi.org/10.3138/jcs.35.4.161>> ('A Relational Approach').

38 David Dyzenhaus, 'What is a "Democratic Culture of Justification"?' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 425 <<https://doi.org/10.5040/9781474201704.ch-021>>.

39 These features of dialogue are also present in some competing approaches to inter-institutional interactions about rights: see, eg, Eoin Carolan, 'Dialogue Isn't Working: The Case for Collaboration as a Model of Legislative-Judicial Relations' (2016) 36(2) *Legal Studies* 209, 223–7 <<https://doi.org/10.1111/lest.12099>>; Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) 4–9; Aileen Kavanagh, 'What's So Weak About "Weak Form Review"? The Case of the UK *Human Rights Act 1998*' (2015) 13(4) *International Journal of Constitutional Law* 1008, 1037–8 <<https://doi.org/10.1093/icon/mov062>>; Hiebert, 'A Relational Approach' (n 37).

the *ICCPR*.<sup>40</sup> Secondly, consideration of how section 31 supports/undermines the underlying objectives of the *Charter* is instructive.

### 1 Compared (Unfavourably) to International Human Rights Instruments

As explored previously,<sup>41</sup> the rights-restricting powers contained in the *Charter* go beyond those ordinarily sanctioned in international rights instruments. This is especially true of section 31 – its scope is broader than equivalent rights instruments, and it does not contain safeguards built into corresponding rights instruments.

First, under international human rights law, some rights are non-derogable.<sup>42</sup> Article 4 of the *ICCPR* explicitly lists rights that cannot be derogated from.<sup>43</sup> The Human Rights Committee ('HRC'),<sup>44</sup> the monitoring body under the *ICCPR*, has expanded this list in *General Comment 29*.<sup>45</sup> Conversely, the *Charter* does not

40 See Debeljak, 'Balancing Rights in a Democracy' (n 9) for a comparison with regional rights instruments: at 439–40, 442–4, 449–52, and domestic rights instruments: at 458–68.

41 Debeljak, 'Balancing Rights in a Democracy' (n 9).

42 Ibid 437–9. For a discussion of the equivalent provisions under the *ECHR*, which is the basis for the *UK HRA*, the *Canadian Charter*, and the *South African Bill of Rights* see pages 439–40.

43 The non-derogable provisions of the *ICCPR* are listed in article 4(2) as follows: the article 6 right to life; the article 7 rights to freedom from torture or cruel, inhuman and degrading treatment or punishment, and freedom from medical or scientific experimentation without consent; the article 8(1) and (2) rights to freedom from slavery and servitude; the article 11 right to not be imprisoned because of an inability to pay a contractual debt; the article 15 prohibition on the retrospective operation of criminal laws; the article 16 right of everyone to recognition everywhere as person before the law; and the article 18 right to freedom of thought, conscience and religion. Article 6 of the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* provides that 'the present Protocol shall not be subject to any derogation under article 4 of the Covenant', such that State Parties to the Protocol cannot derogate from the prohibition on capital punishment: *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 July 1991) art 6(2).

44 The Human Rights Committee ('HRC') is established under Part IV of the *ICCPR*, and is the Treaty monitoring body for the *ICCPR*.

45 Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) 5–6 [13]–[16] ('*General Comment 29*'). The HRC has added the following rights to the non-derogable list: the article 10(1) right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; aspects of the article 27 right of persons belonging to ethnic, religious or linguistic minorities; the article 20 prohibition on propaganda for war, and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and the article 2(3) obligation to provide effective remedies for violations of the protected rights. In addition, the HRC has introduced a series of procedural safeguards to ensure that a derogation to a right under article 4 does not, in truth, result in a derogation from a non-derogable right. In essence, 'procedural safeguards cannot be subject to derogating measures that undermine the protection of non-derogable rights': Debeljak, 'Balancing Rights in a Democracy' (n 9) 438. Further, the HRC 'considers certain elements of the right to fair trial under art 14 to be non-derogable' because those elements are guaranteed in international humanitarian law, and required by 'the principles of legality and the rule of law': Debeljak, 'Balancing Rights in a Democracy' (n 9) 439 (citations omitted). See also Stanislav Chernichenko and William Treat, *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening (Final Report)*, UN Doc E/CN.4/Sub.2/1994/24 (3 June 1994) annex I art 1. See also Human Rights Committee, *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, UN Doc CCPR/C/128/2 (30 April 2020) 2 [2(d)] ('*Derogations and COVID-19*').

recognise non-derogable rights: all *Charter* rights may be overridden despite being non-derogable under Australia's international human rights obligations.

Secondly, derogation under the *ICCPR* is limited in time – State Parties may respond to extraordinary circumstances of exceptional necessity by temporarily suspending derogable rights.<sup>46</sup> 'Derogations are not ends in themselves, but rather a means to rights-respecting ends', with the HRC confirming that '[t]he 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*]'.<sup>47</sup> The HRC notes that derogating measures 'must be of [a] temporary nature',<sup>48</sup> with the duration of the emergency dictating how long derogations can be justified: derogating measures 'may only last as long as the life of the nation concerned is threatened'.<sup>49</sup> This is *somewhat* recognised under section 31(7) of the *Charter*, which provides that all declarations expire after five years 'or on such earlier date as may be specified'. The five-year expiry imposes an outer temporal limit, but the length of each override could and should be shorter depending on the exigencies of each situation.

Thirdly, derogation under the *ICCPR* is limited in circumstance<sup>50</sup> – there must be a 'public emergency which threatens the life of the nation'.<sup>51</sup> Such circumstances include 'a war, a terrorist emergency, or a severe natural disaster, such as a major flood or earthquake'.<sup>52</sup> The HRC has recognised the COVID-19 pandemic constitutes such a circumstance, acknowledging 'that States Parties confronting the threat of widespread contagion may, on a temporary basis, resort to exceptional emergency powers and invoke their right of derogation ... *provided that* it is required to protect the life of the nation'.<sup>53</sup> However, not all crises meet the circumstance: 'even during an armed conflict measures derogating from the [*ICCPR*] are only allowed if and to the extent that the situation constitutes a threat

46 See generally Debeljak, 'Balancing Rights in a Democracy' (n 9) 437.

47 Ibid; *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 2 [1]. This is reinforced in *Derogations and COVID-19*, UN Doc CCPR/C/128/2 (n 45) 2 [2(b)].

48 *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 2 [2]. This is reinforced in *Derogations and COVID-19*, UN Doc CCPR/C/128/2 (n 45) 1 [2].

49 Human Rights Committee, *General Comment No 5: Article 4 (Derogations)*, UN Doc HRI/GEN/1/Rev.9 (31 July 1981) 1 [3]. Note, this *General Comment* has now been replaced by *General Comment No 29*: see *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 2 [1].

50 See generally Debeljak, 'Balancing Rights in a Democracy' (n 9) 441–4.

51 *ICCPR* (n 1) art 4(1). Public emergencies must be 'officially proclaimed' by the derogating State Party: (art 4(1)). A derogating State Party 'shall immediately inform the other State Parties' via the Secretary-General of the United Nations 'of the provisions from which it has derogated and of the reasons by which it was actuated': art 4(3). Joseph and Castan criticise the poor standard of notices of derogation under the *ICCPR*, noting 'the inferior quality of extant notices of derogation', and that '[m]ost have been only a few lines long, containing little explanation of the exact nature of the measures of derogation': Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 920 [26.77] <<https://doi.org/10.1093/law/9780199641949.001.0001>>.

52 Joseph and Castan (n 51) 911 [26.53].

53 *Derogations and COVID-19*, UN Doc CCPR/C/128/2 (n 45) 1 [2] (emphasis added).

to the life of the nation'.<sup>54</sup> The HRC expects State Parties to 'provide careful justification ... for their decision to proclaim a state of emergency'.<sup>55</sup>

By contrast, under sections 31(3) and (4) of the *Charter*, Parliament must demonstrate that 'exceptional circumstances'<sup>56</sup> exist to justify an override. 'Exceptional circumstances', 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'.<sup>57</sup> The *Charter's* 'exceptional circumstances' are not of the same order of magnitude as the *ICCPR* threat to the life of the nation.<sup>58</sup> In truth, there is nothing 'exceptional' about the identified 'exceptional circumstances'. Rather, the circumstances reflect the types of justifications offered for *unexceptional limitations* under international rights instruments,<sup>59</sup> not the justifications for exercising the *exceptional* power to *derogate* – although the *Charter* override power is more akin to the derogation power: both are mechanisms of temporary suspension in extreme circumstances, that sit alongside the rights-restricting mechanisms of qualifications and limitations.

54 *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 2 [3]. See Human Rights Committee, *Communication No. 34/1978: Silva et al v Uruguay*, UN Doc CCPR/C/12/D/34/1978 (8 April 1981), where the HRC did not accept the public emergency claims of the Government of Uruguay because its claims were not supported by factual details or information: at [8.2]. The HRC is yet to indicate whether a geographically limited emergency qualifies, but Siracusa Principle 39 indicates that the entire population must be affected by the emergency: 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) 7(1) *Human Rights Quarterly* 3 ('Siracusa Principles') <<https://doi.org/10.2307/762035>>; and the Paris Standards suggest that an emergency affecting and threatening the organised life of a particular population qualifies, and the emergency measures may reach beyond that particular population if the circumstances require: Richard Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79(4) *American Journal of International Law* 1072, 1073–4 ('Paris Standards') <<https://doi.org/10.2307/2201848>>. The Siracusa Principles were developed by 31 distinguished international law experts at a colloquium in Siracusa, Italy, in 1984, initiated by the American Association for the International Commission of Jurists. The Paris Standards were adopted by the International Law Association at its 61<sup>st</sup> conference in Paris in 1984, '[a]fter 6 years of study by a special subcommittee and 2 additional years of revision by the full Committee on the Enforcement of Human Rights Law': at 1072.

55 *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 3 [5]. This is reinforced in *Derogations and COVID-19*, UN Doc CCPR/C/128/2 (n 45) 1–2 [1]–[2(a)]. Under the article 15(1) *ECHR* equivalent, in the context of civil unrest, the European Court of Human Rights ('ECtHR') indicated that the requisite public emergency must have the following characteristics: '[i]t must be actual or imminent ... [i]ts effects must involve the whole nation ... [such that] [t]he continuance of the organised life of the community [is] threatened', and 'normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order [must be] plainly inadequate': European Commission of Human Rights, *The Greek Case: Report of the Sub-commission* (1969) vol 1, 70 [113]. In the context of responding to terrorism, the ECtHR required the existence of an 'exceptional situation of crisis ... affect[ing] the whole population [of the State] and constitutes a threat to organised life of community', a consistent and alarming increase in terrorism, and evidence that 'the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland': *Lawless v Ireland [No 3]* (European Court of Human Rights, Chamber, Application No 332/57, 1 July 1961) 28 [28], 29 [36] respectively.

56 *Charter* (n 2) ss 31(3)–(4).

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

58 See generally Debeljak, 'Balancing Rights in a Democracy' (n 9) 444–7.

59 For a discussion of the circumstances justifying an internal limitation under the *ICCPR*, see *ICCPR* (n 1) 3.

This difference in circumstance is significant. If the underlying circumstance for a restriction equates to the accepted reasons for limiting rights, such restrictions are normally subject to reasonableness and justifiability assessments under section 7(2). The executive and Parliament must articulate why the legislative objective behind the rights-limitation is reasonable and how the legislative means adopted is demonstrably justifiable. If challenged, the judiciary can offer its assessment of section 7(2), and use section 32 rights-compatible interpretations or section 36 declarations where warranted. The representative arms can then respond. However, if the rights-restriction is cast as ‘exceptional’, justifying a section 31 override, no such justification or oversight is required. To use the *extraordinary* power to address *ordinary* clashes over rights suspends judicial oversight and mutes the dialogue which, in turn, compromises accountability for, and justification of, the rights-impacts of policy and legislation.

Procedural aspects similarly fall short. Although sections 31(3) and (5) outline procedures requiring an explanation of the ‘exceptional circumstances’ by the responsible parliamentarian in Parliament, under section 31(9) there is no consequence if those statements are not made. This bolsters parliamentary sovereignty, but significantly undermines rights accountability and justifiability.

Fourthly, derogation under the *ICCPR* is limited in its effects.<sup>60</sup> Article 4(1) provides that ‘State Parties ... may take measures derogating from their 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’.<sup>61</sup> According to the HRC, exigency of the situation ‘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’.<sup>62</sup> Moreover, the HRC recognises that derogation is distinct from qualifications and limitations, but then notes the following commonality: ‘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’.<sup>63</sup> In the COVID-19 context, the HRC confirms that derogating measures ‘must be proportional in nature’; and that derogation should *not* be relied on when State Parties ‘are able to attain their public health or other public policy objectives by invoking the possibility to restrict certain rights ... or ... introducing reasonable limitations on certain rights’.<sup>64</sup>

60 See generally Debeljak, ‘Balancing Rights in a Democracy’ (n 9) 447–51.

61 *ICCPR* (n 1) art 4(1). The listed grounds of prohibited discrimination under article 4(1) are race, colour, sex, language, religion or social origin. This is less encompassing than the non-discrimination protections in articles 2(1) and 26 in two ways: see also Joseph and Castan (n 51) 914–15 [26.62]–[26.63].

62 *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 2 [4]. This is reinforced in *Derogations and COVID-19*, UN Doc CCPR/C/128/2 (n 45) 2 [2(b)].

63 *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 2–3 [4]. This is reinforced in *Derogations and COVID-19*, UN Doc CCPR/C/128/2 (n 45) 2 [2(b)]. See also below n 141.

64 *Derogations and COVID-19*, UN Doc CCPR/C/128/2 (n 45) 2 [2(b)]–[2(c)]. Examples of such provisions are article 9 (right to personal liberty), article 12 (freedom of movement), article 17 (right to privacy), article 19 (freedom of expression), and article 21 (right to peaceful assembly). More generally, the HRC recognised ‘States Parties must take effective measures to protect the right to life and health’, and that ‘such measures may, in certain circumstances, result in restrictions’ on rights: at 1 [2].

