"Enhancing Australian democracy with a federal charter of rights and responsibilities"

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The subject of my address is enhancing Australian democracy with a federal charter of rights and responsibilities. I address that subject from the perspective of a judge of a state court – the Supreme Court of Victoria – and the president of Australia's largest tribunal – the Victorian Civil and Administrative Tribunal.

I think is it important for state judicial officers[1] to contribute to the debate about a federal charter. The state courts are part of the national legal framework, the state courts and tribunals would be affected by a federal charter and state judicial officers, particularly those in Victoria, which has the *Charter of Human Rights and Responsibilities Act 2006*, have something significant to contribute to the debate from their unique perspective. Of course, the same may be said of judicial officers in the Australian Capital Territory, which has Australia's first charter, the *Human Rights Act 2004* (ACT).

Australian democracy is constituted by a federal system under a constitution founded on the pre-existing state frameworks, which includes their judicial systems. It is supported by a federal legal system in which the federal and state components usually exercise different jurisdictions. But the Constitution allows the Commonwealth to enlist the state courts for the exercise of its judicial power, and it has frequently done

[1] By judicial officers I mean the judges, magistrates and members of the state courts and tribunals.

so. Thus, as Gaudron J put it in *Kable v Director of Public Prosecutions (NSW),*[2] "one of the clearest features" of the Australian Constitution is "that it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth."

Judges of the state courts are often conscious of administering the state component of a federal system. They might conduct the trial of a person accused of a federal crime, enforce the standards of trade and commerce stipulated in federal trade practices legislation, hear and determine purely federal proceedings under the cross-vesting legislation and interpret and apply federal legislation in countless respects. Their active engagement with federal law gives state judges a legitimate interest in the debate about a federal charter, for a charter would impact on the content and interpretation of federal legislation which they help to administer.

Their exercise of the judicial power of the Commonwealth integrates the state courts into the federal judicial system in other important respects. The state courts are not governed by the separation of powers doctrine enshrined in Chapter III of the Commonwealth Constitution, which applies to the federal courts. However, by reason of their exercise of federal judicial power, the state courts must conform to certain fundamental organising principles which are derived from the Commonwealth Constitution. Those principles apply to a state court as a court whatever be the jurisdiction it is exercising.[3] Thus the judges of the state courts have a little federal blood in their veins. They have a stake in debate about the laws which influence the overall operation of the federal legal system, as would a charter.

The judicial officers of the state tribunals have the same stake for related reasons. When conferred by state legislation, as is the case with the civil jurisdiction of VCAT,[4] the state tribunals can and do exercise the judicial power of the states. But, not being courts (except perhaps for specific statutory purposes),[5] they cannot

2 (1995) 189 CLR 51, 102.
3 See generally *Kable v Director General of Public Prosecutions* (1995) 189 CLR 51.
4 See for example s 108(1) of the *Fair Trading Act 1999*, which confers jurisdiction on the tribunal to hear and determine consumer and trader disputes and small claims.
5 See eg *Australian Postal Commission v Dao* (1986) 6 NSWLR 497 (Equal Opportunity Tribunal of New South Wales held to be a "court" for the purpose of the *Suitors' Fund Act 1951* (NSW)). VCAT has been held to be a "court" for certain statutory purposes: see eg *Treverton v Transport*

exercise the judicial power of the Commonwealth, for that can only be exercised by a court and not a tribunal.[6] Thus the state tribunals do not administer federal law as do the state courts. Nevertheless, the state tribunals play a very important role in Australia's national justice system. The judicial officers of the state tribunals frequently apply federal law in exercising their civil and administrative jurisdictions. Federal law is often the source of relevant rights and obligations in state tribunal proceedings. Interpreting federal legislation is an everyday occurrence in the state tribunals. If a federal charter with an interpretative principle were enacted, it would probably apply to everybody interpreting federal legislation, including the judicial officers of the state tribunals.

