

THE SOCIAL CONSTRUCTION OF HUMAN RIGHTS LEGISLATION: INTERPRETING VICTORIA'S STATUTES THROUGH THEIR LIMITATIONS

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Interpreting human rights statutes through their objectives encourages their description as empowering instruments with their hortatory language emphasising the potential of each instrument to protect and promote rights. This article examines Victoria's Equal Opportunity Act 2010 (Vic) and Charter of Rights and Responsibilities Act 2006 (Vic) through a different lens and argues that a focus on their limitations and derogations offers a better understanding of the nature and extent of the human rights protection that each purports to provide.

These limitations are no mere peripheral encumbrances and help shape the rights protecting functions of each statute. This article adopts a social constructivist approach to explain how, as socially constructed instruments, the operation of the limitations reveals an ambivalent role for each statute. The design and functionality of each statute, with their self-limiting provisions, means that each acts to sustain as well as challenge the existing power relationships and social arrangements.

I INTRODUCTION

We are more accustomed to interpreting human rights legislation in terms of its potential to deliver enhanced protection of our rights, both real and imagined. This interpretation should not be viewed as unusual when we acknowledge the dominance of legal analysis in the rights discourse and its tendency to be overly optimistic as to what human rights legislation can achieve.¹ This legislation should rather be viewed in more ambiguous terms, often serving various powerful interests, particularly those bolstering the political status quo. This article's focus is upon the two principal Victorian human rights Acts, the *Equal*

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¹ Conor Gearty, 'Against Judicial Enforcement', in C Gearty and V Mantouvalou, *Debating Social Rights* (Hart Publishing, Oxford, 2011) 1.

Opportunity Act 2010 (Vic) (the EO Act) and the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the Charter) and how they are framed by their various limitations and the extent to which these limits define how protecting of rights each statute is in its operation.

The objectives clauses of the two statutes contain a number of ‘motherhood’ statements and the language of each statute tends to be generally hortatory rather than binding on duty holders. Such language is not uncommon when it comes to human rights legislation and is arguably somewhat misleading as to the statutes’ true impact. In spite of the normative content of each about how rights will be protected through its operation, each statute is an ordinary piece of legislation and remains subject to amendment at will.

Rather than as an asocial universal abstraction, rights as held by individuals are best seen as contextual and subject to the interaction between an individual and the rest of her society.² If we accept that individual rights, as expressed through such legislation, are capable of limiting power or challenging existing power relationships, then it is equally understandable that such legislation, in the way it institutionalises these rights, can serve to sustain the existing power relationships in various ways. How a particular statute balances rights and whether and how certain rights are privileged over others can shape the nature and level of rights protection overall, whose interests are advanced, and the extent to which power may or may not be constrained. Particularly through how they are legally framed, rights can end up playing a highly ambivalent role in respect of power.³

This article examines each of these statutes through the lens of their limitations and argues that by focusing upon how the limitations and derogations within each of Victoria’s human rights statutes influence their design and operation we can better understand how each has been framed to be ambivalent instruments of the state. It is argued that the effect of these limitations and derogations should not be considered peripheral to the intent and operation of each statute but rather as central to understanding their rights-protecting capabilities. This article applies a social constructivist approach to argue that these human rights statutes are conditioned by social liberalist understandings that consider formal equality as the norm and seek to confine the legislated rights to civil and political ones. The broader social reality within which these statutes have been enacted is one framed within the dominant (neo)liberal paradigm of contemporary society with its promotion of market-led politics and an aversion to state intervention. The social constructivist explanatory approach postulates that the social reality is created through the interaction of social actors, bringing

² Neil Stammers, ‘Human Rights and Power’ XLI (1993) *Political Studies* 70, 72–73.

³ Neil Stammers, ‘Social Movements and the Social Construction of Human Rights’ (1999) 21 *Human Rights Quarterly* 980, 999.

with them their ideas and interests, while at the same time being conditioned by their particular social context.

In this study, it is argued that despite the expansive human rights rhetoric of each statute, the nature of the human rights *policy in action* of each is more restricted and is to be understood from how political decision-makers have interpreted the social reality at the time of each statute's enactment. According to this approach, how each particular social reality is constructed is necessary to fully appreciate its true nature⁴ and its role in shaping the legislation of that time. Of course, the influence of particular interests and ideas changes over time and this results in a changed social reality. This is something of which astute political decision-makers will be keenly aware.

How each of these statutes works in practice is a result of the interplay of these interests and their respective influence. In terms of rights legislation, how that reality is constructed determines the nature of the rights that are recognised, what effect will be given to them, and in doing so 'provides the necessary conditions for intentional human activity as well as circumscribing it'.⁵ Interpreted in this way, we can see that the human rights as enunciated in the *EO Act* and the Charter have been 'created, re-created, and instantiated by human actors in particular socio-historical settings and conditions'.⁶

While each statute makes reference to particular international human rights norms, their effectiveness in law and policy depends on the translation of these by political decision-makers influenced, as they must be, by the dominant political discourse and ever mindful of important social and political interests. These are two ordinary Acts of Parliament and, as such, are expected to perform certain roles on behalf of society. Their dominant purpose is presented as the protection and promotion of certain human rights. This purpose will be supported by some social actors though there will be others, often highly influential social and economic actors, who see their interests being better served through the maintenance of certain constraints upon the protection of these rights.

The increasing acceptance of rights within the social reality of contemporary Victoria is reflected in particular provisions in each of these statutes under consideration. That some of the rights protecting provisions would have been inconceivable in Victoria only two decades ago helps us to understand the impact of the changing social

⁴ Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (Penguin Books, 1967) 30.

⁵ Roy Bhasker, *Reclaiming Reality* (Verso, 1989) 77.

⁶ *Ibid* 981.

reality within which political decision-makers find themselves. Equally, the continuing existence of certain restrictions to and limitations upon these rights also provides some of the answers to explain how the law can be used to limit the impact of any rights protecting changes.

Investigating these statutes as socially constructed instruments helps to explain the tension inherent in each statute as attempts are made to translate certain international legal human rights standards into domestic legislation while accommodating powerful social and economic interests. The social construction behind these legal instruments has been exposed periodically through, for instance, debates over the impact of particular exceptions or exemptions in the *EO Act* and those around efforts to enhance the Charter's enforcement regime. Legislators interpret the social reality in various ways, some perhaps seeing opportunities to advance the rights-protecting provisions, others perhaps seeking to bolster the rights limiting ones. The almost inevitable compromises that result, as had been the case with those at the time of the statutes' enactment, in turn help us to understand the true nature of that changed social reality.

The article will focus upon those provisions within each statute which, either as part of their design or operation, act to adjust both the statute's descriptive and normative rights-protecting content. In the *EO Act* a number of provisions act positively to enhance substantive equality, such as in the recognition both of minorities in certain areas of employment and education, and of differential capacity, and these can be best explained in terms of the changed social reality since its predecessor was passed in 1995. Likewise, this can be seen in the Victorian government's recent response to the 2015 Charter Review supporting certain recommendations. For instance, those seeking to assist the Victorian Equal Opportunity and Human Rights Commission (the Commission) in its work promoting and protecting rights and the reconsideration of the exception of religious bodies from the Charter's public authority obligations can both be explained in terms of identifying changes to the contemporary social reality.