From a transparency, accountability, and explanatory perspective, the HRC requires derogating States to ‘provide careful justification ... for any specific measures’ taken, with State Parties under a legal ‘duty to conduct a careful analysis ... based on an objective assessment of the actual situation’.<sup>65</sup> Regarding ‘a natural catastrophe, a mass demonstration ... or a major industrial accident’, the HRC seeks proof from States ‘that all their measures derogating ... are strictly required by the exigencies of the situation’; and suggests that *limitations* to movement and assembly rights will be ‘generally sufficient’ for such emergencies *without resort to derogation*.<sup>66</sup> Joseph and Castan agree: given the generous capacity to justifiably limit rights under the ICCPR, ‘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’.<sup>67</sup>

The *Charter* does not impose limits on the effects of an override. First, there is nothing stopping overriding measures violating other norms of international law. Second, proportionality between the demands of the emergency and the overriding measures taken is not needed. This compares unfavorably with *Charter* limitations.<sup>68</sup> With limitations, as previously noted, the executive and Parliament ‘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’.<sup>69</sup> It is nonsensical to require a lesser standard/no justification when employing extraordinary powers to impose far greater encroachments on rights through the override, than when the executive and Parliament impose ordinary limitations on rights. Sure, parliamentary sovereignty is preserved, but policy-development and law-making that is transparent about, accountable for, and requires justification of, the rights-impacts of decisions is undermined.<sup>70</sup>

## 2 *The Override: Not Necessary for Parliamentary Sovereignty*

In addition to these shortcomings, the override does not reinforce the underlying objectives of the *Charter*.

First, the override is not needed to preserve parliamentary sovereignty under the *Charter*.<sup>71</sup> The override was first developed for the *Canadian Charter of Rights and*

65 *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 3 [5]–[6].

66 *Ibid* 3 [5].

67 Joseph and Castan (n 51) 912 [26.57] (emphasis added). By way of example, Joseph and Castan 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 how it could ever be proportionate in an emergency situation to restrict freedom of movement beyond the need to protect national security, public order, public health or moral, or the rights and freedoms of others, as permitted under article 12(3): at 912–3 [26.57]. See also Sarah Joseph, ‘Human Rights Committee: General Comment 29’ (2002) 2(1) *Human Rights Law Review* 81, 97 <<https://doi.org/10.1093/hrlr/2.1.81>>.

68 It is also in contrast to qualifications to rights under the *Charter*.

69 Debeljak, ‘Balancing Rights in a Democracy’ (n 9) 449 (emphasis added).

70 *Ibid* 447, 449, 452.

71 *Ibid* 453–5.

*Freedoms* (‘*Canadian Charter*’). Being a ‘constitutional’ instrument,<sup>72</sup> judges are permitted to invalidate unreasonable and/or unjustifiable rights-limiting legislation under the *Canadian Charter*.<sup>73</sup> However, to avoid judicial supremacy, Parliament is empowered to enact legislation ‘notwithstanding’ the *Canadian Charter* rights, such that Parliament can re-enact legislation invalidated by the judiciary.<sup>74</sup>

By contrast, the override will never be necessary under the Victorian *Charter* to preserve parliamentary sovereignty.<sup>75</sup> This is for three reasons:<sup>76</sup> firstly, judicially-assessed rights-*incompatible* legislation cannot be invalidated; secondly, unwanted or undesirable section 32 judicial rights-*compatible* interpretations of legislation can be altered by Parliament enacting ordinary legislation; and thirdly, section 36 judicial declarations are non-enforceable. As discussed above, the executive and Parliament have several mechanisms to ensure that rights-*incompatible* legislation, supported by incompatible statutory purposes and/or a SOIC, can withstand rights-*compatible* judicial interpretation.<sup>77</sup> The override is only needed where the representative arms want to ‘avoid the controversy of ... ignoring a [section] 36 judicial declaration’.<sup>78</sup> However, in a properly functioning system of transparency, justification and accountability, the use of the override ought to generate as much controversy as ignoring a section 36 judicial declaration.<sup>79</sup>

72 The *Canadian Charter* (n 2) is still considered a constitutional document, with the judiciary empowered to invalidate legislative and executive action that is not consistent with the rights therein, despite the capacity of the Parliament to enact legislation ‘notwithstanding’ the *Canadian Charter* under section 33.

73 ‘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.’: *Canadian Charter* (n 2) s 52.

74 Note, the section 33 notwithstanding provision is limited in its operation, applying only to sections 2 and 7–15 of the *Canadian Charter* (n 2). Democratic rights (sections 3–5) and mobility rights (section 6) are excluded from the operation of section 33. The override has been variously described as: the provision that ‘broke the impasse on entrenchment by tempering judicial review of rights claims with a legislative escape’: Debeljak, ‘Balancing Rights in a Democracy’ (n 9) 453 n 142, citing Lorraine Eisenstat Weinrib, ‘Learning to Live with the Override’ (1990) 35(3) *McGill Law Journal* 541, 563; the ‘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* (Oxford University Press, 2<sup>nd</sup> ed, 2001) 195 (citation omitted); and, ‘[f]or those who see judicial review as another form of fallible policy-making ... a prudent fail-safe device’: Peter Russell, ‘Canadian Constraints on Judicialization from Without’ in Chester Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995) 137–8 (citations omitted).

75 George Williams confirms that ‘as a matter of law the override clause ... is unnecessary’: George Williams, ‘The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope’ (2007) 30(3) *Melbourne University Law Review* 880, 899.

76 For a similar analysis regarding the *UK HRA*, see Debeljak, ‘Balancing Rights in a Democracy’ (n 9) 454.

77 The New Zealand decision of *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, and the legislative response to the decision in *Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021* (NZ), highlight how Parliament can respond to unwanted rights-*compatible* judicial interpretations of legislation, by clearly expressing an intention for legislation to be *incompatible* with the rights contained in a statutory rights instrument, even where the statutory rights instrument does not contain an override provision, like the *NZ BORA* (n 22). The author is grateful to an anonymous reviewer for drawing her attention to this example.

78 Debeljak, ‘Balancing Rights in a Democracy’ (n 9) 454.

79 Of the three sub-national human rights instruments currently enacted in Australia, only the ACT Parliament resisted including an override/derogation provision in its *ACT HRA* (n 2).

### 3 The Override: Not Necessary for Inter-institutional Dialogue

Nor is the override necessary to create an inter-institutional dialogue.<sup>80</sup> Under the *Canadian Charter*, much of its dialogue relates to the reasonableness and justifiability of limitations to rights – that is, where the legislative *objectives* are not reasonable and the legislative *means* are not justifiable.

Where legislative means are problematic, Parliament can achieve its legislative objectives by adjusting the legislative means used to achieve the objectives. Usually, rights-limiting legislative means fail the proportionality test because there are less rights-restrictive alternative legislative means reasonably available to secure the legislative objective, or because the chosen legislative means are not rationally connected to the legislative objective.<sup>81</sup> Thus, Parliament ‘adjust[s] [the rights-limiting] legislative means to ensure that it is less rights-restrictive and more rationally connected to the ... legislative objective’, without resorting to the override.<sup>82</sup>

By contrast, the override is needed under the *Canadian Charter* where the legislative objectives are found to be unreasonable. Such judicial rulings are infrequent: only 3% of Canadian legislation across a ten-year period was invalidated because its legislative objectives were judicially assessed as not reasonable.<sup>83</sup> To avoid a judicial monologue, where judges would have the final word, the override momentarily pauses the dialogue and gives precedence to the voice of the representative arms.

Victorian *Charter* analysis is different. The judiciary cannot invalidate rights-limiting legislation based on unreasonable legislative objectives (or, for that matter,

80 See generally Debeljak, ‘Balancing Rights in a Democracy’ (n 9) 455–7.

81 These matters translate to the section 7(2)(e) factor and the section 7(2)(d) factor under the general limitations test under the Victorian *Charter* (n 2). Numerous Canadian academics have undertaken analysis of the frequency of the unreasonableness or demonstrable unjustifiability of limitations under section 1 of the *Canadian Charter* (n 2): see, eg, Leon E Trakman, William Cole-Hamilton and Sean Gatien, ‘*R v Oakes* 1986–1997: Back to the Drawing Board’ (1998) 36(1) *Osgoode Hall Law Journal* 83; Peter Hogg and Allison Bushell, ‘The *Charter* Dialogue between Courts and Legislatures: Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing after All’ (1997) 35(1) *Osgoode Hall Law Journal* 75.

82 Debeljak, ‘Balancing Rights in a Democracy’ (n 9) 456. Of course, the executive and Parliament may still resort to the override: ‘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’: at 456 n 153.

83 Trakman, Cole-Hamilton and Gatien (n 81) 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 n 37. Examples where the objectives were found not to be reasonable include *R v Big M Drug Mart Ltd* [1985] 1 SCR 295; *Canada (Attorney General) v Somerville* (1996) 136 DLR (4th) 205 (Alberta Court of Appeal); *Attorney General of Quebec v Quebec Association Protestant School Boards, The Protestant School Board of Greater Montreal and Lakeshore School Board* [1984] 2 SCR 66; *R v Zundel* [1992] 2 SCR 731. The notwithstanding clause has never been used in relation to federal legislation. The notwithstanding clause has been used in Quebec on numerous occasions in the early years of the *Canadian Charter*, including its infamous omnibus use, whereby a notwithstanding provision was inserted into every law. Quebec’s use of the override must be understood in the context of its opposition/non-consent to the constitutional settlement of 1982. Only three other provinces (out of ten provinces) have utilised the notwithstanding clause on one occasion each – the relevant legislation in Yukon never came into force; the need for the override legislation in Saskatchewan fell away when the relevant legislation was upheld as constitutional on appeal to the Supreme Court of Canada; and Alberta used an override to deny same-sex marriage: see generally Peter W Hogg, Thompsons Carswell, *Constitutional Law of Canada*, 5th ed supplemented (online at 13 April 2022) [39.2].

unjustifiable legislative means). Moreover, Parliament can immunise rights-incompatible legislative objectives from section 32 rights-compatible interpretation through clear and explicit statutory language, statements of legislative purpose and a SOIC. Further, any problematic section 32 rights-compatible interpretations of legislative objectives can be amended by Parliament via ordinary legislation, and section 36 declarations arising from unreasonable legislative objective are non-enforceable. As previously argued, Victoria's Parliament 'does not need "a legislative counter-weight to judicial power" 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'.<sup>84</sup> Finally, the representative arms do not need to mute the judicial contribution to amplify their voices within the dialogue because there is no risk of a judicial monologue. If anything, the *Charter* risks producing a representative monologue, through permitting pre-emptive use of the override (see Part III(D)(3) below).<sup>85</sup>

#### 4 Conclusion

The scope of, and safeguards under, the section 31 *Charter* override do not meet the minimum human rights standards associated with derogations and overrides under international and comparative instruments.<sup>86</sup> Moreover, the override is superfluous: parliamentary sovereignty is preserved by constraining judicial powers and embedding an inter-institutional dialogue. With this context, we consider the *Charter* override in practice.

### III JULIAN KNIGHT

#### A Background

The first case study concerns legislation enacted regarding Julian Knight. On 9 August 1987, Knight undertook a mass shooting, known as the 'Hoddle Street massacre', killing 7 people and injuring 19 people. Knight pleaded guilty to numerous charges before the Supreme Court of Victoria ('SCV'), and he was sentenced to imprisonment for life for each of the seven counts of murder, and imprisonment for 10 years for each of the 46 counts of attempted murder. A minimum term of 27 years was fixed as the non-parole period, which was to expire in May 2014.<sup>87</sup>

84 Debeljak, 'Balancing Rights in a Democracy' (n 9) 457, citing Peter H Russell, 'Standing Up for Notwithstanding' (1991) 29(2) *Alberta Law Review* 293, 301 ('Standing Up for NWS') <<https://doi.org/10.29173/alr1563>>.

85 This is also true of the *Canadian Charter*: see Debeljak, 'Balancing Rights in a Democracy' (n 9) 446 n 111.

86 For comparison of section 31 of the *Charter* (n 2) with the *South African Bill of Rights* (n 10), the *UK HRA* (n 22), and the *Canadian Charter* (n 2), see Debeljak, 'Balancing Rights in a Democracy' (n 9) 458–68.

87 The High Court of Australia ('HCA') explained that the minimum term to be served of 27 years was fixed under section 17 of the *Penalties and Sentences Act 1985* (Vic), which is now referred to as the non-parole period since the enactment of the *Sentencing Act 1991* (Vic): *Knight v Victoria* (2017) 261 CLR 306, 316 [1] ('*Knight*') (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ).

## B Legislation

On 2 April 2014, Parliament enacted the *Corrections Amendment (Parole) Act 2014* (Vic) ('CAPA'). The CAPA inserted section 74AA into the *Corrections Act 1986* (Vic) ('*Corrections Act*'), which regulates Knight's eligibility for parole. Under section 74AA(3), the Adult Parole Board ('Board') may make an order with respect to Knight if, and only if, the Board

- (a) is satisfied ... that the prisoner –
  - (i) is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person; and
  - (ii) has demonstrated that he does not pose a risk to the community; and
- (b) is further satisfied that, because of those circumstances, the making of the order is justified.

Section 74AA(4) states that the *Charter* 'has no application to this section', constituting the section 31 override declaration. Section 74AA(5) provides that the five-year sunset clause under section 31(7) does *not* apply.

## C Executive and Parliamentary Justifications

### 1 Statement of Compatibility

Mr Wells (Minister for Police and Emergency Services) of the Liberal Party ('Liberal') issued a SOC for Corrections Amendment (Parole) Bill 2014 (Vic) ('the Bill'). Mr Wells summarised Knight's offences and his punishment, highlighting that the sentencing judge described his offending as 'one of the worst massacres in Australia'.<sup>88</sup> He canvassed why various rights were not unjustifiably limited by the Bill (section 12 freedom of movement and section 8(3) equality before the law).<sup>89</sup> He relied on the High Court of Australia ('HCA') decision in *Crump v NSW* ('*Crump*') to conclude that the section 21 right to liberty was not violated:<sup>90</sup> the Bill 'does not alter the head sentences of imprisonment imposed by the Supreme Court', but simply 'alters the conditions on which the adult parole board may order his release on parole during the currency of the sentence and after the expiration of a non-parole period'.<sup>91</sup>

Mr Wells' consideration of the section 10(b) prohibition on cruel, inhuman and degrading punishment bears fuller consideration, particularly because the *ICCPR* equivalent article 7 is non-derogable. In *Vinter v United Kingdom* ('*Vinter*'),<sup>92</sup> the European Court of Human Rights ('ECtHR') considered 'whole of life' sentences. In England and Wales, a murder conviction carries a mandatory sentence of life imprisonment. For 'ordinary' murders, the trial judge sets a minimum term of imprisonment before a prisoner is eligible to apply to a parole board for release

88 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2014, 745 (Kimberley Wells) ('*Parliamentary Debates*, 13 March 2014').

89 Ibid.

90 *Crump v New South Wales* (2012) 247 CLR 1, 19 ('*Crump*') (French CJ); Ibid.

91 *Parliamentary Debates*, 13 March 2014 (n 88) 745 (Kimberley Wells).