The state and federal tribunals are not integrated like the state and federal courts. But they interact strongly in organisational and legal respects. The state and federal tribunals are members of the Council of Australasian Tribunals, which is very active in supporting the professional development of both members and staff. The state and federal tribunals administer some legislation that is very similar, such as freedom of information and privacy legislation. There is developing a common body of tribunal jurisprudence, which is referred to by state and federal tribunals when deciding cases in these areas. The enactment of a federal charter would influence the administration of federal tribunals, and their interpretation of federal legislation, which would have downstream effects on the work of the state tribunals. Therefore the judicial officers of the state tribunals also have a legitimate interest in the debate about a federal charter.

Victoria has the *Charter of Human Rights and Responsibilities Act 2006*. It is the first state to have a charter. As a judge of the Supreme Court of Victoria, and more recently as the president of VCAT, I have been able to observe the effects of the Charter on the operation of the law and the conduct of government in this State, albeit for a relatively brief period. I will draw on this experience in the comments I will now make.

Accident Commission (1998) 14 VAR 150 (the *Evidence Act 1959* (Vic)) and *Sherman v One.Tel Ltd (in liquidation)* [2001] VCAT 1896 (the *Corporations Act 2001*).

[6] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

How ironic it is that the loudest criticism of a charter is that it is undemocratic, yet the main reason for enacting a charter is to enhance the operation of democracy. Enhancing democracy was indeed the main reason for the enactment of the Charter in Victoria, as was made clear in the the principles identified in the preamble as founding the Charter and in Attorney-General's second reading speech in the Legislative Assembly.

The first principle on which the Preamble states the Charter is founded is that -

> "human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;…"

This is the first paragraph of the second reading speech:: [7]

> This is an historic day for Victoria. Today the government fulfils its commitment to provide better protection for human rights for all people in Victoria through the enactment of a charter of rights and responsibilities that will strengthen and support our democratic system.

That a charter can be seen by some persons committed to democracy as a democratic negative and others having that same commitment as a democratic positive exposes the real issue in the debate, which concerns the nature of the democratic system itself.

In general terms, democracy is the election by the people of a parliament that will govern for the people. It is the parliament's responsibility to make laws for which it will be politically accountable to the people. Similarly, the due conduct of the executive – by which I mean all facets of public administration – is the responsibility of the elected government of the day.

Those elements of democracy are of fundamental importance and form the basis of Australia's parliamentary system of government. Some say a charter would impair the operation of democracy so defined. If that were true, it would be a sufficient reason for not having a charter. While retaining and respecting the fundamental elements of the parliamentary system, a charter appeals to a broader, more inclusive and empowering concept of democracy, one wherein every member of the community knows what to expect from their government and how they should treat others.

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[7] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289 (Mr Rob Hulls, Attorney-General).

That, in broad terms, is the foundation of the *Human Rights Act 1998* of the United Kingdom, which was followed in the ACT and Victorian legislation. Thus the Charter in Victoria is ordinary legislation of the Parliament, and can be amended in the usual way. It is an expression of the democratic will, and it could be repealed or amended by the expression of that same will. The courts and tribunals (and everybody else) are required to interpret legislative provisions compatibly with the stipulated human rights, so far as it is possible to do so consistently with their purpose.[8] But, once interpreted, and whether it is compatible with human rights or not, legislation cannot be declared invalid, and must be applied. This protects the constitutional primacy of parliament-made law in the legal system.

Under the Charter, the Supreme Court of Victoria has been given a power to examine legislation so that, through a declaration process, it might refer to parliament legislation that cannot be interpreted consistently with human rights. Such a declaration does not make the legislation invalid, but it triggers an important parliamentary process by which the Minister administering the legislation must respond.[9] By this process, a dialogue is facilitated about the content and operation of the legislation – hence this is sometimes called the "dialogue model".

This model doesn't please all proponents of human rights charters. Many would prefer the constitutional charter that has been adopted in Canada. Nobody is interested in the model adopted in the United States of America, whose historical antecedents Australia doesn't share. Interestingly, Canada began with a legislative model and later adopted a constitutional model.