Against those provisions which reflect the hortatory statements in each statute as to the protection and promotion of rights must be placed those limitations and derogations that seriously compromise the effectiveness of particular rights-protecting provisions and more generally detract from the ability of each statute to protect rights. This article will discuss these in terms of the purpose they serve and how they reflect a social reality that either privileges certain powerful interests and/or, in broader terms, bolsters the (neo)liberal socio-economic view prescribing a more limited role for rights-protecting statutes.

This ambivalence inherent in each of the two statutes, as expressed through the interplay of rights and their limitations, varies depending upon which ideas influence which provisions. For instance, we find that some ideas support certain interests, such as those framing the right to privacy, while others serve to enhance the participation of minorities, thereby limiting the right to equality. Still other ideas, such as allowing restrictive employment practices, are about privileging certain interests over others. Through a mix of limitations, derogations and their apparent contradictions we can identify the nature of the political compromises built into the structure and operation of each statute as they both give effect to certain rights while supporting the status quo and providing safety valves to seek to curtail demands for further rights restrictions.

II NEOLIBERALISM AND THE RIGHT TO EQUALITY

Australia's embrace of economic rationalism, as a variant of neoliberalism, in the 1980s brought with it deregulation, privatisation, de-institutionalisation and the contracting out of state services. Neoliberalism with its mantra of individualism treats all individuals as equal in a formal sense and its approach to economic management undermines the role of the state to champion changes to employment and social practices which would advance substantive equality, or the equality of outcomes. In so doing, neoliberalism acts to effectively mask the underlying social inequality.⁷ Australian law and policy making around rights fits comfortably into what has been termed a liberal egalitarian paradigm where the regulating of apparent inequalities is of greater interest than advancing an 'equality of condition' amongst the people⁸ and appears more about process than results.⁹ Neoliberalism's emphasis upon market-based policy outcomes has also brought with it a level of resistance by the state to framing legislation and advocating policy and practices which would empower people as rights holders. This has contributed to the reluctance to legislate a national bill of rights which would ideally empower people and, for example, impose further duties upon employers and educational authorities, the two most common targets of discrimination claims.

⁷ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 14.

⁸ J Baker, K Lynch and S Cantillon, *Equality. From Theory to Action* (Palgrave Macmillan, 2nd ed, 2009) 31.

⁹ Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 334.

Australian anti-discrimination legislation and the two subnational bills of rights in the ACT and Victoria have not been immune from what can be called complacent apathy at best and a strident anti-rights sentiment at worst.¹⁰ Equality has been a more important value than individual liberty in Australia and the local variant of democracy has been very much about egalitarian notions of social justice.¹¹ This particular notion of equality was expected to be delivered through a strong state, arranged federally and acknowledging the paramount position of parliament.

While equality has had a strong resonance in the broader community, often vernacularised in terms of some kind of ‘mateship’, it has been translated into legislation with a strong social liberalist flavour with its emphasis upon formal equality over substantive or outcome-oriented equality. There is a serious question over whether the state has, through its law making, moved beyond ‘same treatment’ and actually legislated to change social arrangements to address inequality. The *EO Act 2010* made tentative moves towards addressing systemic discrimination but amendments the following year drew back from this broader approach to equality. What this means is that under Victorian legislation, the prevailing policy approach continues to be to view a particular problem or issue, where discrimination is proven, as being about finding a remedy against a ‘bad individual in what is generally a fair and equitable society’ (Gaze 2002, 330). Both statutes address the right to equality but in slightly different ways. Where the *EO Act 2010* refers to the elimination of discrimination and to the right to equality (as also included in the Charter) as part of its Objectives in section 3, the Charter refers to the principles of non-discrimination and equality in its Preamble and gives a broad equality guarantee in section 8, though this is narrower than the definition given in the *International Covenant on Civil and Political Rights* (ICCPR).¹²

III LIMITING THE EQUAL OPPORTUNITY ACT

The *EO Act 2010* introduced a positive duty on organisations to eliminate discrimination, sexual harassment and victimisation while encouraging the identification and elimination of the systemic causes of these. The *EO Act* states that it seeks to promote and protect the right to equality as found in the Charter and to promote and facilitate its

¹⁰ Australia’s reluctance to embrace human rights in a legislative form is as relevant today as it was two decades ago when highlighted by Hilary Charlesworth, ‘The Australian Reluctance About Rights’ (1993) 31 *Osgoode Hall Law Journal* 195 and Brian Galligan ‘Australia’s Political Culture and Institutional Design’, in P Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law and Human Rights and Equal Opportunity Commission, 1994) 55.

¹¹ Galligan, above n 10, 59–60.

¹² Justice Bell referred to this difference in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination) (Lifestyle Communities) (2009) VCAT 1869*.

progressive realisation as far as reasonably practicable. In particular, section 3 (d) (iii) states that for there to be substantive equality, reasonable adjustments, reasonable accommodation and the taking of special measures may be required. Adopting many of the recommendations of the 2008 Gardner review¹³, the Act recognises the need to progressively achieve substantive equality through requiring employers, educational authorities and service providers to make reasonable adjustments for a person who has an impairment and only allows discrimination in these areas once such efforts have been made (ss 20, 40 and 45). Only after the employer or authority has made reasonable adjustments can it then claim an exemption from the application of the Act with an exception allowed if the person providing access to or use of public premises could not reasonably be expected to avoid the discrimination. In this case, the onus is on the person providing the premises to show that it would be unreasonable to make the adjustments for access to or use of the premises by the impaired person (s 58).

The 2010 *EO Act* was also a partial response to a 2009 report by the Victorian Parliament's own Scrutiny of Acts and Regulations Committee (SARC) (Scrutiny of Acts and Regulations Committee 2009b). The amendments which followed brought the Act into line with other jurisdictions and updated a number of important causative and comparative elements to the legislation. However, the broader framework of the limitations to the Act as well as a number of important exceptions remained. In all, the Act prohibited discrimination on 17 grounds and at the same time allowed for significant derogation from the right to equality through some 53 exceptions. The limitations to the *EO Act* are to be found in the various derogations, namely its exceptions, exemptions and special measures.¹⁴ These instances of 'legal exceptionalism' effectively remove the jurisdiction of the anti-discrimination laws rather than acting as defences against the accepted application of these laws.

A General Exceptions

The most important derogations are the general or automatic exceptions and while some have general application, others apply in

¹³ Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (Department of Justice, 2008). This review was conducted by Julian Gardner, the former Public Advocate, for the Department of Justice.