92 *Vinter v United Kingdom* (European Court of Human Rights, Grand Chamber, Applications Nos. 66069/09, 130/10 and 3896/10, 9 July 2013) ('*Vinter*').

on licence. Where ‘the seriousness of the offence is exceptionally high’, the trial judge may instead make a ‘whole life order’.<sup>93</sup> A ‘whole life’ prisoner can only be released if the Secretary of State exercises their discretion in favour of release, and this may only be exercised where the prisoner is, inter alia, terminally ill, and the risk of reoffending is minimal.<sup>94</sup>

The ECtHR held that a ‘whole life sentence’ was incompatible with the *ECHR* article 3 prohibition on inhuman and degrading treatment or punishment *unless* there is some ‘prospect of release’.<sup>95</sup> The domestic law had to ‘[afford] the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner’.<sup>96</sup> Reasons for this included: the need for ‘legitimate penological grounds for that detention’, which require ‘review of the justification for the continued detention at an appropriate point in the sentence’;<sup>97</sup> the fact that a whole life sentence does not allow a prisoner to ‘atone for his offence’<sup>98</sup> which undermines the prisoner’s efforts at rehabilitation; and incompatibility with human dignity – ‘to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom’.<sup>99</sup> The ECtHR concluded that ‘all prisoners, including those serving life sentences, [should] be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved’.<sup>100</sup>

Mr Wells argued that *Vinter* did not apply to section 10(b) and the Bill. He relied on *DPP v Hunter* (‘*Hunter*’), where the SCV imposed a life sentence without a parole period after considering *Vinter* and the *Charter*.<sup>101</sup> Mr Wells concluded that ‘[i]f a sentence of life imprisonment with *no* possibility of parole is not cruel and inhuman punishment in Victorian law, a sentence of life imprisonment with a limited possibility of parole under statutory conditions cannot be cruel and unusual punishment’.<sup>102</sup>

However, Mr Wells acknowledged that the judiciary ‘may take a different view’ on the Bills’ rights-compatibility, so he used the override. The exceptionality was stated to be the need ‘to ensure that the life sentences imposed by the Supreme

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93 Ibid [12].

94 Ibid [12], [42]–[44]. The full criteria for compassionate release on medical grounds at the discretion of the Secretary of State are: (a) ‘suffering terminal illness and death is likely to occur’; (b) the ‘risk of re-offending is minimal’; (c) ‘further imprisonment would reduce the prisoner’s life expectancy’; (d) ‘there are adequate arrangements for the prisoner’s care outside prison’ and (e) ‘early release will bring significant benefit to the prisoner or their family’: at [43].

95 Ibid [109].

96 Ibid.

97 Ibid [111].

98 Ibid [112].

99 Ibid [113].

100 Ibid [114].

101 See also *Director of Public Prosecutions v Hunter* [2013] VSC 440 (‘*Hunter*’). This decision was upheld by the Victorian Court of Appeal: *Hunter v The Queen* (2013) 40 VR 660. See *Parliamentary Debates*, 13 March 2014 (n 88) 745 (Kimberley Wells).

102 *Parliamentary Debates*, 13 March 2014 (n 88) 746 (Kimberley Wells) (emphasis added).

Court for these egregious crimes are fully or almost fully served and to protect the community from the ongoing risk of serious harm presented by Julian Knight'.<sup>103</sup>

## 2 *Second Reading Speech*

The Second Reading Speech ('SRS') outlined the changes the 'coalition government has made to the adult parole system in Victoria [to] make it the toughest in Australia', and noted that the Bill 'builds on the coalition government's achievements by protecting the Victorian Community from Julian Knight forever'.<sup>104</sup>

The SRS referred to the override, stating that although the Bill is considered by the executive to be compatible with the *Charter*, 'it is possible that a court may take a different view'.<sup>105</sup> In addition to the 'exceptional circumstances' presented in the SOC,<sup>106</sup> the SRS offered the further justifications that the override will 'provide legal certainty' and 'avoid a court giving the bill an interpretation based on *Charter Act* rights which does not achieve the government's intention'.<sup>107</sup> The SRS noted that the override declaration 'goes further' than the provisions of the *Charter* by making it 'clear that the *Charter Act* does not apply to section 74AA at all',<sup>108</sup> and the override does not expire after five years.

## 3 *SARC Report*

SARC focused on three rights. SARC merely summarised the SOC discussion of section 10(b), and disagreed with the SOC assessment of section 8(3).<sup>109</sup>

However, distinguishing *Crump*,<sup>110</sup> SARC was concerned that Knight's section 24(1) right to have his criminal charges (including sentences) decided by an independent court after a fair hearing may be compromised – the practical effect of section 74AA was to change the judicial sentencing order *from* Knight 'not be[ing] eligible for parole [for] 27 years' *to* Knight's 'sentence not includ[ing] any parole eligibility date'.<sup>111</sup>

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103 Ibid 746–7.

104 Ibid 746. It also highlighted that the Bill mirrored the NSW legislation, that was upheld as constitutional in *Crump* (n 90).

105 *Parliamentary Debates*, 13 March 2014 (n 88) 746 (Kimberley Wells).

106 Being, 'to ensure that the life sentences ... for these egregious crimes are fully or almost fully served and to protect the community for the ongoing risk of serious harm presented by Julian Knight': *ibid* 746–7.

107 Ibid 747.

108 Ibid.

109 The Scrutiny of Acts and Regulations Committee ('SARC') found that the Bill 'may be to similar effect' as a Bill of Attainder (a law allowing punishment without trial of designated persons or groups), which may compromise section 8(3) equality before the law: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 3 of 2014, 11 March 2014) 3 (citations omitted) ('*SARC Alert Digest*, 11 March 2014').

110 The law in *Crump* (n 90) was stated in general terms compared to the Bill which named a single prisoner. SARC relied on *Baker v The Queen* (2004) 223 CLR 513, [50] ('*Baker*'), where the HCA distinguished between laws of general application and laws which name an individual target: *SARC Alert Digest*, 11 March 2014 (n 109) 5 n 15.

111 *SARC Alert Digest*, 11 March 2014 (n 109) 5.

SARC considered whether these limitations were justified, focusing on section 7(2)(e). SARC asked Parliament to consider whether a less rights-restrictive option was to expand the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (*'SSODSA'*) – which allows for the preventive detention of prisoners ‘if the Supreme Court determines that there is an unacceptable risk that the prisoner will reoffend if ... not detained’<sup>112</sup> – to other violent offenders.<sup>113</sup> This solution was less rights-restrictive, given ‘its general terms, provision for regular court review and non-penal character’.<sup>114</sup>

SARC also asked Parliament to consider whether the circumstances of the Bill ‘constitute grounds for an “exceptional circumstance” justifying the override.’<sup>115</sup> SARC merely recited the ‘exceptional circumstances’ from the SRS, without adding its own analysis.

#### 4 Parliamentary Debate

Debate on the Bill took eight pages of Hansard, being four pages in each of the Legislative Assembly and Legislative Council, with only five parliamentarians contributing.<sup>116</sup>

Parliamentarians addressed the federal constitutional issue of separation of judicial powers.<sup>117</sup> In this context, Mr Pakula (Australian Labor Party (*'ALP'*)) highlighted that legislation like the Bill ‘is something that ought to be done only in the most extreme cases and exceedingly rarely’,<sup>118</sup> but confirmed that Knight presents an ‘exceedingly rare’ case justifying legislative intervention.<sup>119</sup>

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112 Ibid 6.

113 SARC referred to the recent *Crimes (Serious Sex Offences) Amendment Act 2013* (NSW), which extended its detention and supervision provisions to other categories of high-risk violent offenders, such as high-risk murderers: *ibid* 6, 6 n 20.

114 Ibid 6.

115 Ibid 2.

116 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 2014, 828–30 (*'Parliamentary Debates*, 25 March 2014'); Victoria, *Parliamentary Debates*, Legislative Assembly, 27 March 2014, 1041; Victoria, *Parliamentary Debates*, Legislative Council, 11 March 2014, 590–3 (*'Parliamentary Debates*, 11 March 2014').

117 See, eg, *Parliamentary Debates*, 25 March 2014 (n 116) 828–9 (Martin Pakula). See generally at 830 (Andrew McIntosh); *Parliamentary Debates*, 11 March 2014 (n 116) 591 (Susan Pennicuik), 592 (David O'Brien).

118 *Parliamentary Debates*, 25 March 2014 (n 116) 829 (Martin Pakula). Mr Tee also noted that the power to create legislation that applies to one person ‘should be exercised with caution’: *Parliamentary Debates*, 11 March 2014 (n 116) 590 (Brian Tee). Ms Pennicuik referred to the earlier case of Garry David, who was also named in legislation which allowed his continuing detention because he was considered a serious risk to the safety of the public: at 591 (Susan Pennicuik). Garry David killed himself in prison three years later: at 591.

119 *Parliamentary Debates*, 25 March 2014 (n 116) 829 (Martin Pakula). Mr Pakula also warned that there ‘are lots of really bad people in prison’, some ‘who have committed heinous crimes and are not serving sentences of life with no parole’; and ‘there will be an expectation of the government ... that it legislate to remove the possibility of that person being granted parole’: at 829. Mr Pakula concluded that it was undesirable for Parliament to take away the Board’s power to make the ‘correct, justifiable and appropriate decisions’ about parole in these situations, but differentiated the case of Knight is an ‘exceedingly rare’ case justifying legislative intervention: at 829.

Mr Pakula and Ms Pennicuik of the Australian Greens ('Greens') noted that under current parole laws it was 'highly unlikely' that Knight would be granted parole, with Ms Pennicuik emphasising that 'public safety is paramount' in parole decisions – observations undermining the need for the Bill and the override.<sup>120</sup> By contrast, Mr Tee (ALP) noted that the parole system 'should be fixed not just to protect the community from Julian Knight but to protect the community from other violent offenders',<sup>121</sup> highlighting the non-exceptionality of the situation and the legislation.

The *Charter* was *not* explicitly addressed. Each parliamentarian commented on the heinous nature of Knight's crimes, their horrific impact, and/or that Knight had shown little remorse.<sup>122</sup> Some parliamentarians touched on the exceptionality of Knight, without linking this to the section 31 override justification.<sup>123</sup> The closest debate came to the *Charter* was Mr McIntosh's (Liberal) arguments about why the currently enacted *SSODSA* could not apply to Knight – which was not illuminating, given that SARC acknowledged that amendments to the *SSODSA* would be needed.<sup>124</sup>

Given the *exceptional* nature of overriding the *Charter*, why did Parliament fail to scrutinise the Bill against the *Charter*? This illustrates the triumph of executive dominance over effective parliamentary scrutiny. This is predictable with 'law and order' and community safety issues, with the opposition party reluctant to be labelled 'soft on crime'. This also illustrates the triumph of the majority over the unpopular, which is again predictable given the circumstances. However, the predictability does not discount the cost to the transparency of, and accountability for, the rights-impacts of this legislation, and the disdain demonstrated for the culture of justification the *Charter* was supposed to engender. One would expect deeper consideration of the rights issues and alternative solutions.<sup>125</sup>

#### D Transparent, Justified and Accountable Lawmaking?

The executive and parliamentary rights-scrutiny regarding policy-development and law-making under the *Charter* were inadequate. The justification, transparency and accountability expected in the policy-development and law-making processes

120 Ibid; *Parliamentary Debates*, 11 March 2014 (n 116) 591 (Susan Pennicuik). See also below n 140 and accompanying text.

121 *Parliamentary Debates*, 11 March 2014 (n 116) 590 (Brian Tee).

122 *Parliamentary Debates*, 25 March 2014 (n 116) 828 (Martin Pakula), 830 (Andrew McIntosh); Ibid 590 (Brian Tee), 591 (Susan Pennicuik), 592 (David O'Brien).

123 For example, Mr McIntosh stated that '[o]f current Victorian prisoners, Julian Knight is in a class of his own': *Parliamentary Debates*, 25 March 2014 (n 116) 830 (Andrew McIntosh). This was repeated in the Legislative Council: *Parliamentary Debates*, 11 March 2014 (n 116) 592 (David O'Brien).

124 *Parliamentary Debates*, 25 March 2014 (n 116) 830 (Andrew McIntosh). These arguments were reiterated in the Legislative Council: *Parliamentary Debates*, 11 March 2014 (n 116) 592 (David O'Brien).

125 Similar arguments have been made in relation to the *Canadian Charter* (n 2). See Russell, 'Standing Up for NWS' (n 84) 299: '[t]he 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'. Russell supports the inclusion of the override within the Canadian constitutional settlement 'when it is invoked only after a reasoned debate in the legislature': at 298–9.

were compromised: in terms of the *Charter* provisions, when compared to minimum rights standards for temporarily suspending rights, and vis-à-vis the underlying principles of the *Charter*.

### 1 *Charter Provisions*

First, the SOC/SRS claims to exceptionality are problematic. To link the egregiousness of the crimes with the requisite exceptionality under section 31 is curious: does this satisfy the ‘exceptional circumstances’ standard of ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria’?<sup>126</sup> Not likely. Moreover, given the existence of other offenders whose offences can be and have been similarly classified, is this situation ‘exceptional’?<sup>127</sup> Not likely. Further, the ongoing and real risk Knight presents could be addressed in other ways. Most obviously, the Board could assess Knight’s application and refuse parole based on justifiable and appropriate considerations. Indeed, the Board had found that Knight was an ongoing risk,<sup>128</sup> and numerous parliamentarians referred to recent changes to the parole system making it the toughest in Australia and that Knight was unlikely to be granted parole.<sup>129</sup> Another alternative, as SARC suggested, was to extend the *SSODSA* and avoid the use of the override.<sup>130</sup>

The link to legal certainty and judicial interpretation are not ‘exceptional’ either. There is uncertainty in application in relation to many laws, and many laws are open to judicial interpretation that may not coincide with Parliament’s intentions. Surely section 31 exceptionality would not apply to all such laws, justifying a section 31 override. Moreover, the *Charter* provides the executive and Parliament with mechanisms to minimise legal uncertainty and avoid rights-compatible interpretations where rights-incompatible interpretations are intended. These require Parliament to be explicit about its rights-limiting intentions through the language of legislation, clear statements of parliamentary intent, and SOICs – all of which support transparent and accountable decision-making based on a culture of justification.

Secondly, another consideration is the justiciability of ‘exceptional circumstances’ under sections 31(3)–(4) of the *Charter*. If Victoria follows the

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

127 Indeed, the series of cases that gave rise to the principle of separation of judicial power in State courts concerned changes to sentences and parole conditions for offenders that continued to be considered risks as the end of their sentences approached, some of which were identified from the sentencing remarks of the sentencing judge: see, eg, *Kable v DPP (NSW)* (1996) 189 CLR 51; *Baker* (n 110); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

128 *SARC Alert Digest*, 11 March 2014 (n 109) 6. See also *Parliamentary Debates*, 13 March 2014 (n 88) 746 (Kimberley Wells).