Nobody suggests the Victorian Charter is a perfect instrument. No doubt there are aspects of its operation that might be improved. These can be examined in the review which the Attorney-General must cause to be carried out by 2011.[10] The Parliament has, in the Charter, already determined that the review must include consideration of

[8] *Charter of Human Rights and Responsibilities Act 2006*, s 32(1).
[9] See s 37.
[10] Section 44(1).

some of the key issues, such as the inclusion of additional human rights[11] and the improvement of the Charter system of enforcement.[12]

Despite its arguable limitations, the Charter is indeed historic legislation. I would note the conclusion of the Victorian Equal Opportunity and Human Rights Commission in its 2007 report on the operation of the Charter, that the community can be "confident that a strong foundation has been laid for the successful implementation of the Charter and the emergence of a human rights culture across government in Victoria."[13]

Now, a strong case can be made that democracy in Victoria has been enhanced by the adoption of the Charter. This does not mean that those relying on human rights arguments always succeed. Indeed, as we shall see, and depending on the context, the Charter requires careful judgments to be made, case by case, about whether limitations on human rights are justified in a free and democratic society. Still, the positive benefits that might be obtained by the adoption of a federal charter can be illustrated by reference to the operation of the Charter in Victoria. I would highlight these features of the Charter from the administrative, legislative and judicial spheres of its application:

- government agencies must act consistently with the Charter unless legislation specifies otherwise
- new legislation must be compatible with human rights unless the Parliament makes an override declaration
- all legislation must be interpreted compatibly with human rights so far as possible consistently with its purpose, and can be identified by the Supreme Court if it cannot

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[11] Section 44(1)(a) includes for consideration (non-exhaustively) the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Right of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*. At present, the rights specified in Part 2of the Charter are derived from (but do not exactly replicate) the rights specified in the *International Covenant on Civil and Political Rights.*

[12] Section 44(1)(f) includes for consideration whether further provision should be made in the Charter for bringing proceedings and awarding remedies in respect of acts for decisions of public authorities that are unlawful because of the Charter.

[13] Victorian Equal Opportunity and Human Rights Commission, *2007 Report on the operation of the Charter of Human Rights and Responsibilities* (2008), 68. The Commission is required to report on the operation of the Charter annually by s 41(1).

Debate among lawyers about a charter is usually focussed on the interpretation of legislation, the concept of proportionality and the change "of some of the rules of engagement"[14] between parliament and the courts. Important as these questions are, there is another dimension to the operation of a charter which greatly influences the lives of ordinary people - improving the conduct of public administration so as ensure it respects and promotes of human rights.

The philosophy behind the Charter is that, when individuals see their human rights respected by government, this is of value in itself – human rights are "human" rights, and respecting them builds respect for the rule of law and society's democratic institutions. The idea is that, at the level of the individual, people are more likely to be conscious of their responsibilities to society if they find respect for and vindication of human rights in its public administration and laws, and individuals who are more empowered and conscious of their own human rights are more likely to be conscious of their responsibilities to others. At the level of society, the idea is that, when the relationship between government and the community is made by a charter to reflect human rights values, society is encouraged to become more rights-respecting and tolerant. This is a fundamental objective of a charter, one which gives effect to an evolved concept of democracy. But I repeat, for the reasons I gave earlier, it does not mean everybody with a human rights argument wins. Democratic interests may justify limitations imposed on human rights under law.

Of course, Victoria has existing legislation which offers protection of specific human rights, the equal opportunity[15] legislation being a good example. The Commonwealth parliament has enacted similar legislation. But the purpose of a charter is to provide protection that is systematic and comprehensive, which specific legislation is not.

The Victorian Charter implements this purpose by s 38(1), which provides:

> Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

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14 Chief Justice Murray Gleeson, "The meaning of legislation: context, purpose and respect for fundamental rights", Victoria Law Foundation Oration, 31 July 2008, 29.