¹⁴ *Exceptions* are provisions in the Act which excludes a specified activity or a specified entity from compliance with the Act while *exemptions* refer to permission granted by a tribunal or administrative agency to someone or an organisation which excuses their compliance.

specific areas of public activity. The *EO Act* provides for exceptions which exclude a specified activity or a specified entity from compliance with the Act's anti-discrimination provisions and act to either privilege certain interests or to protect interests which might otherwise be disadvantaged. The 2010 *EO Act* retained but tightened the general exceptions. This reflected a growing recognition that the social reality had slightly changed in favour of the removal or dilution of certain restrictive employment practices while the then government was reluctant to unduly disturb the status quo so as to invite a reaction from certain identified important social interests, such as organised religion. There are a range of specific exceptions in the Act on the basis of religion and relate to the activities of religious bodies, religious officials and religious schools. Religious bodies can claim a broad exception which allows them to discriminate on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity. All the religious body needs to show is that its action conforms to its religious doctrines, beliefs or principles and that the action was necessary to avoid injury to the religious sensitivities of its adherents (ss 82(2)).

The religious exception has been a matter of some political contestation. An amendment, as part of the *EO Act 2010*, removed the application to employment unless the organisation could show that conforming with the religions' doctrines, principles or beliefs was an 'inherent requirement' of the position. The new Coalition government reversed this in 2011 and removed the inherent requirement test and widened the religious exception. The then Attorney-General, in reinstating the wider exemption, argued that the provision in the *EO Act 2010* would 'dramatically undermine the rights of parents to send their children to schools that are able to provide the values-based education their parents are seeking for them...'.¹⁵ While a little obscure, it can be seen that in public policy terms, this reinstatement represents a widening of the scope of the private sphere in terms of a child's education, despite the fact that these religious schools receive extensive public funding.¹⁶ To complement this exception in the *EO Act*, the Charter does not require a public authority to act compatibly with a human right if it would have the effect of impeding or preventing a religious body from acting in conformity with the religious doctrines, beliefs or principles (ss 38(4)). This reveals both the continuing importance of the liberal notion of the public/private divide, supporting an unregulated private sphere linking with the continuing social power of organised religion to support discriminatory employment practices.

This remains a highly controversial exception given its broad nature and the obvious conflict between the right to religious freedom and the

¹⁵ Victoria, *Parliamentary Debates*, (2011) Legislative Assembly, 5 May, 1363–67.

¹⁶ Margaret Thornton, 'Excepting Equality in the Victorian Equal Opportunity Act' (2010) 23 (3) *Australian Journal of Labour Law* 240, 242–43.

right to equality. While all people should be entitled to equal treatment in being employed in educational institutions, the exception allows religious schools to refuse to employ, for example, de facto couples, single mothers, gays or lesbians without breaching the Act. The current Labor government has flagged that it will be seeking to amend the legislation to make it more difficult for religious organisations to discriminate on the basis of their faith or sexuality.¹⁷ This reflects a changing social reality in Victoria with growing support for the recognition of Lesbian Gay Bisexual Transgender and Intersexual (LGBTI) rights in all areas of employment. Any proposed change can be expected to be fiercely contested, revealing not only the tension between the two rights of religion and equality but, importantly, the continuing societal influence of organised religion, and related interests, particularly the Australian Christian Lobby.

The extent to which religious organisations can rely on this exception has been brought into some doubt by the Court of Appeal's decision in *Christian Youth Camps Ltd & others v Cobaw Community Health Service Ltd & others*.¹⁸ The majority held that the camp was not a religious organisation and thus could not rely on the religious exemption. It would now seem that how such an organisation is established, the activities it performs, as well as how closely they align with the espoused religious principles may all be examinable matters for an organisation claiming such an exemption in the future.

Under section 27 of the previous 1995 *EO Act*, an employer could discriminate on the basis of age in paying an employee under the age of 21 years according to her/his age. While this was repealed by the 2010 Act, the *Fair Work Act 2009 (Cth)*,¹⁹ which in Victoria, governs all but the most senior state public employees, allows for the payment of a junior wage for people in this age group and thus has the same discriminatory effect. In its 2009 report, SARC recommended that the old provisions be amended to allow for trainee wages relating to the level of experience or training without reference to a person's age. It recognised that while the federal *Age Discrimination Act 2004* continued to authorise youth wages, there was no reason for Victoria to follow suit.²⁰

¹⁷ Henrietta Cook, 'Religious Groups Hit out at Labor's Move to Rewrite State's Equal Opportunity Laws' (2014) *The Age Online*, December 8, <<http://www.theage.com.au/action/printArticle?id=63954978>>.

¹⁸ (2014) VSCA 75.

¹⁹ See eg, *Fair Work Act 2009 (Cth)* sub-s 153 (3), 195 (3).

²⁰ Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995—Final Report* (Parliament of Victoria, November, 2009).

The *EO Act 2010* remained silent on this particular matter, failing to take advantage of the opportunity to counter the federal position and bring itself into line with a number of other states. The 2011 amendments, reflecting the then Coalition government's industrial position favouring employers, reinstated the original 1995 provision for age related payments for those under 21 years (s 28A). At the other end of the age spectrum, the Act allows discrimination, though more narrowly drawn, as to particular activities in relation to both age benefits and concessions (s 87) and in relation to eligibility to superannuation funds (ss 78 and 79). Compared to the issue of youth wages, the public policy purpose here is more defensible but it also reveals, as reflected in other social policies, that political decision-makers identify the cohort of people over 60 years of age as a more potent social and political force than the under 21 years of age cohort.

Part 4 of the *EO Act 2010* provides for a number of specific exceptions and these are identified in terms of either or both the persons or groups of persons or a particular activity. Discrimination is also permitted by the Act on the basis of political belief or activity (where employment is with a political party or a Minister of Parliament), and also where only offering employment to a person with a particular attribute when that employment is to provide service for people with the same attribute. The direct relevance of a person's political beliefs or activity when employed by a political party or a Minister of Parliament makes this restriction both obvious and sensible. The specificity of this discriminatory ground can be contrasted with the general nature of the exception applying to employment by a religious body or institution.

Other provisions proscribe qualifying bodies from discriminating but these bodies are able to set reasonable terms in relation to the qualification required to enable a disabled person to qualify for a relevant profession. In another provision, which represents a policy tilt in favour of small enterprises, partnerships of less than five can only discriminate where reasonable while, more generally, employers can claim an exception in respect of unpaid or volunteer workers. Recognising a growing awareness of sexual harassment, provision is made for unpaid or volunteer workers to make claims under this ground.

The liberal notion of a public/private regulatory divide is highlighted in section 24 where an employer can discriminate in respect of domestic or personal services²¹ even though the *EO Act 2010* removed the exception available for family and small businesses to practise discrimination, as recommended by the 2009 Victorian Parliament's

²¹ This has been extended to cover the employment of people who work in employment agencies and who provide domestic or personal care services staff, if so requested: section 24 of the *Equal Opportunity Act 2010*.