129 *Parliamentary Debates*, 13 March 2014 (n 88) 745 (Kimberley Wells); *Parliamentary Debates*, 25 March 2014 (n 116) 828 (Martin Pakula), 830 (Andrew McIntosh); *Parliamentary Debates*, 11 March 2014 (n 116) 591 (Susan Pennicuik), 592 (David O’Brien). Mr Tee stated at 590:

Everyone involved in the criminal justice system would say there is no way that Julian Knight would be eligible for parole under the current system. What is clear, therefore, is that even if this legislation were not passed, it is almost impossible to imagine Julian Knight being released.

130 *SARC Alert Digest*, 11 March 2014 (n 109) 6.

Canadian lead,<sup>131</sup> the override will contain ‘requirements of form only’, not requirements of substance which may impose ‘the impermissible judicial task [of] substantive review of the legislative policy motivating the override’.<sup>132</sup> As such, the existence of ‘exceptional circumstances’ will not be a justiciable pre-condition to the exercise of overrides. George Williams supports this view.<sup>133</sup>

Conversely, if section 31(4) is considered justiciable, the exceptionality of the circumstances could be tested by judges. Presumably the judiciary, at a minimum, would consider the meaning of ‘exceptional circumstances’ as outlined in the Explanatory Memorandum.<sup>134</sup> This falls short of minimum human rights standards, but imposes some type of hurdle (albeit not met here). Beyond this, the section 32(1) rights-compatible interpretative obligation, coupled with the section 32(2) power to consider international human rights law, may justify the substantive content of section 31(4) being based on the *extraordinary* derogating-justifying circumstances of threat to the life of the nation, rather than the *ordinary* override-justifying circumstances that resemble justifications under limitations analysis.

Section 31(4) has not been litigated, most likely because failing to comply with the procedural aspects of sections 31(3) and (5) do not impact on the validity, operation or enforcement of the overridden legislation under section 31(9). However, section 31(4) is not covered by section 31(9), leaving the door open to a challenge.

Thirdly, the disapplication of the section 31(7) sunset provision appears to be unlawful, given that section 31(9) does not apply to it. The disapplication was not explained or justified by the executive or Parliament, and has not been litigated. The *Charter* will be undermined if disapplication of section 31(7) is similarly considered non-justiciable.

## 2 *Minimum Standards*

Regarding the minimum standards for temporary suspension of rights, the *CAPA* falls short. First, under article 4(2) of the *ICCPR*, the article 7 prohibition on torture and cruel, inhuman and degrading treatment or punishment is non-derogable. Questions about *CAPA*’s compatibility with the equivalent *Charter* section 10(b) prohibition was the motivation behind the override declaration. This override constitutes a likely breach of the *ICCPR*.

Secondly, any suspension of rights in an emergency must be temporary, and is only justified for the duration of the threat. Had the override been subject to the section 31(7) five-year sunset provision, a question would remain about whether this was arbitrary, because the duration of the override must be linked to the threat rather than a standard five-year timeframe. More problematically, permanent disapplication of section 31(7) does not align with the temporal requirements under minimum rights standards, as exemplified in the *ICCPR*.

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131 See *Ford v Attorney-General (Quebec)* [1988] 2 SCR 712.

132 Debeljak, ‘Balancing Rights in a Democracy’ (n 9) 466–7.

133 Williams (n 75) 900.

134 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21–2.

Thirdly, Part II(D)(1) explored what circumstances justify suspending rights, with the *Charter*'s definition of 'exceptional circumstances' falling below the minimum standards required under the *ICCPR*. Analysis in Part III(D)(1) suggests that the *CAPA* did not even satisfy the *Charter*'s lower threshold of 'exceptional circumstances'. Both factors demonstrate a lack of conformity with the circumstances criteria under the *ICCPR*.

The more transparent and accountable course under the *Charter* would be the enactment of the *CAPA*, subject to a SOIC which outlines why the limitation does not meet the section 7(2) criteria, supported by explicit language in the statutory provisions and purposes that Parliament was enacting the *CAPA* fully aware of its rights-incompatibility and intentionally choosing to proceed. This would preclude a section 32 rights-compatible judicial interpretation of the *CAPA*, and any section 36 declaration that might follow would have no impact on the validity of the *CAPA*. Parliament would prevail, the judiciary would contribute its views on the rights-(in)compatibility of the *CAPA* under the dialogue model, and the people would be more fully informed about decisions being made on their behalf.

Fourthly, there was no 'careful justification' 'based on an objective assessment of the actual situation' that the exceptional measures 'were required by the exigencies of the situation'.<sup>135</sup> Minimum standards require the proportionality of exceptional measures to be demonstrated by the derogating State.<sup>136</sup> The justifications offered for this override were the desire for a prison sentence to be served or almost fully served, community safety, legal certainty, and avoidance of an adverse judicial interpretation. Of these, community safety seems the most plausible basis for 'exceptional circumstances'. However, an objective assessment of this situation would acknowledge that community safety is *the* paramount consideration of the Board in *all* parole decisions. The government itself boasted about the parole system being 'the toughest in Australia',<sup>137</sup> yet put no faith in it to protect the community from Knight. As Mr Pakula asked in debate:

When the recent changes to the parole system were made by this government ... it was said ... that those changes would ensure that individuals of this nature would not be released by the parole board. In those circumstances, the only curiosity about this bill is: if the government accepts its own rhetoric about the changes it recently made to the Adult Parole Board of Victoria system, why does the government not believe those changes will lead to the outcome it seeks with the implementation of this bill – that is, the refusal to release Julian Knight?<sup>138</sup>

Mr Pakula acknowledged that Parliament should not interfere with the Board's power to make the 'correct, justifiable and appropriate decisions' about parole in difficult situations<sup>139</sup> – yet yielded on Knight, categorising him as an 'exceedingly rare' case justifying legislative intervention.<sup>140</sup>

135 *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 3 [5]–[6].

136 *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 2–3 [4]; *Derogations and COVID-19*, UN Doc CCPR/C/128/2 (n 45) 2 [2(b)].

137 *Parliamentary Debates*, 13 March 2014 (n 88) 746 (Kimberley Wells).

138 *Parliamentary Debates*, 25 March 2014 (n 116) 829 (Martin Pakula).

139 *Ibid.*

140 *Ibid.*

An assessment of the override justifications should be done alongside the limitations analysis, given that (a) the necessity for the override arose from the limitations analysis, and (b) proportionality analysis is relevant to both limitations and overrides, with no conceptual difference between proportionality under the two mechanisms.<sup>141</sup> There were problems with the limitations analysis offered by the executive and Parliament, which also tainted the override analysis.<sup>142</sup> For instance, reliance on *Hunter* to avoid *Vinter* was disingenuous. *Hunter* did not address the issue at hand. The judicial task in *Hunter* was ‘to determine [Hunter’s] individual case, not assess the human rights compatibility of ... the *Sentencing Act*’.<sup>143</sup> This was because the accused had not challenged the rights-compatibility of the *Sentencing Act* under section 32 of the *Charter*, but rather used *Charter* rights ‘as discretionary considerations’ in sentencing the individual.<sup>144</sup> Reference to the outcome of *Hunter*, without reference to its reasoning, was not a transparent basis upon which to conclude rights-compatibility.<sup>145</sup>

Moreover, if the test of proportionality for derogation is akin to the tests for limitations to rights, and there were questions around *CAPA* meeting the section 7(2) limitations criteria, there must also be questions about the *CAPA* meeting the derogation ‘strictly required’ test. Again, this criterion has arguably not been met.

### 3 *Parliamentary Sovereignty and Dialogue*

This case study confirms that Parliament remains sovereign under the *Charter*, but at what cost? Allowing overrides of the *Charter* on the basis of standards below the minimally accepted human rights standards compromises the protection and promotion of rights from the outset. Using the override in a situation that does not meet the already sub-optimal standards further undermines the rights. The pre-emptive silencing of the judiciary on *Charter* issues mutes the inter-institutional dialogue. Dialogue provides an opportunity for the representative arms’ claims to be

141 See Sarah Joseph, ‘A Timeline of COVID 19 and Human Rights: Derogations in Time of Public Emergency’, *Griffith News* (Blog Post, 5 May 2020) <<https://news.griffith.edu.au/2020/05/05/a-timeline-of-covid-19-and-human-rights-derogations-in-time-of-public-emergency/>>:

But it is difficult to see how a valid derogation from those rights [article 12 freedom of movement, article 21 freedom of assembly and article 22 freedom of association] is conceptually different to valid limits imposed on those rights without a derogation. After all, both the derogation and the limits must be proportionate in order to be valid. A difference could lie if derogations somehow incorporate a more deferential or generous notion of proportionality which gives the State more leeway to interfere with human rights, compared to proportionality under the ordinary limitation clauses. Yet in its General Comment 29 on derogations, the Human Rights Committee gave no indication that proportionality under Article 4 was somehow more lax than other tests of proportionality under the *ICCPR*.

142 For example, the limitations analysis regarding section 8(3) referred only to the importance of the purpose of the limitation under section 7(2)(b) (ie the egregious nature of the crime and protection of the community), but ignored other relevant criteria, including the nature and extent of the limitation (section 7(2)(c)), and the relationship between the limitation and its purpose (section 7(2)(d)): see *Parliamentary Debates*, 13 March 2014 (n 88) 745 (Kimberley Wells). Moreover, SARC identified potential issues with the section 24(1) right which were not addressed by the executive or Parliament: see *SARC Alert Digest*, 11 March 2014 (n 109) 5.

143 *Hunter* (n 101) 26 [111] (Bell J).

144 *Ibid.*

145 *Parliamentary Debates*, 13 March 2014 (n 88) 745–6 (Kimberley Wells).

tested against the differently situated and motivated judiciary. Pre-emptive judicial silencing impoverishes the accountability for rights-impacting decision-making envisaged under the *Charter*, and subordinates the culture of justification to the pure assertion of majority power that is the essence of parliamentary sovereignty.

### E Constitutional Challenge

Section 74AA of the *CAPA* was challenged as being contrary to Chapter III of the *Constitution*.<sup>146</sup> The HCA unanimously dismissed the appeal, relying on the decision in *Crump*.<sup>147</sup> The *Charter* was not argued by counsel or raised by the HCA. Arguably, the override rendered *Charter* arguments irrelevant. However, elements of the exercise of the override were worthy of exploration. The section 31(4) requirement for ‘exceptional circumstances’ could have been tested. Alternatively, the legality of issuing an override without the section 31(7) five-year sunset provision could have been challenged.

## IV CRAIG MINOGUE

### A Background

The second case study concerns Craig Minogue’s eligibility for parole. In 1986, Minogue caused a car bomb to detonate outside the Russell Street Police Building, resulting in the death of a policewoman and serious injuries to others. In 1988, he was convicted of murder, and sentenced to life imprisonment with a non-parole period of 28 years.<sup>148</sup>

The non-parole period ended on 30 September 2016 and Minogue applied for parole under section 74(1) of the *Corrections Act* on 3 October 2016. This application triggered a process: the Board decided to proceed to parole planning based on a positive report from the Case Management Review Committee on 20 October 2016; a Community Corrections Services officer was appointed to prepare a Parole Suitability Assessment for the Board; and Minogue provided submissions to the officer on 25 October 2016.<sup>149</sup>

In November 2016, the (Coalition) Opposition introduced into Parliament Knight-equivalent legislation for Minogue, but this lapsed. In December 2016, the ALP Government enacted Knight-like legislation that applied to a category of prisoners, rather than a named prisoner, but this legislation was found by the HCA not to apply to Minogue. Finally, in July 2018, the ALP Government enacted legislation that refined the category-specific provisions in response to the HCA decision, and included Minogue-specific provisions.<sup>150</sup> The third Bill was subject to the override; however, the legislative history bears brief consideration.

146 *Knight* (n 87). The relevant basis for the challenge was that section 74AA interfered with the sentence imposed by the court, reflecting SARC’s concern: at 322 [23]–[24].

147 *Ibid* 322–4 [23]–[29], see especially 323 [25].

148 *Minogue v Victoria* (2018) 264 CLR 252, 252 (*‘Minogue’*).

149 *Ibid* 259 [3]–[4], 260 [5]–[6] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

150 I am grateful to Professor Jeremy Gans for his assistance in navigating this legislative history.

## B Opposition Bill 2016

On 23 November 2016, an Opposition (Private Member's) Bill was introduced into the Legislative Council.<sup>151</sup> The Corrections Amendment (Parole) Bill 2016 (Vic) proposed inserting section 74AAC into the *Corrections Act*. This was a Minogue-specific replica of the Knight-specific legislation.<sup>152</sup> The Bill never reached a vote in the Legislative Council, and lapsed when Parliament was dissolved.

The Bill was accompanied by an SOC, with relevant rights considered either not violated, or subject to justifiable limits.<sup>153</sup> Nevertheless, the *Charter* was to be overridden: the SOC stated the *Charter* 'in this exceptional case ... will be overridden because of the need to protect the community',<sup>154</sup> without exploring the exceptionality of the case.

The SRS acknowledged that the amendments were modelled on the Knight-specific legislation and consistent with *Crump*. The override was needed to ensure that Minogue's life sentence 'is fully or almost fully served' and for community protection, with the seriousness of the criminal actions offered as the exceptional circumstances.<sup>155</sup>

SARC reported on the Bill in similar terms to the Knight-specific legislation.<sup>156</sup> Regarding overrides, SARC noted that it was for Parliament to consider whether 'exceptional circumstances' existed to justify the *Charter* override.<sup>157</sup>

## C Initial Legislation 2016

### 1 Legislation

On 14 December 2016, the Government secured the insertion of section 74AAA into the *Corrections Act* via the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic).<sup>158</sup> The amendment was modelled on the *Crump*

151 Victoria, *Parliamentary Debates*, Legislative Council, 23 November 2016, 6193 (Edward O'Donohue).

152 It prevented the Board granting parole to Minogue unless: (a) Minogue no longer has the physical ability to harm any person due to the imminence of dying or serious incapacitation; (b) Minogue no longer poses a risk to the community; and (c) the Board is 'further satisfied because of those circumstances' that a parole order is justified. Section 74AAC(4) provided for the override of the *Charter* (n 2), and section 74AAC(5) excluded the operation of the five-year sunset provision with respect to the override.

153 Victoria, *Parliamentary Debates*, Legislative Council, 7 December 2016, 6508 (Edward O'Donohue).

154 *Ibid*.

155 *Ibid* 6509. Earlier, the Second Reading Speech highlighted the need to protect the community from Minogue, and the police and community sentiment to keep Minogue in jail; and it referred to Justice Vincent's sentencing remarks about the seriousness of the offence.

156 SARC also addressed the Chapter III issue under the *Constitution*: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 1 of 2017, 7 February 2017) 12 ('SARC *Alert Digest*, 7 February 2017'). SARC also highlighted issues with respect to section 8(3) because the Bill was of a similar nature to a Bill of Attainder: at 10, citing *United States Constitution* art I §§ 9–10; *Selective Service System v Minnesota Public Interest Research Group*, 468 US 841 (1984) 847; and section 10(b) because of the 'principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved': at 10, quoting *Vinter* (n 92) 42 [114].