15 *Equal Opportunity Act 1995.*

Most State government officers and agencies in Victoria are "public authorities"[16] under the Charter and are thereby bound to act consistently with the stipulated human rights.[17] Since the Charter was enacted in 2006, the government has undertaken an extensive internal program of human rights auditing, compliance and training. The program has encompassed the entire Victorian public service, which includes, for example, public hospitals and schools, government welfare service providers, the Office of Housing, the Director and Office of Public Prosecutions, Victoria Police,[18] and local councils, their councillors and staff.[19] Courts and tribunals also are public authorities "when … acting in an administrative capacity".[20] In preparation for the commencement of the Charter, the staff of the courts and tribunals have also engaged in human rights training. As occurred in the United Kingdom, appropriate training of judicial officers has been provided. This was done independently by the Judicial College of Victoria, and under the guidance of an advisory committee comprised of representatives from the Supreme Court, County Court, Magistrates' Court and VCAT, which I have chaired on the invitation of Chief Justice Marilyn Warren.

Australia has a complex and diverse multi-cultural community. As in Victoria, a federal charter would promote tolerance and inclusiveness in society. The federal government and its many agencies make a vast array of decisions that affect human rights. If a federal charter were to be enacted, the benefits of improving the public administration that have been achieved in Victoria could be achieved on a national scale.

Under the Charter's new mechanisms for introducing and passing legislation, proposed legislation must be accompanied by a statement of compatibility with

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[16] The definition is in s 4(1) and includes "a public official within the meaning of the *Public Administration Act 2004*" (par (a)), and "an entity established by a statutory provision that has functions of a public nature" (par (b)). There is a power to declare by regulation an entity is not a public authority: see s 4(1)(k).

[17] By s 38(2), this does not apply if under a Victorian or Commonwealth statutory provision, or otherwise "under law", the public authority "could not reasonably have acted differently or made a different decision."

[18] Victoria Police is defined as a public authority by s 4(1)(d).

[19] Councils within the meaning of the *Local Government Act 1989*, and their councillors and staff, are defined as a public authority by s 4(1)(e).

[20] Section 4(1)(j). Acting in an "administrative capacity" means exercising administrative power in the common law sense as compared with judicial power: *Sabet v Medial Practitioners Board of Victoria* [2008] VSC 346, [119]-[126] per Hollingworth J.

human rights[21] and be examined by a parliamentary committee, who must report on whether it is incompatible.[22] The Parliament can make an override declaration under which legislation will have effect despite being incompatible.[23] The Charter states Parliament's intention that "an override declaration will only be made in exceptional circumstances."[24]

The statement of compatibility must be made by the member "who proposes to introduce a Bill into a House of Parliament".[25] It must state whether, in the member's opinion, the Bill is compatible with human rights and how, and whether it is incompatible and if so how.[26]

It cannot be contended that every statement made in Victoria so far is of the same quality. Nor can it be contended that the contents of a statement must be accepted as incontrovertible. Only the Supreme Court can finally determine the human rights compatibility or incompatibility of legislation. But having to make the statement focuses the mind of the proposing member, who will usually be the minister responsible in the government of the day, on the human rights implications of a Bill. How this can influence the preparation of proposed legislation is amply demonstrated by the Attorney-General's statement of compatibility with respect to the Assisted Reproductive Treatment Bill 2008.[27] It is very detailed and sets out a careful analysis of its human rights implications.

The parliamentary committee is the Scrutiny of Acts and Regulations Committee established by the *Parliamentary Committees Act 2003.* The Charter extended the functions of that committee to considering whether proposed legislation was directly or indirectly "incompatible with the human rights set out in the Charter".[28] The value and importance of the work of this committee should not be underestimated. It is a powerful committee that can carefully examine proposed legislation against the

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[21] Section 28.
[22] Section 30.
[23] Section 31(1).
[24] Section 31(4).
[25] Section 28(1).
[26] Section 28(3).
[27] Victoria, *Parliamentary Debates,* Legislative Assembly, 10 September 2008, 3436-3441 (Mr Rob Hulls, Attorney-General).
[28] Section 17(a)(vii) of the *Parliamentary Committees Act.*

Charter and produce a considered report on the subject. It publishes a regular Alert Digest which collects the reports for the general information of the Parliament and the community. I would give the committee's Charter Report on the Assisted Reproductive Treatment Bill 2008, the Prohibition of Human Cloning for Reproduction Bill 2008 and the Research Involving Human Embryos Bill 2008[29] as a good example of the performance of the committee's scrutiny function.