Scrutiny of Acts and Regulations Committee (SARC) report. In line with changes in labour regulation covering the private sphere, the separation of the private or domestic sphere of activity from the public one was more tightly drawn. However, it was only in the public sphere where there was full regulation by anti-discrimination legislation, with obligations applicable across all the Act's grounds. The exception now relates to either the employer's home or if the services are to be provided in the home of another who has requested such discrimination. In similar fashion, the Charter excludes its jurisdiction over a public authority if it applies its activities to 'an act or decision of a private nature' but fails to provide further guidance as to what constitutes 'private' for these purposes (ss 38 (3)). In contemporary society with its diversity of employment arrangements and commercial transactions, this distinction between the regulated public and unregulated private spheres is a social construction that continues to reflect 'western liberal thought which traditionally removed the family or home life from public scrutiny'.²² Reviews of the Charter to date have not sought to either clarify what is meant by 'private' or to recommend a tightening of this provision.

B 'Protective' Exceptions

The *EO Act 2010* allows an 'educational authority' to operate an educational institution or program wholly or mainly for students of a particular sex, race, religious belief, age or age group or students with a general or particular impairment' (s 39). Reasonable adjustments are also required to be made for any person with an impairment so they can benefit from the educational program on offer (s 40) and an authority can then seek an exemption if the person still cannot participate after section 40 has been complied with and reasonable adjustments have been made (s 41). Equally, exceptions can be sought by an educational authority for an age-based admission scheme or a quota in relation to students of different ages or age groups (s 43). These derogations have a protective rationale aimed at promoting inclusion by otherwise disadvantaged groups or recognising differences (including gender based), which are needed to avoid possible discriminatory outcomes. This recognition of difference and protective mechanisms such as quotas result from a changing social reality promoting greater social

²² Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 (4) *Journal of Law and Society* 448, 453.

inclusion with calls upon the state for positive intervention to address perceived inequalities.

Other specific exceptions relate to clubs for minority cultures (s 66), single sex (s 68) or of particular age groups (s 67), and separate access for men and women (s 69) but the onus is on the applicant to show, for example, that it is necessary to preserve a minority culture. A club or sport must satisfy the objective test of reasonableness as to its particular circumstances to avoid a claim of discrimination. Related 'protective' exceptions are to be found in relation to competitive sporting activities and the exclusion of persons on the basis of sex or gender identity but these exceptions have been tightened to restrict their application to where strength, stamina or physique is relevant, exclusion is necessary for progression to elite, national or international competition, or to facilitate the participation of people of the non-excluded sex (ss 72 (1), 72 (1A) and 72 (1B)).

Difference is also recognised in other ways in the *EO Act* where discrimination is allowed on the basis of disability and physical features where this would be reasonably necessary for overarching public policy purposes such as to protect the health, safety or property of any person (ss 86 (1)). Similarly, services, benefits or facilities can be established to meet the 'special needs' of people with a particular attribute, with eligibility to access these services limited to those persons and without proving any particular disadvantage (s 88). An employer can limit the offering of positions to people of one sex where there is a genuine occupational requirement that employees be people of that sex or be necessary for the authenticity or credibility in art or performance (s 26) but this exception is only available in certain circumstances and reflects societal developments acknowledging gender differences, sensitivity and respect.

This plethora of general or automatic exceptions reflects society's recognition that disadvantage can take many forms and the state has particular responsibilities to try to minimise the impact of any such disadvantages. The protective exceptions remain so as to ensure that 'equality of opportunity' is not distorted by people with specific identifiable differences being otherwise given 'same treatment'. Given their aim to promote substantive equality, these protective exceptions constitute important departures from the Act's underlying dominant principle of formal equality.

C Temporary Exemptions

Temporary exemptions are permissions granted by the Victorian Civil and Administrative Tribunal (the Tribunal) to a particular person or organisation, effectively excusing them from compliance. They perform the role of safety valves which promote flexibility in the equal

opportunity regime. An exemption can only exist for five years, be specific or general in nature and may, for example, be sought if the person or class of persons, or conduct or activity is not covered by an exception but where an argument can be made that it should apply in particular circumstances. An exemption may be allowed by the Tribunal even though an exception might only apply to a part of the conduct or an aspect of that conduct. For example, it may be that only some aspects of a role being performed in a business or in an educational authority attract an exception such as where an inherent requirement for a job be that it be occupied by a woman. In such a case, the Tribunal could then grant an exemption for the other aspects of the role so that only a woman would be employed in the position.²³

In considering such an application, the Tribunal not only examines whether an exception or exemption already applies but whether the conduct would amount to prohibited discrimination, the relevant circumstances of the case and importantly, whether the exemption is a reasonable limitation on the right to equality in the Charter, as given in section 8 of the Charter (s 90 of the *EO Act*). A further consideration was brought out in the *Boeing Australia Holdings case*²⁴ which involved employing only persons who were Australian citizens in certain parts of its workforce so as to satisfy US International Traffic in Arms Regulations. The Tribunal accepted an ‘overriding public interest’ argument to justify conduct being taken by the company outside the statutory prohibitions on discrimination. This decision has been rightly criticised for placing economic interests ahead of the right to equality²⁵ and reveals the privileging of powerful economic interests.

The Tribunal’s discretionary power as to temporary exemptions could now be subject to the reasonable limitations test as provided in section 7 (2) of the Charter and in *Lifestyle Communities Pty Ltd (No.3)*²⁶, Justice Bell sought to give meaning to the application of the Charter and said the Tribunal must undertake a ‘balancing act’ between the nature of the right being limited and the importance, purpose, nature and extent of the proposed limitation. To be compatible with the Charter, an exemption must thus either be a measure under section 8

²³ Victorian Equal Opportunity and Human Rights Commission, *Applying for an Exemption under the Equal Opportunity Act 2010*, Seminar, (VEOHRC, 31 July 2012) 7.

²⁴ *Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption)* (2007) VCAT 532.

²⁵ Law Institute of Victoria submission to the Scrutiny of Acts and Regulations Committee’s hearing: Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995—Options Paper* (Parliament of Victoria, May 2009) 148–49.

²⁶ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination) (Lifestyle Communities)* (2009) VCAT 1869.

(4), akin to a special measure under the *EO Act 2010*, or a justified limitation on human rights under section 7 (2).²⁷ A similar case to the *Boeing* case was the *BAE Systems case*.²⁸ In this case, which related to circumstances after the Charter came into effect, the Tribunal granted an exemption but placed certain employment restrictions upon the applicant's business, requiring them to enter into negotiations to lessen the coverage and impact of the exemption.

Such decisions generally favour major economic interests over social ones and have a certain precedential value making it difficult for other jurisdictions not to grant similar exemptions where millions of dollars in profits are at stake.²⁹ The Tribunal has a wide discretion to grant exemptions and it remains unclear as to whether it will be prepared to follow Justice Bell and limit this discretion by reference to the Charter. While the Tribunal's power to grant, renew or revoke exemptions under the *EO Act* is as a 'public authority' as defined by and subject to the Charter,³⁰ there is no conclusive evidence to show that the Tribunal considers that this exercise of power is so constrained. There is no doubt that the Tribunal has sought to address the balance of rights and interests in considering applications for temporary exemptions. Yet, not surprisingly, its decisions are made within the broader social liberalist context and reveal the influence of important economic interests and the checking of rights.