157 *SARC Alert Digest*, 7 February 2017 (n 156) 9.

158 The legislation was enacted on 8 December 2016 and commenced operation on 14 December 2016.

legislation, applying to a category of persons being ‘police-killers’. To this extent, it was more rights-friendly in avoiding problematic ad hominem legislation.

Section 74AAA(1) prevented the Board making a parole order ‘in respect of a prisoner convicted and sentenced ... to a term of imprisonment with a non-parole period for the *murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer*’ unless the prisoner applies for parole. Section 74AAA(3) provided that ‘[i]n considering the application, the Board must have regard to the record of the court in relation to the offending, including the judgment and the reasons for sentence’. Section 74AAA(4) stated that the Board must *not* grant parole *unless* the Board is:

- (a) satisfied ... that the prisoner
  - (i) is in imminent danger of dying, or is seriously incapacitated and, as a result, the prisoner no longer has the ability to do harm to any person; and
  - (ii) has demonstrated that the prisoner does not pose a risk to the community; and
- (b) is further satisfied that, because of those circumstances, the making of the parole order is justified.<sup>159</sup>

## 2 Statement of Partial Incompatibility

Ms Neville (Minister for Police) (ALP) issued a Statement of Partial Incompatibility (‘SOPI’).<sup>160</sup> She acknowledged that ‘the effect of removing the prospect of release of certain offenders and diminishing their possibility of rehabilitation’ – and the ‘sense of hopelessness’ this may induce – may violate the section 10(b) freedom from cruel, inhuman and degrading treatment and punishment, and the section 22(1) right to be treated humanely when detained.<sup>161</sup>

By way of justifying the potential violations, Ms Neville considered section 7(2) of the *Charter*. The section 7(2)(b) object of the amendment was ‘strengthening parole laws in relation to a particular class of offending, in order to further enhance community safety and protection’.<sup>162</sup> The class of offending was ‘the murder of police officers, which is the most serious offence within that

159 On 20 December 2016, section 127A was inserted into the *Corrections Act 1986* (Vic) (‘*Corrections Act*’), via section 24 of the *Corrections Legislation Further Amendment Act 2017* (Vic), to ensure section 74AAA applied retrospectively to police-killer prisoners, even if they had become eligible for parole, had taken steps to secure parole, and the Board had begun considering their application. This was presumably considered necessary because Minogue had become eligible for parole, had applied for parole, and the Board had started the process of considering his application.

160 The statement explored rights that were relevant, but either not violated or reasonably and justifiably limited in the Minister’s opinion. These rights were the section 8(3) right to equality before the law, the section 21 right to liberty, the sections 17(2) and 23 rights of the child, the section 24 right to a fair hearing, the section 25(2)(k) freedom from self-incrimination, and the section 27 freedom from retrospective criminal laws: see Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2016, 4722–4 (Lisa Neville).

161 Ibid 4725. Restricting parole for prisoners who are not serving a life sentence may also violate section 10(b) inhuman treatment because of the ‘hopelessness that serving a full sentence may engender for that offender’.

162 Ibid.

category’, as evidenced by the SCV ordinarily imposing ‘the harshest sentence that can be imposed, being life imprisonment’.<sup>163</sup> The extent of the limitation under section 7(2)(c) was described as ‘fairly confined’,<sup>164</sup> with only three prisoners currently affected, and the amendments acting as a future deterrent. The limitation was argued to be rationally connected to the Bill’s object under section 7(2)(d): the denial of parole to police-killers ‘reflect[s] the seriousness of the offending and its impact on society’.<sup>165</sup>

Ms Neville then accepted ‘that the nature of the limitation is severe’ under section 7(2)(c), preventing certain offenders ‘from being released on parole except in very limited circumstances, and those circumstances are not conducive to leading any useful life post-release’; and that this ‘is aggravated by the retrospective effect of the limitation’.<sup>166</sup> She also accepted that section 7(2)(e) ‘alternative less restrictive means reasonably available to achieve the purpose’ may be available, including ‘parole conditions which facilitate an increased possibility of release’.<sup>167</sup>

Nevertheless, Ms Neville proceeded with the Bill ‘notwithstanding the possibility that clause 3 is incompatible with the charter’ because ‘there is a need to strengthen parole laws to counter this particular abhorrent form of offending’ and deter future offenders.<sup>168</sup> The potential partial incompatibility was justified by the legitimate objectives of the Bill, which are to enhance ‘a critical aspect of community safety and protection’, and address ‘community concerns regarding the release of prisoners who commit the worst kind of crimes’.<sup>169</sup>

An override declaration was *not* relied upon. This aligns with international human rights standards, given that the *ICCPR* equivalent of section 10(b) is a non-derogable right.

### 3 *Second Reading Speech*

The SRS offered little regarding the potential *Charter* violations. It referenced the *Crump* considerations by stating that the amendment ‘is not intended to alter the original sentence of imprisonment’, but rather ‘introduces additional conditions that must be satisfied before the adult parole board may grant parole’ to relevant prisoners.<sup>170</sup> It highlighted the ‘important safeguard’ that ‘the offender must have known or been reckless as to whether the victim was a police officer’,<sup>171</sup> and noted that the amendments will apply to three sentenced prisoners and future offenders.

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163 Ibid. Mention is also made of an attack on the police force being an attack on society itself.

164 Ibid.

165 Ibid.

166 Ibid.

167 Ibid.

168 Ibid.

169 Ibid.

170 Ibid 4728.

171 Ibid 4727.

#### 4 Parliamentary Debate

The Bill was rushed through Parliament *before* SARC could report under the *Charter*. Debate canvassed the rights of victims and their families;<sup>172</sup> community safety and community concerns;<sup>173</sup> community expectations around ‘life’ meaning ‘life’ for offenders like Minogue;<sup>174</sup> that police-killers are beyond rehabilitation and should never be granted parole;<sup>175</sup> the need to protect police and adequately respond to the gravity of police murders;<sup>176</sup> and the deterrent effect of the legislation.<sup>177</sup>

Rights concerns were *implicit* in some aspects of debate. For example, legislating for categories of persons rather than named individuals was considered more effective in ‘deal[ing] with these offenders as a class’,<sup>178</sup> with parliamentarians acknowledging the Bill will apply to only three current prisoners.<sup>179</sup> Moreover, the retrospective application of the Bill was recognised and lamented,<sup>180</sup> but did not vitiate the need for the legislation.<sup>181</sup>

172 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4851 (Gabrielle Williams), 4854 (Timothy McCurdy), 4864 (Paul Edbrooke) (*Parliamentary Debates*, 7 December 2016’); Victoria, *Parliamentary Debates*, Legislative Council, 8 December 2016, 6599–6600 (Edward O’Donohue), 6603 (Susan Pennicuik), 6623–4 (Bernard Finn), 6625 (Georgina Crozier), 6626 (Gayle Tierney) (*Parliamentary Debates*, 8 December 2016’).

173 *Parliamentary Debates*, 7 December 2016 (n 172) 4850 (Robert Clark), 4851 (Gabrielle Williams), 4855 (Frank McGuire), 4864–5 (Paul Edbrooke), 4865–6 (Suzanna Sheed); *Parliamentary Debates*, 8 December 2016 (n 172) 6606 (Wendy Lovell), 6621 (Joshua Morris), 6623 (Bernard Finn), 6624–6 (Georgina Crozier), 6626–7 (Gayle Tierney).

174 *Parliamentary Debates*, 7 December 2016 (n 172) 4854 (Timothy McCurdy); *Parliamentary Debates*, 8 December 2016 (n 172) 6609 (Joshua Morris).

175 For example, Mr Bourman stated that ‘parole should be exceptional, not business as usual ... it should not be available for serious violent offences’: *Parliamentary Debates*, 8 December 2016 (n 172) 6601. See also *Parliamentary Debates*, 7 December 2016 (n 172) 4858, where Mr Pearson stated:

This bill ... basically say[s] to people who have killed sworn officers of Victoria Police that they are to be imprisoned and there is no chance of rehabilitation because they are incapable of being rehabilitated.

The reality is, if you go out and deliberately seek to unleash this level of terror on a community, you are beyond salvation and you should not be released into the community. You forfeit your rights.

176 See, eg, *Parliamentary Debates*, 7 December 2016 (n 172) 4851 (Gabrielle Williams), 4853 (Timothy McCurdy), 4858 (Daniel Pearson), 4859 (John Pesutto), 4864–5 (Paul Edbrooke), 4865 (Suzanna Sheed). See also *Parliamentary Debates*, 8 December 2016 (n 172) 6608 (Joshua Morris), 6623 (Bernard Finn), 6626 (Gayle Tierney).

177 For example, Mr Melhem stated that the proposed legislation will ‘send the message that if you commit a crime, particularly killing a police officer, and you are convicted and you get sentenced to life, it is more than likely that you will spend the rest of your life in jail and there will be no likelihood of parole’: *Parliamentary Debates*, 8 December 2016 (n 172) 6601 (Cesar Melhem). See also at 6609 (Joshua Morris).

178 *Parliamentary Debates*, 7 December 2016 (n 172) 4852 (Gabrielle Williams). It was acknowledged that care was needed when naming individuals in legislation: at 4863 (Joshua Morris), 4868 (David O’Brien), but that ‘there are certain individuals where we need to put some of those principles aside, and I understand that Minogue is one of those’: at 4868 (David O’Brien).

179 *Parliamentary Debates*, 7 December 2016 (n 172) 4852 (Gabrielle Williams), 4856 (Samuel Hibbins), 4863 (Joshua Morris); *Parliamentary Debates*, 8 December 2016 (n 172) 6599 (Edward O’Donohue), 6603 (Susan Pennicuik).

180 *Parliamentary Debates*, 8 December 2016 (n 172) 6605 (Susan Pennicuik): ‘a system which permits the Parliament to retrospectively increase a criminal sentence or sanction is a dangerous and fundamental attack on the law’.

181 *Parliamentary Debates*, 7 December 2016 (n 172) 4853 (Gabrielle Williams); *Parliamentary Debates*, 8 December 2016 (n 172) 6601 (Cesar Melhem).

Only the Greens *explicitly* voiced rights-based concerns. Mr Hibbins (Greens) canvassed the community safety purposes underlying parole (being, the supervised reintegration of offenders into the community):<sup>182</sup> ‘the purpose of parole is to ensure community safety when a prisoner is released at the end of their sentence’.<sup>183</sup> Mr Hibbins and Ms Pennicuik referred to recent evidence-based reforms of the parole system, and queried whether the Bill demonstrated distrust in the ability of the Board to uphold community safety through its decisions.<sup>184</sup> Ms Pennicuik lamented introducing blanket rules for categories of offenders and victims, and the ‘taking away [of] discretion of the court and the adult parole board to deal with particular circumstances of every case’.<sup>185</sup> She noted that application of the *SSODSA* ‘would be a preferable way to deal with these offenders than the way this bill is proposing to deal with them’.<sup>186</sup>

Criticism of the rushed legislative timetable was extensive – the Bill was tabled in the last sitting week of the year, and the Legislative Council debated it on the afternoon of the last sitting day of the year.<sup>187</sup> Many parliamentarians noted that the Bill could have been introduced days, weeks, if not months earlier; and that the Bill was passing through Parliament without following the standard procedures.<sup>188</sup> In Mr Finn’s (Liberal) words, if the issue was not ‘rush[ed] through in two days’, ‘we would actually have a bit more time to consider the full implications’ of the Bill<sup>189</sup> – an understatement, given the SOPI. No parliamentarian mentioned the

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182 *Parliamentary Debates*, 7 December 2016 (n 172) 4856. Mr Hibbins referred to the Corrections Victoria explanation of the purpose parole:

If the prospect of parole is removed ... there is less incentive to undertake steps designed to reduce the risk of reoffending... [T]he board’s most important consideration is community safety. Parole is served under the supervision of a community corrections officer and on conditions fixed by the adult parole board... The purpose of parole is to supervise and support the reintegration of offenders into the community. This supervision and support benefits the wider community by reducing the risk that offenders will commit further offences when released into the community.

183 *Ibid.* Similar comments were made by Ms Pennicuik: *Parliamentary Debates*, 8 December 2016 (n 172) 6604.

184 *Parliamentary Debates*, 7 December 2016 (n 172) 4856 (Samuel Hibbins); *Parliamentary Debates*, 8 December 2016 (n 172) 6603–4 (Susan Pennicuik).

185 *Parliamentary Debates*, 8 December 2016 (n 172) 6604–5 (Susan Pennicuik).

186 *Ibid.* 6606.

187 Predictably, the Government denied that the Bill was rushed. Ms Tierney noted that ‘[t]here has been substantial work done in this area for some time’, and that introducing it before Christmas recess was about ensuring community safety – ‘[s]afety in the community is a priority of this government, and that is why we have made sure it has been done this year’: *Parliamentary Debates*, 8 December 2016 (n 172) 6628 (Gayle Tierney).

188 *Parliamentary Debates*, 7 December 2016 (n 172) 4857 (Samuel Hibbins), 4864 (Joshua Morris); *Parliamentary Debates*, 8 December 2016 (n 172) 6598 (Edward O’Donohue), 6603 (Susan Pennicuik), 6623 (Margaret Fitzherbert), 6624 (Bernard Finn), 6624–5 (Georgina Crozier). See *Parliamentary Debates*, 8 December 2016 (n 172) 6598 (Edward John O’Donohue):

[T]he government in its haste has brought this bill this week to be passed this week ... why was this bill not brought in the last sitting week or two sitting weeks ago? ... why was this bill not brought back in September, October or November ... it is only passing the house this week with the cooperation of the house and the Parliament, bypassing the normal layover times and the normal layover processes, to enable its passage.

189 *Parliamentary Debates*, 8 December 2016 (n 189) 6624 (Bernard Finn).

absence of a SARC report – again, remarkable given the SOPI. Only Ms Pennicuk appeared to have received independent legal advice on the issues.<sup>190</sup>

## 5 SARC

The Bill received royal assent on 13 December 2016, and SARC reported under section 17(c)(i)–(ii) of the *Parliamentary Committees Act 2003* (Vic) ('PCA') on 7 February 2017.<sup>191</sup> SARC sought clarification from the Minister regarding the 'procedure, standard of proof, rules of evidence or appeal rights' vis-à-vis establishing knowledge or recklessness 'as to whether the person ... murdered was a police officer'.<sup>192</sup> Ms Tierney (Minister for Corrections) (ALP) responded,<sup>193</sup> reiterating that 'the legitimate objectives of ... community safety and protection and addressing community concerns regarding the release of prisoners who commit the worst kind of crimes'<sup>194</sup> justified any partial incompatibility with the *Charter*.