In these ways, the Parliament has chosen to place a new discipline on members of parliament who propose new legislation, and on the Parliament itself, to consider its human rights impact. In doing so, it has created more effective means by which it can address that impact, and make any necessary modifications, at an early stage. Alternatively the Parliament can make an override declaration with respect to incompatible legislation, for which it would accept direct political responsibility. By these new mechanisms, the Victorian Parliament has enhanced its own consideration of human rights, which is a powerful democratic statement in itself.

Arguably, Commonwealth legislation has an even greater capacity to impact on human rights than state legislation, and of course it is national in scope. The case for considering human rights at an early stage is very strong in the development of federal legislation. The statement of compatibility and committee scrutiny mechanisms adopted by the State parliament under the Charter in Victoria could equally be adopted by the Commonwealth parliament under a federal charter, with the same potential benefits.

The new obligation on public authorities demonstrates the application of the Charter in the administrative sphere. The new parliamentary mechanisms demonstrate the application of the Charter in the legislative sphere. In the new principle governing statutory interpretation, and also new the procedure in the Supreme Court for identifying legislation that cannot be interpreted compatibly with human rights, we can see the application of the Charter in the judicial sphere.

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[29] See Scrutiny of Acts and Regulations Committee, *Alert Digest No 14 of 2008*, 3.

Under the interpretative principle, all statutory provisions – the entire Victorian statute book – must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.[30]

The first actual application of the principle, in Victoria if not in Australia, was in VCAT. In *Guss v Aldy Corporation Pty Ltd,*[31] the tribunal was concerned with a person's statutory right to a rehearing when an order is made at a "hearing" at which they did not appear.[32] The applicant was the subject of an order made in her absence at a "compulsory conference" at which the tribunal may make orders in the absence of parties.[33] Senior Member Vassie held the right to a rehearing of orders made at hearings extended to orders made at compulsory conferences. A reason he gave for this conclusion was that one of the human rights stipulated in the Charter was the right to a fair hearing.[34] He said the more generous interpretation of the provision giving the right to a rehearing was compelled by the interpretative principle in the Charter.[35]

In Victoria, it is early days with the interpretative principle. The court has not yet considered many important questions that arise with respect to its interpretation and application. What the principle does, at the least, is to bring human rights immediately to the mind of everybody involved in statutory interpretation, whether they be a judicial officer, government official or legal practitioner. When state legislation of any kind is examined to ascertain its meaning, there must always be a question about whether the legislation affects a human right, and whether it can be interpreted compatibly with that right, consistently with its purpose. Of course, there are existing rules, under both the common law[36] and statute,[37] with respect to the significance of purpose in statutory interpretation, as well as existing rules of the common law with respect to interpreting statutes[38] and exercising judicial powers and

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30 Section 32(1).
31 [2008] VCAT 912.
32 Section 120(1) of the *Victorian Civil and Administrative Tribunal Act 1998.*
33 Section 87 of the *Victorian Civil and Administrative Tribunal Act 1998.*
34 Section 24(1).
35 [2008] VCAT 912, [36].
36 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 187 CLR 384, 408.
37 Section 35 of the *Interpretation of Legislation Act 1984.*
38 *Dietrich v R* (1992) 177 CLR 292, 306; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265; *Minister for Immigration and Ethnic Affairs v Teoh* (1994-1995) 183 CLR 273, 287; *Jumbunna*

discretions[39] consistently with international human rights. But the interpretative principle stands apart as a definite and particular legislative directive about how Victorian statutory provisions should be interpreted. This can only strengthen the human rights compatibility of Victorian statutory law.