D Positive Discrimination

As with other anti-discrimination statutes, the *EO Act* recognises the need for 'measures to be taken to ensure that persons from all sections of society have a genuinely equal chance of satisfying the criteria for access to a particular social good'³¹ and seeks to do this through a number of positive measures in favour of certain individuals or groups. These measures are arguably the most protective of the *EO Act's* measures and represent some recognition of a changing and more inclusive social context. As forms of discrimination, they are directed towards the goal of equality of results or outcomes, thereby playing an important role in seeking to balance rights within the *EO Act*.

The *EO Act* allows organisations to take special measures to promote or realise substantive equality (s 12) and such measures can cover all grounds or attributes. The measures are available for a group of people with one or more protected attributes such as race, sex or disability and

²⁷ Bill Swannie, 'House Rules' (2010) 84 (7) *Law Institute Journal* 58, 60.

²⁸ *BAE Systems Australia Limited (Anti-Discrimination Exemption)* (2012) VCAT 349.

²⁹ Thornton, above n 16.

³⁰ Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law* (VEOHRC, 2013) 78.

³¹ Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 19.

are usually provided where a special need exists and for groups or a class of people. In Victoria someone can be granted a special measure in the form of a temporary individual exemption.³² Under the *EO Act* such an exemption need not be for an existing designated job but can be given where a designated position is created to promote substantive equality in an organisation. For example, Aboriginal employment in the public sector has been facilitated by a toolkit which provides for either ‘identified jobs’ which, while open to all, require a sound knowledge of Aboriginal community, society and culture or where ‘designated jobs’ are only open to Aboriginal candidates.³³

The test to determine whether something is a special measure for the purpose of promoting equality was established in 1985 by the High Court in *Gerhardy v Brown*³⁴. For the High Court, a measure would qualify if it conferred a benefit, was conferred on members of a class, membership of which is based on an identified characteristic, and the measure was for their advancement. The *EO Act* has expanded on this High Court classification by requiring that a special measure must be undertaken in good faith, be reasonably likely to achieve its purpose of promoting or realising substantive equality, be a proportionate means of achieving the purpose, and be justified because the members of the group have a particular need for advancement or assistance (s 12 (3)). For example, an educational provider may decide to create a bursary each year to provide accommodation for one Indigenous student who lives remotely. However, the measure would fail the test if its purpose was found to not be the promotion or realisation of substantive equality. The Commission sees a special measure as a ‘balancing mechanism to facilitate equality but not unfairly advance one group over another once the playing field is even.’³⁵ These positive measures are important but their capacity to effect change is inhibited given they can only be applied on a case by case basis and do not directly address more general issues of indirect discrimination, particularly in employment and education. Such measures amount to tacit recognition that without reference to such promotion of substantive equality, the Act is only focusing on the provision of formal equality.

The *EO Act* has taken a more forthright approach to challenging powerful societal interests where it places a positive duty upon employers to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation, with even greater

³² Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-discrimination Law* (Federation Press, 2nd ed, 2014) 525.

³³ Kate Jenkins, ‘Equal Opportunity Act 2010—Reflections and Opportunities’, Speech to *Victorian Government Solicitors Office Seminar* (24 March 2014) 8.

³⁴ (1985) 159 CLR 70, 126.

³⁵ Victorian Equal Opportunity and Human Rights Commission, *Special Measures* (VEOHRC, Melbourne, 2015).

responsibilities placed upon large organisations (s 15). Where these organisations are public authorities, they must also act in accordance with section 38 of the Charter. While this additional duty upon employers under the *EO Act* represents a move away from the individual complaints-based model, it is written in hortatory rather than mandatory language.³⁶ The person introducing a special measure rightly has the onus of proof, but whether it meets the test or should be modified still depends on someone submitting a complaint to the effect that the dominant purpose of a special measure is not the general promotion and realisation of substantive equality. Thus, in deference to its underlying liberalist principles, the Act here continues to rely on individuals for enforcement.³⁷

E Defences to Discrimination

Defences are *internal* exceptions and can only be entertained once the duty or duties under the *EO Act 2010* have been admitted. The defence of statutory authority enables a person to be released from the obligations imposed on them by the anti-discrimination laws so that they can comply with the requirements of another statute (s 75). The High Court has, in the past, stated that such a defence should not be interpreted expansively³⁸ and in Victoria, as in a number of other states, the defence is only available when it is ‘necessary’ for the respondent to act as he or she did in order ‘to comply with’ the requirements of another statute.³⁹ In so making the *EO Act* subservient to all other Acts, this provision emphasises the ‘ordinariness’ of the *EO Act* and while SARC, in its 2009 Report, recommended the provision’s repeal within a reasonable timeframe,⁴⁰ the then government did not support this recommendation. This was a missed opportunity for if human rights norms are to be placed at the centre of public policy, a provision such as this should either be repealed or be made subject to serious restrictions.

F Limitations in the EO Act’s Regulatory Design

Equal opportunity legislation in Australia reflects its liberal foundations and provides the individual complaint mechanism as the means by which to seek redress. The Labor government had trumpeted as one of its objectives in the *EO Act 2010* that it would seek to give the

³⁶ Thornton, above n 16, 244.

³⁷ Dominique Allen, ‘Victoria Paves the Way to Eliminating Discrimination’ (2010) 23 (4) *Australian Journal of Labour Law* 318.

³⁸ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 413.

³⁹ Rees, Rice and Allen, above n 32, 563.

⁴⁰ Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995—Final Report* (Victoria, Parliament of Victoria, November, 2009) 55.

Commission the power not only to respond to individual complaints but to inquire into systemic discrimination directed against entire groups. Systemic discrimination was addressed in the Second Reading Speech to the 2010 Bill and in the Explanatory Memorandum⁴¹ one positive outcome from the resultant legislation was that the Commission could focus on broader, more systemic, issues rather than investigating all complaints.⁴² Overall, however, the resultant legislation made only tentative steps in this direction, principally through the further resourcing of the Commission's educative role.⁴³

The Commission was given an enforcement role by the *EO Act 2010* similar to that given to the *Fair Work Ombudsman* and the *Australian Competition and Consumer Commission* to move it towards a compliance driven model rather than a purely complaints model. On the basis of information received, the Commission can investigate how a group or class of persons were being treated in an organisation and should discrimination be found, it could exercise a range of powers, including issuing a compliance notice. However, these new Commission powers were amended in the 2011 Act before they had come into operation, limiting its powers to either enter into an agreement with a person about action required to comply with the Act or to refer the matter to the Tribunal (s 139).⁴⁴

The then Coalition government obviously considered that giving the Commission additional enforcement powers was at odds with how it envisaged the regulatory role of this Act within what it considered to be the social reality of the time with its prescription for a (neo)liberal and non-interventionist policy approach. In the words of the then Attorney-General, '[T]he 2010 Act did not achieve a fair balance between the competing rights and obligations that make up the equal opportunity framework. It failed to recognise the potential for harm that it created by giving the [Commission] sweeping coercive powers...'⁴⁵ Leaving the Commission with this limited set of powers has been criticised for consigning it to be 'a watchdog that can bark but cannot bite'⁴⁶ and highlights the problem that anti-discrimination regulation

⁴¹ Attorney General Hulls referred to shifting 'from complaints processing to encouraging and facilitating best practice and compliance through education, information and advice': Victoria, Parliament of Victoria, 2010, Explanatory Memorandum, *Equal Opportunity Bill 2*.