## 6 Judicial Review

Minogue successfully challenged the application of the legislation to him.<sup>195</sup> His successful argument concerned *how* the section 74AAA(1) prerequisites were to be established:<sup>196</sup> (a) 'that of conviction for the murder of a police officer'; and (b) 'that of the prisoner's knowledge or recklessness as to the person being a police officer'?<sup>197</sup> Minogue argued the Board could only rely on the sentencing judge's

190 Ms Pennicuk mentions 'consult[ing] the Law Institute of Victoria and Liberty Victoria about this particular bill': *Parliamentary Debates*, 8 December 2016 (n 172) 6605.

191 Under section 17(c)(ii) of the *Parliamentary Committees Act 2003* (Vic) ('PCA'), SARC may report on a Bill within ten sitting days of a Bill receiving royal assent.

192 *SARC Alert Digest*, 7 February 2017 (n 156) 20–1. SARC was also concerned that section 74AAA could apply to 'existing prisoners who murdered a police officer when they were a child but who were sentenced as adults', which may be incompatible with rights, and sought ministerial clarification: at 20.

193 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 2 of 2017, 21 February 2017) 15. The Minister also confirmed that section 74AAA will apply to a prisoner who 'was 17 years of age and about to turn 18 years of age' when the offence was committed, but that '[t]his prisoner, when he was an adult, received a life sentence of imprisonment from the court'.

194 *Ibid.*

195 There were two unsuccessful arguments, the first of which centred on whether section 74AAA and section 127A could apply to Minogue, given that his non-parole period had ended, he had applied for parole, and the Board had decided to proceed with parole planning before either section commenced. The joint judgment rejected this argument, citing the long line of authority, including *Crump* (n 90), 'that statutes providing for parole may be expected to change from time to time, to reflect changes in government policy and practice': *Minogue* (n 148) 264 [20]. More specific arguments pertaining to the operation of section 127A were also dismissed: at 265–6 [24]. Minogue's second unsuccessful argument was that section 74AAA was not capable of applying to him because knowledge that the deceased was a police officer, or recklessness thereto, was not an element of the offence for which he was convicted. The joint judges also rejected this argument: at 267 [30].

196 This argument had two elements. The first element centred around whether a prisoner's knowledge (or recklessness) as to the identity of the victim must be connected with the sentencing of the prisoner for murder. The joint judges held that section 74AAA is capable of applying where the sentencing court did not make a finding that Minogue was convicted for the murder of a police officer, and that Minogue knew (or was reckless) as to whether the victim was a police officer. See *Minogue* (n 148) 267–8 [33]–[37].

197 *Ibid* 269 [38].

findings. The State of Victoria argued it was for the Board to decide for itself, making ‘such enquiries as it considers necessary’ and that it ‘would not be limited to the court record and sentencing remarks’.<sup>198</sup>

Chief Justice Kiefel, along with Bell, Keane, Nettle and Edelman JJ, rejected Victoria’s construction. In essence, such construction required ‘the addition of words to s 74AAA(1) to make it clear that the Board is intended to satisfy itself as to the question of the prisoner’s state of mind’.<sup>199</sup> However, there was no clear case for implying those additional words,<sup>200</sup> particularly given ‘[t]he text of s 74AAA(1) points to the sentencing process’;<sup>201</sup> and section 74AAA(3) ‘requires the Board to have regard to the court record and sentencing remarks’.<sup>202</sup> Applying Minogue’s narrower construction, their Honours found that Minogue ‘was not sentenced on the basis that he knew that the person murdered was a police officer ... or that he was reckless as to that fact’.<sup>203</sup>

The plurality raised *Charter* issues: particularly, whether the section 74AAA restrictions violated section 10(b);<sup>204</sup> and whether Minogue’s narrower construction of section 74AAA was a section 32(1) rights-compatible interpretation.<sup>205</sup> However, their Honours held it was not necessary to resolve the *Charter* issues because ‘ordinary processes of construction clearly favour[ed] a narrower approach and if the *Charter* applied in the way contended it would lead to no different conclusion’.<sup>206</sup>

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198 Ibid 269 [42].

199 Ibid 269 [43].

200 Reasons given include: (a) it would have been easy for the drafters to indicate that the Board can conduct its own enquiry: *ibid*; (b) ‘[i]t cannot be said to be necessary to advance the purpose of s 74AAA for the Board to undertake its own enquiry’: at 270 [43]; and (c) even though the *Corrections Act* does allow the Board to ‘inform itself on any matter as it sees fit’, this general power is to be read subject to the specific provisions of section 74AAA: at 270 [44], citing *Corrections Act* (n 159) s 71.

201 *Minogue* (n 148) 270 [43]. ‘The natural reading of s 74AAA(1) is that the mental element necessary is to be gleaned from what has been said by the court on sentencing’: at 271 [46].

202 *Ibid* 270 [43]. ‘It describes the prisoner to whom it is to apply by reference to ascertainable facts and s 74AAA(3) enjoins the Board to have regard to the record of the court in relation to the offending, including the judgment and reasons for sentence’: at 270–1 [46].

203 *Ibid* 275 [66]. Indeed, their Honours found that ‘[t]he remarks of the sentencing judge contain no reference to the plaintiff’s state of mind concerning the identity of the police constable who was killed’: at 274 [63]. Justices Gageler and Gordon essentially agreed with the plurality: 280–1 [88]–[90] (Gageler J), 284 [101]–[102] (Gordon J).

204 *Ibid* 272 [52]–[53].

205 The issue was that, although section 74AAA may not apply to Minogue for want of relevant findings by the sentencing judge, it would still apply to prisoners where there were relevant findings. In their Honours’ words, ‘[a]t best, [Minogue’s] construction might narrow the class of persons to whom it applies’: *ibid* 273 [54]. Minogue responded that ‘s 74AAA(1) would accord with s 32(1) if a construction minimised the extent of the incompatibility with or encroachment on human rights’: at 273 [55]. That is, the rights of fewer prisoners would be infringed, because the Board would *retain* the power to issue parole for prisoner’s whose sentencing judges *did not* find the requisite state of mind, and the Board would only *lose* the power to issue parole for prisoner’s whose sentencing judges *did* find the requisite state of mind.

206 *Ibid* 273 [56]. Justice Gageler went further, finding that section 74AAA violated the section 10(b) prohibition and the section 22 right to humane treatment when deprived of liberty, and that no attempt to justify the limitations under section 7(2) were proffered: at 278 [79]. But his Honour came to a similar conclusion as the plurality: ‘[b]ecause s 32(1) of the *Charter* was relegated to the periphery of the argument’, it ‘is not an appropriate occasion for the Court to revisit’ section 32(1) and its application

Tantalisingly, Gageler J referred to section 31 generally, noting the need for ‘exceptional circumstances’ and the five-year sunset provision, and remarking on its use in the Knight-specific legislation.<sup>207</sup> However, his Honour did not (and did not need to)<sup>208</sup> address the justiciability of ‘exceptional circumstances’, or refer to the disapplication of section 31(7) in the Knight-specific legislation.

## D Response Legislation 2018

### 1 Legislation

In response, the government proposed amendments to the police-killer provisions, and introduced a Knight-equivalent, Minogue-specific provision. The Corrections Amendment (Parole) Bill 2018 (Vic) was introduced to the Legislative Assembly on 24 July 2018 (one month after the HCA decision),<sup>209</sup> and the *Corrections Amendment (Parole) Act 2018* (Vic) commenced on 31 July 2018 (one week later).

Regarding police-killers, section 74AAA of the *Corrections Act* was amended to clarify what the Board may and must consider in relation to parole applications. Under the new section 74AAA(1)(c), the Board *must be satisfied* that the prisoner:

- (i) [I]ntended to cause the death of, or really serious injury to, a police officer; or
- (ii) knew that the person whose death was caused ... was a police officer; or
- (iii) knew that it was probable that the death of, or really serious injury to, a police officer would be caused by the[ir] conduct.

Under the new section 74AAA(2), in deciding the prisoner’s state of mind under section 74AAA(1)(c), the Board *must have regard only* to:

- (a) the evidence led at trial;
- (b) the judgment;
- (c) the reasons for sentence;
- (d) any reasons in connection with the fixing of a non-parole period ... [and]
- (e) any judgment on appeal.

However, under section 74AAA(6), when considering parole applications made by police-killers, the Board: ‘(a) *must* have regard to the record of the court in relation to the offending, including the judgment and the reasons for sentence; and (b) *may* have regard to any other information that the Board considers is relevant’.

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to section 74AAA, particularly given ‘all questions concerning the construction of s 74AAA(1) can be resolved in a manner which excludes Mr Minogue from the class of prisoners identified in s 74AAA(1) without reference to s 32(1)’; at 278 [80]. See also Matthew Groves, ‘A Life without Hope: The Victorian Charter and Parole’ (2018) 42(6) *Criminal Law Journal* 353; Andrew Dyer, ‘Irreducible Life Sentences, Craig Minogue and the Capacity of Human Rights Charters to Make a Difference’ (2020) 43(2) *University of New South Wales Law Journal* 484 <<https://doi.org/10.53637/NDYR5085>>.

207 *Minogue* (n 148) 276–7 [74]–[77].

208 The Minogue legislation before the court did not contain an override.

209 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 July 2018, 2235 (‘*Parliamentary Debates*, 24 July 2018’). The HCA handed down its decision on 20 June 2018.

Section 74AAA(9) overrode the *Charter*, while section 74AAA(10) disapplied the five-year sunset provision.

The new section 74AB was directed at Minogue by name. Section 74AB(3) stated that the Board *may* make an order for parole for Minogue *only if* satisfied of the same factors in the original section 74AAA(4),<sup>210</sup> which equate to the Knight-specific legislation.<sup>211</sup> Section 74AB(4) overrode the *Charter*, while section 74AB(5) disapplied the five-year sunset provision.<sup>212</sup>

## 2 Statement of Incompatibility

Ms Neville (Minister for Police) issued a SOIC. She acknowledged the amendments responded to the HCA decision, and that ‘the effect of the Bill will be to deprive Craig Minogue of the benefit of the judgment he received in the High Court’.<sup>213</sup>

Ms Neville recognised the amendments may mean prisoners serving life sentences for police-killings may be ineligible for parole until close to death or incapacitated, and thus constitute violations of the right not to be subject to cruel, inhuman and degrading treatment (section 10(b)) and the right to be treated humanely when deprived of liberty (section 22(1)). The violations stemmed from the ‘diminish[ed] ... possibility of rehabilitation’, and the ‘sense of hopelessness in an offender’ induced by parole restrictions, citing the principle described in *Vinter*.<sup>214</sup>

Ms Neville attempted to justify the violations under section 7(2). Regarding section 7(2)(b), she acknowledged the purpose of the legislative restrictions was to strengthen parole laws, enhance community safety and protection, avoid the risk to the community posed by police-killers, and reflect the seriousness of the crime through restricting parole. Regarding the extent of the limitation under section 7(2)(c), she highlighted that the provisions impacted on only three current prisoners, and will deter future police-killings. Regarding the nature of the limitation under section 7(2)(c), she recognised the severity of the provisions on life sentence prisoners, who may never be released or only be released when there is no prospect for a useful life post-release; and the aggravation of the retrospective application of the provisions on prisoners who had some prospect for release and a useful

210 The original section 74AAA(4) became section 74AAA(5) after the amendments. In full, section 74AB(3) states that the Board *may* make an order for parole for Minogue ‘only if, the Board (a) is satisfied ... [that Minogue] (i) is in imminent danger of dying or is seriously incapacitated and, as a result, [can] no longer ... do harm to any person; and (ii) has demonstrated that he does not pose a risk to the community; and (b) is further satisfied that, because of those circumstances, the making of the order is justified’.

211 These provisions mimic section 74AA of the *Corrections Act 1986* (Vic) which is directed at Julian Knight.

212 Both the police-killer specific and Minogue-specific provisions were also subject to the section 127A transitional provisions in the *Corrections Act 1986* (Vic), which ensures the parole exclusions provisions apply, even if the prisoner/Minogue has become eligible for parole, the prisoner/Minogue has taken steps to ask the Board for parole, and the Board has begun to consider whether the prisoner/Minogue should be granted parole: see above n 159 and accompanying text.

213 *Parliamentary Debates*, 24 July 2018 (n 209) 2238 (Lisa Neville, Minister for Police).

214 *Ibid* 2237. She recognised that police-killers *not* serving life sentences may also be subject to inhumane treatment ‘through the hopelessness that serving a full sentence may engender’: at 2238.

post-release life.<sup>215</sup> Weighing these factors, Ms Neville concluded the section 10(b) and section 22 violations cannot be justified, and the amendments were incompatible with the *Charter*, generating the need for the override.<sup>216</sup>

There was no explanation for excluding the five-year sunset provision, but there was an articulation of the ‘exceptional circumstances’: Ms Neville referred to the need to ensure sentences for ‘exceptional and egregious crimes ... are fully (or almost fully) served, and to protect the community from the ongoing risk of serious harm presented by Craig Minogue’.<sup>217</sup> The override statement justifications included ensuring police-killers fully serve their sentences, ‘provid[ing] legal certainty’, and ‘avoid[ing] a court giving the bill an interpretation based on charter rights which do[es] not achieve the government’s intention’.<sup>218</sup>

### 3 *Second Reading Speech*

The SRS again offered little regarding the *Charter* violations. Restricting the Board to ‘various court records’ when assessing the prisoner’s state of mind was described as ‘an important safeguard’, given that ‘information received outside of the criminal process may be less reliable as it is not tested in the same rigorous manner that a court tests evidence’.<sup>219</sup>

### 4 *Parliamentary Debate*

Debate in both Houses was brief, with the Legislative Assembly debate taking 10 and a half pages of Hansard, and debate in the Legislative Council taking 14 pages, with an additional 3 and a half pages in Committee Stage.

The rights of Minogue and other police-killer prisoners were *not* debated in the Legislative Assembly or Legislative Council. Use of the override was *not* debated in the Legislative Assembly. The override was mentioned in the Legislative Council by way of fact rather than scrutiny: having indicated that ‘exclud[ing] the operation of the charter *in toto*’ was ‘a very rare step’ and ‘worth exploring ... in committee’, the Opposition still ‘support[ed] that initiative’ and failed to raise it in committee.<sup>220</sup>

Parliamentarians acknowledged the HCA decision,<sup>221</sup> with many noting that separation of powers required Parliament to respect that decision.<sup>222</sup> There was,

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215 Ibid.

216 Ibid.

217 Ibid.

218 Ibid 2239.

219 Ibid. This follows remarks made in *Minogue: Minogue* (n 148) 271 [48] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), 280 [87]–[88] (Gageler J).

220 Victoria, *Parliamentary Debates*, Legislative Council, 26 July 2018, 3296 (Edward O’Donohue) (emphasis added) (*Parliamentary Debates*, 26 July 2018’).