Speaking generally, whether a statutory provision is compatible or incompatible with human rights depends on two considerations. First, whether the provision engages a human right – such as by impairing or limiting its exercise. If the provision did not engage a human right, no question of compatibility would arise. If it did, the next consideration would be whether the impairment or limitation was justified – which is why it is sometimes said that a human rights framework creates a culture of justification. For some, that is a negative. I think it is a positive, because the exercise of fundamental human rights should not be limited without demonstrable justification.

"Justification" in the human rights context has a special meaning of central importance. Under the Charter, human rights are not absolute. An action of a public authority or a statutory provision is not incompatible with human rights for the reason only that it limits those rights. It will be incompatible only if the limitation is unjustified. A good example of the application of the justification test is in the statement of compatibility concerning the Assisted Reproductive Treatment Bill 2008. It sets out several respects in which the Bill limits human rights and why, in the opinion of the Attorney-General, the limits were justified.

The test of justification is known in the international jurisprudence as "proportionality". It requires a range of public interest considerations to be balanced. Under the Charter, this test is set out in s 7(2). As the Attorney-General said in the second reading speech, this "general limitations clause embodies what is known as the

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Coal Mine NL v Victorian Coal Miners Association (1908) 6 CLR 309, 363; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38; and see generally DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 38-42, 176-177.

[39] See eg *Tomasevic v Travaglini* (2007) 17 VR 100, 114; *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1, [66].

'proportionality test.'"[40] Section 7(2) is much more detailed and helpful than its equivalent in other jurisdictions, and provides this:

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

The Victorian parliament spoke in s 7(2) – which is the crucible in which so many human rights issues are resolved – with carefully chosen words that, like the principles expressed in the Preamble, make an express link between human rights and the operation of democracy. Human rights can only be subjected under law to "such reasonable limits as can be demonstrably justified in a free and democratic society". The idea is that human rights enhance democracy, but must give way to a demonstratively greater democratic interests expressed under law.

The court has not yet considered the proportionality test in s 7(2), so any observations I make must be tentative. Again speaking generally, and without intending to foreclose argument on the subject, the proportionality test would appear to have three main spheres of operation. First, the test may be relevant when working out the limits within which a discretionary action or decision of a public authority may be taken or exercised compatibly with human rights. Next, under the interpretative principle in s 32(1) of the Charter, the test may be relevant when working out how far it is possible to interpret a provision (consistently with its purpose) compatibly with human rights. Whether that is correct, and the precise point that s 7(2) might come into the application of the interpretative principle, has not been decided and I express no view about it. Lastly, when the Supreme Court is determining whether to issue a declaration of inconsistent interpretation with respect to a statutory provision, the test will be relevant in working out whether any limitation imposed by the provision is justified so that, if not, the provision will be incompatible with human rights. I have

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[40] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Mr Rob Hulls, Attorney-General).

said enough about the operation of the test in the first two spheres. I will conclude by making some observations about its operation in the third.

The Supreme Court has issued no declarations of inconsistent interpretation.. But the possibility is there as part of the framework created by the parliament in the Charter for working out difficult problems that might potentially confront Victoria as a modern state democracy. It gives the Supreme Court a significant role to play, and responsibility to exercise, for which it is well suited, because it is impartial and independent, and because, over time, and with the assistance offered by the national and international jurisprudence,[41] it will develop valuable expertise in the interpretation and application of human rights law. The paramount position of the Victorian parliament is protected because, to repeat, under the Victorian model, the court cannot decide, and a declaration of inconsistent interpretation does not decide, that legislation is invalid. The dialogue created by this mechanism does, however, greatly strengthen the capacity of the parliament to address human rights issues. This, it can be strongly argued, has significantly enhanced Victorian democracy. So too, it can be strongly argued, would Australian democracy be enhanced, with a federal charter.

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[41] Section 32(1) of the Charter expressly allows reference to international law and to the judgments of domestic, foreign and international courts relevant to human rights when interpreting a statutory provision.