⁴² The Commission can issue practice guidelines or provide advice on an action plan which an organisation may voluntarily develop to improve compliance with the *EO Act*.

⁴³ Rees, Rice and Allen, above n 32, 31.

⁴⁴ The Commission can still also report the matter to the Attorney-General or directly to Parliament.

⁴⁵ See above n 15, 1363.

⁴⁶ Dominique Allen, 'Equal Opportunity. Unfinished business' (2011) 36 (4) *Alternative Law Journal* 273, 274.

continues to be considered a threat to the interests of some powerful political forces.

IV THE CHARTER AND ITS LIMITATIONS

The Charter approaches the matter of the protection and promotion of human rights from a different perspective to Victoria's anti-discrimination legislation even though anti-discrimination is one of the Charter's foundational principles. The definition of discrimination in section 3(1) is written in similar terms to the *EO Act 2010* and the government has accepted the recommendation of the 2015 Charter Review that the Charter's definition of discrimination be clarified and linked to the *EO Act* by limiting it to 'direct or indirect discrimination' on the basis of a protected attribute in the *EO Act 2010*.⁴⁷ The Charter, as a parliamentary bill of rights, is a much broader instrument in its scope and is designed to influence all other legislation, present and future, to encourage rights compatibility through the issuing of Statements of Compatibility (s 28) and to promote rights-based decision-making by public authorities (s 38).

The breadth of the Charter's scope needs to be balanced against other design features which have a limiting impact upon its operation. The Charter ensures the supremacy of parliament, with the judiciary only able to make Statements of Inconsistency when comparing a statute to the Charter rather than declaring the statute invalid (s 36). Also, Parliament need only engage in a *dialogue* with both the judiciary and the community over any incompatible legislation. These restrictions are not unusual for such a bill of rights and together constitute a key mechanism for an institutional dialogue about rights rather than a monologue by one institution.⁴⁸

The Charter states from the outset that no right is absolute and each should be seen as balanced against both other rights and against other competing interests. The government has held to that position despite arguments that some rights should be recognised as absolute, such as the right to protection from torture and cruel, inhuman or degrading treatment.⁴⁹ While the Charter is careful not to be so comprehensive as

⁴⁷ Michael Brett Young, *From Commitment to Culture. The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government, 2015) 227; Department of Justice and Regulation, Government response to the 2015 review of the Charter of Human Rights and Responsibilities Act (Victoria, Department of Justice and Regulation, 2016) 14.

⁴⁸ 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 *Melbourne University Law Review* 422, 423.

⁴⁹ Human Rights Law Centre, *Submission to the Inquiry and Review of the Charter of Human Rights and Responsibilities* (Human Rights Law Centre, 2011), < <http://hrlc.org.au/submissions-to-the-review-of-the-victorian-charter/> > 77.

to limit, by act or omission, any right that is available under any other legislation (s 5), it only includes civil and political rights, as well as one provision on indigenous cultural rights (s 19) and one on property rights (s 20).

Economic, social and cultural rights were explicitly given in the Terms of Reference for consideration in the 2011 Charter Review but, reflecting strong opposition, the committee did not recommend their inclusion, something readily accepted by the then government.⁵⁰ Subsection 3(d) of the *EO Act 2010* explicitly refers to social and economic disadvantage being a possible outcome of discrimination with reasonable adjustments, reasonable accommodation and the taking of special measures possibly required to deliver substantive equality. These adjustment measures may well enable economic, social and cultural rights to be addressed in an indirect and at least partial manner. The Terms of Reference for the 2015 Charter Review did not explicitly raise the inclusion of these rights and the reviewer chose not to make such a recommendation. However, the government has accepted the reviewer's 'housekeeping' recommendation that the Charter's definition of human rights be extended to include all rights in the Charter, not just civil and political rights.⁵¹

In addition to possible specific internal limitations on rights within the Charter, there is a general limitation provision in section 7⁵² which acts across all the specific Charter rights.⁵³ Contrary to the operation of the *EO Act*, this general limitation section provides a test to aid in assessing whether a particular restriction is reasonable. The limitation must be provided under law, be reasonable, and its imposition on human rights be justified in a free and democratic society based on human dignity, equality and freedom (s 7(2)). The use of the word 'reasonable' aims to give it an objective test. As used in the *EO Act*, such language is open-textured and without further interpretation and explanation, effectively gives this limiting provision a very broad scope. This limiting of rights is provided by a test consisting of an explicit list of five factors. These are the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the

⁵⁰ Scrutiny of Acts and Regulations Committee, *Victorian Government Response, Review of the Charter of Human Rights and Responsibilities Act 2006* (Parliament of Victoria, 2012) 6.

⁵¹ Brett Young, above n 47, 155. The Reviewer recommended that economic, social and cultural rights be a possible item for future review but the government declined any such prescriptions for such a review: Department of Justice and Regulation, above n 47, 9.

⁵² Section 7 of the Charter is modelled on section 5 of *New Zealand's Bill of Rights Act 1990* and, more particularly, section 36 of the Bill of Rights in the *Constitution of the Republic of South Africa 1996*.

⁵³ Victoria, Parliament of Victoria, *Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006* 7–8.

relationship between the limitation and its purpose, and whether the purpose could be achieved reasonably by a less restrictive means (s 7 (2) (a) to (e)). In terms of how the Charter is designed, this test would need to be applied by parliament in assessing any existing or new legislation, including the *EO Act*; by the Supreme Court in its interpretation of laws; and by public authorities in discharging their responsibilities.

As well as the general and external limitation provided by section 7 of the Charter, rights have been both internally qualified and limited in accordance with the law. An internally qualified limitation could validly relate to a person's circumstances such as being detained after conviction. An internal limitation would be where the exercise of a right may be restricted such as to address a matter of national security or public safety. Rights can also be limited by other laws so long as they are reasonable and justified in a free and democratic society.⁵⁴ Again, the language is general and open to broad interpretation. In its 2009 Report, SARC declined to take up the opportunity to consider recommending that the exceptions to the *EO Act* be made subject to the five factors used in the Charter to determine their reasonableness and justification though it did recommend that the section 7 test be used where there was doubt as to the construction of a provision in the *EO Act*.⁵⁵ There is no legal obligation for the *EO Act* and the Charter to be compatible other than the indirect obligation in terms of the Supreme Court's power to declare whether an Act is inconsistent with the Charter (ss 38 and 39 of the Charter). As well, the Charter imposes a general obligation upon the parliament to consider whether the content of all Acts, including the *EO Act*, are compatible with the Charter (s 32 of the Charter).