221 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 July 2018, 2351–2, 2365 (Robert Clark), 2366 (Daniel Pearson), 2367 (David O’Brien), 2369 (Marsha Thomson), 2371 (Frank McGuire) (*Parliamentary Debates*, 25 July 2018’); *Parliamentary Debates*, 26 July 2018 (n 220) 3294 (Edward O’Donohue), 3297 (Susan Pennicuik), 3299 (Shaun Leane), 3304 (Georgina Crozier), 3306, 3317 (Gayle Tierney).

222 *Parliamentary Debates*, 25 July 2018 (n 221) 2366 (Daniel Pearson), 2369 (Marsha Thomson), 2369 (Bradley Battin); *Parliamentary Debates*, 26 July 2018 (n 220) 3299 (Shaun Leane). Some comments were less accommodating of the judicial decision: at 3300 (Shaun Leane), 3300 (Jeffrey Bourman).

however, substantial backing for parliamentary responses to court rulings, in support of inter-institutional dialogue, across the major parties.<sup>223</sup> There was also reference to ensuring the amendments reflected the original enacting-parliament's intention.<sup>224</sup> Community sentiment and the views of the electoral majority,<sup>225</sup> the deterrent effect of the parole restrictions,<sup>226</sup> and the fact only three prisoners would be impacted,<sup>227</sup> drove parliamentary support for the amendments.

Parliamentarians acknowledged the rarity and gravity of naming individuals in legislation,<sup>228</sup> considered the rights of the individual against community safety (in the abstract), and the heinous nature of the crimes – with the latter outweighing the former.<sup>229</sup> Ms Pennicuik again expressed concern about introducing mandatory provisions ‘that we have always spoken against’, rather than allowing the Board to retain its discretion.<sup>230</sup>

There were complaints about the government's one month delay in responding to the HCA decision, leaving Parliament with one week to enact the amendments.<sup>231</sup> The rushed legislative timetable meant Parliament proceeded *again* without a SARC report, with Ms Pennicuik noting that ‘we should not be considering bills

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- 223 Mr Pearson noted ‘we can ... say as legislators that we are responding to the decision made by the High Court’: ‘we have made a decision as a government to respond’ to the HCA: *Parliamentary Debates*, 25 July 2018 (n 221) 2366 (Daniel Pearson). Mr Pearson also observed that ‘[t]he High Court of Australia made a decision [and] the onus is back on us as legislators as to how we respond to that decision’: at 2367. Mr O’Brien stated ‘it was incumbent on this chamber, this Parliament, to pass legislation to overturn that decision’: at 2368 (David O’Brien). Ms Pennicuik indicated that ‘technical amendments’ were required ‘as a result of the High Court decision’: *Parliamentary Debates*, 26 July 2018 (n 220) 3297 (Susan Pennicuik). See also *Parliamentary Debates*, 25 July 2018 (n 221) 2369 (Marsha Thomson); *Parliamentary Debates*, 26 July 2018 (n 220) 3295 (Edward O’Donohue).
- 224 *Parliamentary Debates*, 25 July 2018 (n 221) 2369 (Marsha Thomson), 2371 (Frank McGuire); *Parliamentary Debates*, 26 July 2018 (n 220) 3306, 3316 (Gayle Tierney).
- 225 *Parliamentary Debates*, 25 July 2018 (n 221) 2366 (Daniel Pearson), 2367–8 (David O’Brien), 2368 (Marsha Thomson), 2369 (Bradley Battin), 2371 (Frank McGuire); *Parliamentary Debates*, 26 July 2018 (n 220) 3295 (Edward O’Donohue), 3300 (Shaun Leane), 3303 (Bernard Finn), 3305 (Georgina Crozier).
- 226 *Parliamentary Debates*, 25 July 2018 (n 221) 2369 (Marsha Thomson), 2371 (Frank McGuire); *Parliamentary Debates*, 26 July 2018 (n 220) 3301 (Joshua Morris), 3306 (Gayle Tierney).
- 227 *Parliamentary Debates*, 26 July 2018 (n 220) 3298 (Susan Pennicuik).
- 228 *Parliamentary Debates*, 25 July 2018 (n 221) 2367 (David O’Brien); *Parliamentary Debates*, 26 July 2018 (n 220) 3294 (Edward O’Donohue), 3297–8 (Susan Pennicuik). Some parliamentarians had no issue with naming Minogue: see, eg, *Parliamentary Debates*, 26 July 2018 (n 220) 3302–3 (Bernard Finn).
- 229 *Parliamentary Debates*, 25 July 2018 (n 221) 2367 (David O’Brien), 2369–70 (Bradley Battin); *Parliamentary Debates*, 26 July 2018 (n 220) 3294 (Edward O’Donohue), 3301 (Joshua Morris). The Coalition and Greens were concerned about the two-pronged nature of the amendments: did the Minogue-specific provision indicate uncertainty about the legality of the police-killer specific provisions? If so, would Parliament be required to enact further ad hominem legislation in the future?: at 3295 (Edward O’Donohue), 3298 (Susan Pennicuik). The government side-stepped the issue, claiming it was merely being ‘comprehensive’: at 3317 (Gayle Tierney).
- 230 *Parliamentary Debates*, 26 July 2018 (n 220) 3298 (Susan Pennicuik).
- 231 *Parliamentary Debates*, 25 July 2018 (n 221) 2351 (Mr Clark), 2368 (Mr O’Brien), 2370 (Mr Battin); *Parliamentary Debates*, 26 July 2018 (n 220) 3295 (Edward O’Donohue), 3303 (Bernard Finn), 3305–6 (Georgina Crozier). Indeed, Mr O’Donohue suggested that in the one last sitting week post-*Minogue*, the government should have used the opposition’s Private Members Bill, which ‘remained on the notice paper since its introduction in 2016’, and passed the law quickly: at 3294 (Edward O’Donohue).

... with very obvious human rights implications, in the absence of a report ... [T]hat there is no report from the committee on this bill is really unacceptable'.<sup>232</sup>

Given the SOIC and override declaration, one should expect more in-depth and sophisticated debate on the floor of Parliament. Again, the executive was able to 'wedge' the Parliament on a 'law and order'/community safety issue, with majoritarian-driven community safety overshadowing the rights-impact on the unpopular.

## 5 SARC

SARC reported on 7 August 2018, again under section 17(c)(ii) of the *PCA* because the amendments received royal assent on 31 July 2018.<sup>233</sup>

SARC reviewed the SOIC, focusing on section 7(2)(e). SARC argued that the *Serious Offenders Act 2018* (Vic) ('*SOA*') allowed the continuing detention of persons serving sentences for murder where the SCV 'determines (giving paramount consideration to the safety and protection of the community) that there is an unacceptable risk of the offender committing a serious sex or violence offence if the offender is in the community',<sup>234</sup> and that this was a less rights-restrictive, reasonably available alternative. On 20 August 2018, Ms Tierney responded to SARC's request to consider this alternative, dismissing it on the basis that the *SOA* 'is a civil, non-punitive scheme to manage offenders who pose an unacceptable risk of harm', whereas the parole reforms '[reinforce] that parole is a privilege and ensures that prisoners who commit the heinous crime of murdering a police officer are granted parole only in very restrictive circumstances'.<sup>235</sup>

SARC reviewed the override, noting that overrides are exercisable only in exceptional circumstances, which SARC again left for Parliament to assess.<sup>236</sup> However, SARC did criticise the breadth of the override. Section 31(6) refers to the *Charter* having no application 'to the extent of the declaration', and the legislative

232 *Parliamentary Debates*, 26 July 2018 (n 220) 3299 (Ms Pennicuk). Mr O'Donohue noted the absence of a SARC report as an 'unfortunate side effect' of the timing: at 3296–7 (Edward O'Donohue).

233 SARC was confident that the change in parole eligibility rules was constitutional based on *Crump*, and that the Minogue-specific provisions were constitutional based on *Knight*: see Scrutiny of Acts Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 11 of 2018, 7 August 2018) 7 ('*SARC Alert Digest*, 7 August 2018').

234 *Ibid* 9 (citations omitted).

235 SARC, Parliament of Victoria, *Alert Digest* (Digest No 12 of 2018, 21 August 2018) app 1 ('*SARC Alert Digest*, 21 August 2018'). SARC also asked Parliament to consider 'whether the retrospective application of s 127A is justified in the circumstances', particularly because the SOIC acknowledges that the impact of the limitation on rights is aggravated by the retrospective application of the law: *SARC Alert Digest*, 7 August 2018 (n 233) 6; see also above n 212. Moreover, SARC challenged the claim in the SOIC that 'these reforms will not capture any existing offender who was sentenced as a child', reproducing the advice to SARC from the Minister that there was one co-offender who was 17 years of age (almost 18 years) when he committed a murder and received a life sentence when he was an adult: *SARC Alert Digest*, 7 August 2018 (n 233) 9–10. SARC noted the international and comparative jurisprudence 'that imprisoning a person for life without parole for crimes committed as a child may be incompatible with human rights in some circumstances': at 10. In response, Ms Neville reiterated that the prisoner of interest was an adult when the life sentence was imposed, and that legislation will have limited effect on future child offenders: *SARC Alert Digest*, 21 August 2018 (n 235) app 1.

236 *SARC Alert Digest*, 7 August 2018 (n 233) 5–6.

note specifically refers to the inapplicability of the section 32 interpretation and section 36 declaration provisions. By contrast, this override declaration applies to the entire *Charter*, which includes exclusion of sections 32 and 36, as well as SARC's section 30 obligation of scrutiny, Victorian Equal Opportunity and Human Rights Commission's ('VEOHRC') section 41(a) obligation to annually report on override declarations to Parliament, and the Attorney-General's section 41(b) power to seek VEOHRC review of legislation.<sup>237</sup> SARC suggested that narrowing the override declaration to preserve the parliamentary and executive scrutiny mechanisms within the *Charter* would be a less rights-restrictive alternative. Ms Neville's response was dismissive, merely reiterating the arguments from the override statement and failing to answer SARC's criticism.<sup>238</sup>

## **E Transparent, Justified and Accountable Lawmaking?**

The executive and parliamentary treatment of the override was again problematic.

### **1 Charter Provisions**

The SOIC and SRS again identified circumstances that are not exceptional, and there was no explanation of or justification for suspending the entirety of the *Charter* and disapplying the five-year sunset provision.

Focusing on the 'exceptional circumstances', the Knight-analysis equally applies here. The egregiousness of a crime has not traditionally been considered an 'exceptional circumstance' that threatens national security or is akin to a state of emergency that threatens the safety, security and welfare of the people. Moreover, the Board could have been relied upon to decide parole applications under the recently reformed and significantly stricter parole legislation that privileges community safety;<sup>239</sup> or the *SOA* could have been used to continue Minogue's detention. Legal uncertainty and concern about rights-compatible interpretations should be addressed by the many *less* rights-restricting mechanisms in the *Charter*, before resorting to the override.

Parliament, proceeding without the SARC report, made no mention of the override. There was no debate about the substance of the 'exceptional circumstances', the suspension of the entire *Charter*, or the disapplication of the sunset provision.

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237 Ibid 11–12.

238 The Minister responded that the override 'avoids a court interpreting the Act in an unintended way'; 'provides legal certainty' regarding eligibility for parole of police-killers; and 'enhances a critical aspect of community safety and protection and addresses community concerns regarding the release of prisoners who commit the worst kind of crimes': *SARC Alert Digest*, 21 August 2018 (n 233) app 1.

239 After the rape and murder of Jill Meagher by a parolee, Adrian Bayley, the Victorian Government ordered a review of the operations of the Adult Parole Board, which was undertaken by former High Court judge, Justice Ian Callinan: Ian Callinan, *Review of the Parole System in Victoria* (Report, July 2013). Callinan's report resulted in a significant tightening of the laws relating to parole – see the *Corrections Amendment (Parole Reform) Act 2013* (Vic).

SARC again failed to give guidance on ‘exceptional circumstances’, leaving this assessment to Parliament – which SARC, by that stage, knew had not even debated the issue. SARC did critique the breadth of the override declaration, relying on the legislative notes to section 31(6) to ask Parliament to consider only excluding judicial oversight of legislation, rather than non-judicial oversight. Although SARC’s request of Parliament is welcome, it is not clear that SARC’s stricter reading of section 31 is required under the *Charter* – after all, section 31(1) states that Parliament ‘may expressly declare ... that an Act ... has effect despite being incompatible with one or more of the human rights or *despite anything else set out in this Charter*’.<sup>240</sup> Nevertheless, the development of a parliamentary practice where overrides exclude only judicial oversight would be preferable to broader oversight exclusions, and would support greater transparency of and accountability for the rights-impacts of decision-making.

## 2 *Minimum Standards*

Comparing with derogations, and like the *CAPA*, the amendments do not meet minimum human rights standards. First, suspension of the section 10 prohibition on cruel, unusual and degrading treatment and punishment is non-derogable.<sup>241</sup> Secondly, permanent suspension of rights is not a lawful response to exceptional circumstances.<sup>242</sup>

Thirdly, recall that the *Charter*’s legislative threshold of ‘exceptional circumstances’ falls short of derogation-justifying circumstances under international human rights law.<sup>243</sup> Moreover, the circumstances surrounding parole of Minogue and police-killers do not satisfy the override-justifying ‘exceptional circumstances’ or the higher-threshold of a derogation-justifying ‘public emergency which threatens the life of the nation’.<sup>244</sup>

Fourthly, there was no ‘careful justification’ ‘based on an objective assessment of the actual situation’.<sup>245</sup> As in *Knight*, the reasons put forward included the desire to fully or almost fully serve a life sentence, community safety, legal certainty and avoidance of rights-compatible interpretations. Taking community safety as the most relevant, this is the paramount consideration of the Board in parole cases, and there was no discussion about why the parole legislation was inadequate in this circumstance. The focus on the purposes of parole and the strength of parole

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240 *Charter* (n 2) s 31(1) (emphasis added). Note that Gageler J, in discussing the override in *Minogue* (n 190), seemed to support SARC’s narrower construction: ‘To the extent that an override declaration is made in respect of a statutory provision, the requirement to interpret that provision in a way that is compatible with human rights does not apply’ (citations omitted): *Minogue* (n 148) 276–7 [74]. Justice Gageler’s comments were general comments, and not made in response to specific arguments about the legality of the reach of an override declaration, but they may provide some support for SARC’s argument.

241 *ICCPR* (n 1) art 7.

242 Human Rights Committee, *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11(n 45) 2 [2]; *Derogations and COVID-19*, UN Doc CCPR/C/128/2 (n 45) 1 [2].

243 See above nn 58–9.

244 *ICCPR* (n 1) art 4(1).

245 *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (n 45) 3 [5]–[6] respectively.

legislation evident in the pre-legislative scrutiny for the Knight legislation and the initial-Minogue legislation was absent with the response-Minogue legislation.

Moreover, assuming that the proportionality test justifying derogations is at least as demanding as proportionality testing under limitations, and that the SOIC acknowledged the amendments did not meet the section 7(2) criteria, the ‘strictly required’ test is similarly tainted. In any event, the government’s analysis of section 7(2) was incomplete, given that it focused only on sections 7(2)(b) and (c), without analysing the nature of the rights at risk (section 7(2)(a)), the rational connection between the limits and their purpose (section 7(2)(d)), and less-restrictive alternative means (section 7(2)(e)).<sup>246</sup>

### 3 *Parliamentary Sovereignty and Dialogue*

These amendments could and should have proceeded precisely as they did *minus* the override. Enacting the amendments with the SOIC but *without* the override would have been the more transparent, accountable and justification-focused course under the *Charter*.

The amendments were stated in unambiguous and explicit language, and the secondary materials – the SOIC, SRS and parliamentary debate – made the statutory purpose behind the amendments clear. The SOIC outlined the relevant rights, and analysed some of the section 7(2) criteria that were and were not met. The SOIC highlighted how the judicial ruling was being responded to by making express what the HCA was not willing to imply – that the Board is to establish the prisoner’s state of mind (albeit based on the original trial, judgment, sentencing and appeal by way of safeguard),<sup>247</sup> and the Board may consider matters beyond the court proceedings when deciding whether to grant parole. The SOIC clearly acknowledged that on balance the amendments were rights-incompatible, but that the executive intentionally chose to proceed, and Parliament supported this.

The amendments and their legislative history would have precluded a section 32 rights-compatible judicial interpretation, and any section 36 declaration that might follow would have no impact on the validity of the amendments. Parliament would prevail, the judiciary would still contribute its views on rights-compatibility under the dialogue model, and the people would be more fully-informed about public decision-making.

Instead, use of the override undermined the dialogue. The pre-emptive use of the override, although lawful, stifled the judiciary’s contribution to the dialogue. Disapplying the five-year sunset provision ensures the dialogue is permanently paused. The breadth of the override undermines not just judicial contributions, but

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246 Refer to commentary on the government’s analysis of section 7(2) of the *Charter* in Part IV(D)(2) of this article.

247 ‘Reliance on the most reliable and robust information from the court record, subject to the court’s rules of evidence, is an important safeguard that was included given that the Board is not bound by the rules of evidence or natural justice’: *SARC Alert Digest*, 21 August 2018 (n 233) app 1. The Minister for Corrections refers to sections 71 to 711 of the *Corrections Act*, highlighting that ‘the Board is not bound by the rules of evidence or any other practices or procedures applicable to courts of record and may inform itself of any matter that it sees fit’: at app 1.

also non-judicial contributions from SARC, Parliament via the VEOHRC reports, and the Attorney-General.

## V CONCLUSION

Although the scope of this article does not permit extensive consideration of the Victorian pandemic-response legislation, lessons about the override can be learnt from the *Omnibus Act*. Responding to the health and consequential economic crises precipitated by COVID-19 is *precisely* the situation envisaged by override and derogation provisions. COVID-19 qualifies as a *Charter*-based ‘state of emergency which threatens the safety, security and welfare of the people of Victoria’ and an *ICCPR*-based ‘public emergency which threatens the life of the nation’.<sup>248</sup> Yet, notably, the executive and Parliament responded to this threat *without* resorting to suspending rights via an override declaration.

There is debate about whether the restrictions on rights in the *Omnibus Act* constitute valid qualifications to rights and/or are reasonable and demonstrably justifiable limitations on rights. Indeed, the provisions of the *Omnibus Act* are unprecedented:

- a Henry VIII clause temporarily allows the making of regulations that may disapply or modify the provision of a ‘Justice Act provision’;<sup>249</sup>
- the *Bail Act 1977* (Vic) has been temporarily amended to allow an appearance of a person before a court to be satisfied by appearance by that person’s legal representative or another person empowered by law to appear, and for the appearance to be by audio-visual link or audio link;<sup>250</sup>
- the *Children, Youth and Families Act 2005* (Vic) has been temporarily amended to alter the membership of the Youth Parole Board, to allow pre-sentence reports to be given orally, and to authorise the isolation of youths

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248 For context, as of September 2020, 22 State Parties lodged notices of derogation from the *ICCPR*, temporarily suspending certain obligations because of their responses to COVID-19. This figure is based on a search of the United Nations Treaty Collection’s ‘Depositary Notifications’ undertaken on 24 September 2020: ‘Depositary Notifications (CNs) by the Secretary-General’ *United Nations Treaty Collection* (Web Page) <[https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=\\_en](https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en)>. A similar figure is reported by The Right to Peaceful Assembly (an academic repository for national laws and practice governing the right of peaceful assembly), although this study is focused on derogations from article 21 of the *ICCPR* only: ‘Derogations by States Parties from Article 21 ICCPR, Article 11 ECHR, and Article 15 ACHR on the Basis of the COVID-19 Pandemic’ *Laws on the Right of Peaceful Assembly Worldwide* (Web Page) <<https://www.rightofassembly.info/news/states-begin-to-derogate-from-the-right-of-assembly-owing-to-the-covid-19-pandemic>>. As of May 2020, only 10 State Parties had derogated from the *ICCPR*: see Joseph (n 141) [6]. Joseph notes that the fact that only 10 States have formally derogated from the *ICCPR* ‘may be because other States have breached the notice requirements, and have in substance derogated from their obligations’, or ‘it may be because derogation has very limited applicability, even in the most extreme circumstances’: at [14]–[15].

249 *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) pt 2.1 (‘*Omnibus Act*). Under section 3, a ‘Justice Act provision’ is a provision in legislation administered by the Attorney-General, the Minister for Corrections, the Minister for Police and Emergency Services, the Minister for Victim Support, and the Minister for Youth Justice.

250 *Ibid* pt 3.2.

- in remand centres, youth residential centres and youth justice centres for the purposes of the detection, prevention or mitigation of COVID-19;<sup>251</sup>
- the *Corrections Act* has been temporarily amended to allow visits to prisons to be prohibited or restricted for the purposes of health and safety, to allow for mandatory protective quarantining of prisoners entering prisons for the safety, protection and welfare of prisoners and others, and to restrict the movement and placement of prisoners;<sup>252</sup>
  - various temporary amendments have been made to legislation regulating court and criminal trial procedures to accommodate the needs of social distancing, including allowing the County Court to decide issues based on written submissions and without an appearance from the parties, and allowing a criminal indictment to be tried by judge-alone without a jury;<sup>253</sup>
  - and much more.

Importantly, the SOC accompanying the *Omnibus Act* clearly articulated the purposes underlying the legislation, acknowledged that all *Charter* rights were engaged but four,<sup>254</sup> offered justifications for qualifications of and limitations on rights,<sup>255</sup> and highlighted numerous safeguards where rights were at risk – with the temporariness of the amendments being key.<sup>256</sup> Regarding purposes, the government referred to its obligations to protect the section 9 right to life, as well as the health and safety of Victorians, noting ‘[t]here is no more important purpose’.<sup>257</sup> Moreover, the measures were ‘designed to better deliver critical services while effectively managing public health risks’, and ‘are only intended to be used to support the response to the COVID-19 pandemic’.<sup>258</sup>

If any of these qualifications of rights are adjudged unlawful, or if any limitations on rights are held to be unreasonable and/or demonstrably unjustifiable, the executive and Parliament can respond to section 32 judicial rights-compatible interpretations and section 36 declarations as they fit, utilising the various *Charter* mechanisms at their disposal to express disagreement with the judiciary, and in a manner that preserves parliamentary sovereignty – all *without* the override.

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251 Ibid pt 3.3.

252 Ibid pt 3.4.

253 Ibid pts 3.5, 3.8.

254 *Parliamentary Debates*, 23 April 2020 (n 5) 1179 (Daniel Andrews). Only the section 8 right to recognition and equality before the law, the section 11 freedom from forced work, the section 26 protection against double jeopardy, and the section 27 prohibition on retrospective criminal laws, are not referred to in the SOC.

255 For example, regarding justifications for limiting rights in the context of the suspension of jury trials: see ibid 1180; and for justifications for limiting rights in the context of the mandatory protective quarantine upon entering prison and separation/quarantine/isolation of prisoners in the corrections system: see ibid 1181–2.

256 See, eg, *Omnibus Act* (n 249) ss 11, 22, 24 (referring to the new section 34D of the *Bail Act 1977* (Vic)), 27 (referring to the new section 79D of the *County Court Act 1958* (Vic)). The SOC noted ‘most of the proposed reforms are short-term measures that will sunset after six months’: *Parliamentary Debates*, 23 April 2020 (n 5) 1180 (Daniel Andrews).

257 *Parliamentary Debates*, 23 April 2020 (n 5) 1180 (Daniel Andrews). In the Second Reading Speech, Mr Andrews noted that ‘[t]he impact of the coronavirus (COVID-19) pandemic is without rival’: at 1196.

258 Ibid 1179–80.

There is also debate about the level of oversight of executive and parliamentary decision-making in these difficult circumstances. Yet again, a Bill with major rights implications, and which introduced extensive amendments throughout its 296 pages, was rushed through Parliament in one sitting day and *before* SARC had an opportunity to report.<sup>259</sup> For the executive, the requirement to table human rights certificates with statutory rules under section 12A and legislative instruments under section 12D of the *Subordinate Legislation Act 1994* (Vic) has not provided effective scrutiny.<sup>260</sup> Regulations made under the *Omnibus Act* are considered legislative instruments, and section 12D(3) states that a certificate is *not* needed if the legislative instrument ‘is of not more than 12 months duration and is necessary to respond to (a) a public emergency; or (b) an urgent public health issue’.

Crucially, the discussions about the substance of the *Omnibus Act*, and debates about pre-legislative and post-legislative scrutiny, will occur under the full spotlight of the *Charter* because none of its provisions were suspended under an override declaration. However, this leads to difficult questions. Firstly, if override declarations are being used in unexceptional circumstances, to suspend non-derogable rights, for more than a temporary and justifiable period, without any real oversight about whether the restrictions are strictly required by the circumstances – but are not being used in situations envisaged by section 31 and contemplated by international and comparative derogation equivalents – should the section 31 override provision be repealed? Secondly, if the override is not needed to preserve parliamentary sovereignty, and if the override in practice is used to stifle the inter-institutional dialogue about rights and their restrictions, should section 31 be repealed?

These questions were addressed by Michael Brett Young in the eight-year review of the *Charter*. For these very reasons – that Parliament remains sovereign regardless of the override, the override suppresses dialogue, and its use to date has not met the ‘exceptional circumstances’ requirement and has disappplied

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259 SARC, Parliament of Victoria, *Alert Digest* (Digest No 5 of 2020, 2 June 2020) 8–40. SARC again reported under section 17(c)(i)–(ii) of the *PCA* (n 186): at 8. The SARC report engaged with very few rights issues: (a) it made a technical point about scrutiny under the *Subordinate Legislation Act 1994* (Vic): at 29; (b) it sought clarification about whether the amendments were ‘to authorise the isolation of youth detainees for more than 14 consecutive days’ and whether quarantine requirements were compatible with the ‘right of a child offender to be treated in a way that is appropriate for his or her age’: at 33; (c) whether a retrospective criminal law had been introduced by altering orders made *for* security or safety reasons *into* orders made for health reasons: at 34–5; (d) whether changes made to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) were incompatible ‘with the *Charter*’s rights against disability discrimination’: at 38; (e) whether changes to residential tenancy laws deprived landlords their ‘*Charter* right not to be deprived of property other than in accordance with law’, and tenants the ‘*Charter* right to freedom to choose where to live’: at 40.

260 These are similar in terms to SOC’s/SOICs: see *Subordinate Legislation Act 1994* (Vic) ss 12A(2), 12D(2).

section 31(7) – and more,<sup>261</sup> Brett Young recommended ‘the section 31 provision for an override declaration be repealed’.<sup>262</sup>

Rather than rely on overrides, Brett Young stated that ‘[i]t would be preferable to rely on statements of compatibility (noting any incompatibility), which provide a consistent, transparent and accountable process for the Government to identify how legislation may limit *Charter* rights or be incompatible with *Charter* rights’; with SOCs/SOICs being ‘just as transparent and public as the override process’ but ‘preferable, because it keeps the courts involved in the human rights dialogue’ without compromising parliamentary sovereignty.<sup>263</sup>

Brett Young was confident that the section 7(2) limitations provision was sufficient to address a true state of emergency: ‘that Parliament could pass laws in relation to a severe natural disaster or other emergency, for example, limiting people’s *Charter* rights and those limits would likely be justifiable under section 7(2)<sup>264</sup> without resorting to an override or SOIC. He noted SARC’s conclusion in the four-year *Charter* review that ‘emergency legislation is also likely to be accompanied by an explanation of its justification and sunset provisions’, and that future emergencies may not require new legislation, but may be adequately ‘dealt with under existing emergency management powers or by Ministerial order’.<sup>265</sup>

The *Charter* is designed not only to preserve parliamentary sovereignty, but to also enhance the transparency of and accountability for public decision-making that impacts on rights, and to require justifications for the rights-costs of such decisions. The override, in design and practice, has undermined such scrutiny and accountability. It also allows the substitution of the inter-institutional dialogue with a representative monologue at the worst of times – in times of public emergency, inter-institutional dialogue about rights is most needed as a check against the usual enlargement of largely unchecked executive power. If there is one positive from the current pandemic, perhaps it will be the repeal of section 31 of the *Charter*.

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261 Brett Young (n 3) 198. The reasons given include: ‘it does not serve the policy purpose of acting as a brake on limitations of human rights; it is not necessary to preserve parliamentary sovereignty; and it fails to make clear to the public that Parliament can enact human rights incompatible legislation without an override declaration’.

262 Ibid 200. See recommendation 46 on page 200:

The provision for override declarations in section 31 of the *Charter* be repealed. The explanatory materials for the amending statute should note that Parliament has continuing authority to enact any statute (including statutes that are incompatible with human rights), and the statement of compatibility is the mechanism for noting this incompatibility. If legislation is passed that is incompatible with human rights, the responsible Minister should report to Parliament on its operation every five years.

263 Ibid 199. As for ongoing oversight of legislation subject to SOIC, Brett Young suggests:

To enable Parliament’s ongoing oversight of incompatible legislation, the responsible Minister could be required to report to Parliament every five years on the operation of a provision that was incompatible with human rights when passed. This approach would be stronger than the current approach, whereby legislation that is incompatible with human rights is passed without the requirement for ongoing oversight. SARC and the Victorian Equal Opportunity and Human Rights Commission report on statements of incompatibility in their annual reports. These reports would be useful for preparing the five-year report to Parliament.

264 Ibid. Brett Young cited the Human Rights Law Centre submission (Submission 95) in support: at 200.

265 Ibid 200.