There is some inconsistency in SARC's arguments for not recommending the application of these section 7 rules across and into the *EO Act*. SARC recommended against the test in relation to general (or blanket) exceptions and argued that cases precluding other rights were rare, citing the example of domestic work in a private house. While not calling for guiding rules to assess the balance of rights, SARC did, however, recommend the use of the Charter's reasonable limitations test for all exceptions other than the general ones.⁵⁶ The government, in its response, was more consistent and stated that even specific exceptions need not be subject to the Charter as, in its view, the Charter already provided an 'overwhelming framework' for the *EO Act*.⁵⁷ This weak government response undoubtedly reflected a desire

⁵⁴ Debeljak, above n 48, 424–25.

⁵⁵ Scrutiny of Acts and Regulations Committee, above n 40, 8.

⁵⁶ *Ibid* 6.

⁵⁷ Scrutiny and Regulations Committee, *Victorian Government Response, Inquiry into Exceptions and Exemptions to the Equal Opportunity Act 1995*, (Parliament of

to prevent any constraint on the application of the limitation provisions lest they empower claimants under the *EO Act*.

The Charter's interpretative provision, section 32, has a remedial purpose to ensure that statutory provisions are rights-compatible. However, while the section is used to encourage rights-compatible interpretations in all legislation, it does not impel one and an important limitation here is that the judiciary is not given the power to invalidate legislation found not to be amenable to a section 32 rights-compatible interpretation. It may be that judicial interpretation of section 32 may one day enhance the provision's power in terms of rights-compatibility and that of section 7 in terms of proportionality analysis (and whether the limits are proportionate to the aims of the Charter), thereby reducing the limiting effect of these provisions. However, examining the mix of judicial statements of the High Court in its most recent Charter case, the *Momcilovic* case,⁵⁸ indicates that we are still some distance from such an interpretation.

The 2015 Charter Review recommended that section 32 of the Charter be amended to provide a definition or explanation of 'compatibility' and that this be explicitly linked to the section 7 (2) proportionality test with compatibility with human rights seen to occur where there was either no limit or that limit was reasonable and demonstrably justifiable in terms of section 7(2).⁵⁹ The government has supported in principle the reviewer's recommendation of the need for clarity as to section 7(2)'s role in section 32(1) interpretation.⁶⁰

A Public Authorities and Exceptions to Rights-Based Service Delivery

Section 38 makes it unlawful for a public authority⁶¹ to act in a way that is incompatible with, or fails to consider, a human right. The Charter has arguably been at its most effective at the stage when a public authority is drafting policy and when processes are being

Victoria, 2010), <http://www.parliament.vic.gov.au/sarc/EOA_exempt_except/default.htm> 2.

⁵⁸ *Momcilovic v R* (2011) HCA 34. For a discussion of this case, see Pamela Tate, 'Statutory Interpretive Techniques under the *Charter*: Three Stages of the *Charter*—Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*' (2014) 2 *Judicial College of Victoria Online Journal* 43-68; Sir Anthony Mason, 'Statutory Interpretive Techniques Under the Charter—Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69-76.

⁵⁹ Brett Young, above n 47, 155.

⁶⁰ Department of Justice and Regulation, n 47, 8.

⁶¹ The Charter defines a public authority to include an entity whose functions include those of a public nature: section 4(1)(c).

identified.⁶² Early intervention by an advocate has, on many occasions, addressed departmental processes that have violated the rights of their clients resulting in the policy and/or process being rectified without the matter being litigated in the courts.⁶³ In the *Slattery* case⁶⁴, the Commission interpreted the Tribunal's decision in this discrimination case as confirming that the Tribunal had the jurisdiction to examine whether, when a public authority acted lawfully under another law, such as the *EO Act 2010*, it had breached the Charter.⁶⁵

The imperative for public authorities to act in a rights-compatible manner when delivering a service is not without exceptions. These exceptions can undermine the overall effectiveness of section 38 and arguably reduce the community's confidence in the authorities' ability to make rights-based decisions. For example, in parallel with the public/private divide found in the *EO Act 2010*, the duty upon public authorities to act compatibly with the Charter does not apply in relation to an act or decision of a private nature (s 38 (3)). Also, as with the *EO Act 2010*, section 38 (4) of the Charter provides that religious bodies acting in conformity with their religious doctrines, beliefs or principles are exempt from the application of the Charter. This may soon face amendment as, in its response to the 2015 Charter review, the government has agreed to consider this provision as part of a broader examination of religious exceptions in other laws.⁶⁶

The liberal division of the public/private divide with regard to the role and functions of public authorities under the Charter would appear to be secure. The government, in its response to the 2015 Charter review, rejected the recommendation to establish a Corporate Charter Champions Group to build understanding of the Charter and explicitly confined the educative work of the Commission to bodies with obligations under the Charter.⁶⁷

⁶² Hugh de Krestler, 'Application of the Victorian Human Rights Charter in Legal Practice: Discrimination and Equal Opportunity' (2014) 2 *Judicial College of Victorian Online Journal*, 166, 167.

⁶³ Human Rights Law Centre, *Victorian Charter of Human Rights and Responsibilities in Action*. Case studies from the first five years of operation (Human Rights Law Centre, 2012), <file:///H:/RESEARCH%20%20GENERAL%20&%20BACKGRND/RESEARCH%20-%20BILL%20OF%20RIGHTS/VictorianCharter_in_Action_CASESTUDIES_march2012.pdf>; Russell Solomon, 'A Socio-Legal Lens on the Victorian Charter: Revealing its Role as a Promoter of Social Change' (2013) 38 (3) *Alternative Law Journal* 152.

⁶⁴ *Slattery v Manningham City Council* (2013) VCAT 1869.

⁶⁵ Kate Jenkins, 'Equal Opportunity Act 2010—Reflections and Opportunities', (2014) Speech to *Victorian Government Solicitors Office Seminar 5*.

⁶⁶ Department of Justice and Regulation, above n 47, 5.

⁶⁷ Department of Justice and Regulation, above n 47, 3.

B The Override Provision and Parliamentary Supremacy

The Charter contains an override provision, section 31, that reflects parliament's supremacy within the Act. It is both an essential element of the dialogic design of the Charter and an important limitation upon the capacity of the Charter to give effect to rights. It acts to suspend particular rights, or indeed the entire Charter, for a renewable period of five years. Parliament's override declaration occurs through a statement to the Parliament explaining the exceptional circumstances justifying the override. In effect, the override means that a rights issue is avoided given that both a section 32 interpretation as to rights compatibility and a Supreme Court Declaration of Inconsistent Interpretation under section 36 would be considered to no longer apply.

The override provision is, in fact, unnecessary given that the Charter already circumscribes judicial powers through parliament's dominance and as an ordinary statute, the Charter can easily be amended or repealed. The override stipulates that it only applies to exceptional circumstances but these circumstances equate with ordinary limitations under the International Covenant on Civil and Political Rights and the European Convention on Human Rights.⁶⁸ The chair of the consultative committee which recommended the Charter saw the override provision as allowing 'political imperatives' to be met without amending the Charter even though this meant that laws could still be made which did not meet the limitation test under section 7.⁶⁹ Should a law be incompatible with the Charter but reflect the social reality as interpreted by political decision-makers, the override provision could prove to be a useful mechanism for government even if by using it, it served to sacrifice the Charter's own dialogic processes. The 2015 Charter Reviewer was unconvinced the override declaration would 'serve the policy purpose of acting as a brake on limitations of human rights' or was otherwise necessary and recommended that section 31 be repealed.⁷⁰ The government declined to support this recommendation citing the value of the provision as a 'clear statement of parliamentary sovereignty'.⁷¹ From this we can assume that the government, which did not counter the reviewer's argument for repeal,

⁶⁸ Debeljak, above n 48, 444.

⁶⁹ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 899.

⁷⁰ Brett Young, above n 47, 198.

⁷¹ Department of Justice and Regulation, above n 47, 13.

remains concerned that removal of the provision would be identified as a radical step in changing the Charter's overall design.⁷²

C Limiting the Charter's Value as a Tool for Litigation

Another weakness in the Charter's ability to give effect to its protected rights is the lack of an independent cause of action for those seeking some relief or remedy through litigation (s 39 (1)). This is despite the existence of a separate cause of action for a breach of the *Human Rights Act 2004 (ACT)*. Another important limit which has undoubtedly diminished the value of the Charter as a tool of litigation is the provision that a person cannot be awarded damages for any breach of the Charter (s 39 (3)). This is despite damages being a commonly sought remedy and existing under the *New Zealand Bill of Rights Act 1990 (NZ)*, one of the Acts upon which the Charter was modelled.

In the 2011 Charter review, arguments that there was 'much confusion and unnecessary complication' in having to establish an existing cause of action independent of the Charter⁷³ were rejected by SARC. It saw arguments calling for both an independent cause of action and the remedy of damages as creating 'an absence of boundaries in relation to the Charter [meaning] that remedies decisions...may operate in ways that undermine both the established jurisdictional limits of courts and tribunals...'⁷⁴ Similar arguments for the inclusion of an independent cause of action and damages were presented to the 2015 review of the Charter.⁷⁵ This time the review recommended an independent cause of action for the Charter, the giving of original jurisdiction for Charter claims to VCAT, but declined to recommend a remedy in damages.⁷⁶ Together with the recommendation to give the Commission a dispute resolution function under the Charter,⁷⁷ the government responded that it would consider the matter further. This undoubtedly reflects some discomfort with giving the Charter an independent cause of action

⁷² Probably for the same reason the government, in its response to the 2015 Charter Review, declined to remove the redundant section 15 (3) limitation on the right to freedom of speech: Department of Justice and Regulation, above n 47, 9.

⁷³ See eg, Human Rights Law Centre, above n 49, 45.

⁷⁴ Scrutiny of Act and Regulations Committee, *Review of Charter of Human Rights and Responsibilities* (Parliament of Victoria, 2011) 72.

⁷⁵ See eg, Human Rights Law Centre, 'More Accessible, More Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter' (2015) *Submission to the 2015 Review of the Victorian Charter of Human Rights*, <<https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>> Recommendation 11.

⁷⁶ Brett Young, above n 47, 131.

⁷⁷ This may simply be due to resource implications of establishing a dispute resolution facility for Charter complaints, but the government in its response does not provide evidence that this is the case.

which might elicit an adverse reaction from powerful social and economic interests given the Charter's broad jurisdiction.⁷⁸

V CONCLUDING COMMENTS

There is little doubt that the Charter and the *EO Act* have taken Victoria further along the path towards the protection and realisation of certain rights. It is also accepted that few, if any, rights are absolute and that Acts such as these need 'safety valves' to ensure governments do not feel pressed into hastily amending or repealing them. These Acts are, of course, not above the interference of interests and the rights which they seek to promote and the effectiveness of such legislation remains 'contingent upon the discretion of government ...to repeal those rights should they see fit, for example, in response to the dictates of economic or political expediency'.⁷⁹

The focus of these Acts must not be on how they might work in a perfect world but on how they actually work in their own social and economic context. Here the dominant neoliberal political discourse privileges the market and remains too often prepared to divide the private off from regulation that is found in the public domain, while also serving to benefit powerful social interests (such as religious organisations) or economic interests (such as big business) for the sake of avoiding political conflict.

It is something of a paradox that Acts of Parliament, when presented as rights instruments, are often presented as being more important than ordinary statutes, replete with hortatory statements relating to how people should behave according to certain ideals. The normative and aspirational tone of these Acts and their specific rights have been taken from international human rights instruments without much translation. It is worth noting, however, that there really are no rights that are *pre-politics* or *above politics*.⁸⁰ The two rights instruments discussed in this article need to be recognised for what they are: social constructs each a product of a certain period in time. This is nowhere more obviously the case than when their respective limitations and derogations are considered. While rights instruments can be empowering for minority or marginalised interests, each should also be recognised as containing the means within its design and structure to restrict and constrain that power. These constraints are not boundary matters but go to the very

⁷⁸ Department of Justice and Regulation, above n 47, 7.

⁷⁹ Peter Handley, "'Caught between a Rock and a Hard Place": Anti-discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act' (2001) 36 (3) *Australian Journal of Political Science* 515, 520.

⁸⁰ Conor Gearty, *Can Human Rights Survive* (Cambridge University Press, 2005).

centre of what these statutes purport to promote, the protection of rights.

The dominant political discourse frames the right to equality in terms of formal rather than substantive equality. While giving some allowance for protective exceptions and special measures, the form, process and the appearance of equality are more important within the *EO Act* than the equality of results. The prevailing social structure privileges certain social and economic interests. It is as a testament to the perception that such a rights instrument potentially challenges the power and influence of such interests that there continue to be a number of important general and specific derogations affecting the Act's operation. This is nowhere more obvious than in regard to the religious exceptions and the retention of a notion of a public/private divide which is used to justify the immunity of certain activities from public regulation long after such regulation has been otherwise accepted.

Rights and interests come closer to being balanced within the *EO Act* when the Tribunal considers temporary exemptions and has applied the Charter's section 7 test. Yet, even here there are decisions which have favoured particular powerful social or economic interests. The Charter is internally limited and, as an ordinary statute, can be easily amended or repealed. Its internal limitations, including the open-textured language of its protected rights and the section 7 general limitations, together with its external limiting mechanisms such as the override provision, combine to ensure that the Charter is sufficiently checked. This means that as it seeks to give effect to certain rights, the Charter will not be allowed to depart from what Victoria's dominant social and economic actors consider to be the contemporary social reality, as that has been interpreted by political decision-makers.

Interpreting these rights instruments by their limitations is not to deny their empowering potential. On the contrary, highlighting these derogations helps to reveal that, as socially constructed instruments, they are ambivalent in terms of whose interests they serve. That they exist at all is as a result of social changes promoting rights which have been able to challenge the dominant social and economic interests through the provision of both socio-legal and legal means to address vulnerability and marginalisation. Those provisions within each statute that empower individuals and their advocates to seek to protect their rights are well-matched by other provisions that act to contain the extent of the rights protecting and promotion functions of each Act. These limiting provisions are no mere accidental or peripheral encumbrances and, while not beyond challenge, should be recognised for their highly influential role in the proper interpretation of these rights instruments.