This submission identifies potential constitutional impediments relating to one of the recommendations contained in the Human Rights Law Centre’s submission for this review.

The purpose in identifying the potential impediments is to assist the Scrutiny of Acts and Regulations Committee in the event of consideration being given to the relevant recommendation, which is as follows:

In order to ensure an appropriate balance between the roles of the parliament and courts, section 32 of the Victorian Charter, which requires courts to interpret legislation compatibly with human rights, and section 36, which empowers the Supreme Court and Court of Appeal to make a declaration when a law cannot be interpreted compatibly with rights, should be repealed and replaced with a provision which states that:

- by way of express provision, parliament may enact legislation which is valid and operates notwithstanding any incompatibility with human rights;
- absent such express provision, a law is not to be construed and applied in a way which abrogates, abridges or infringes human rights; and
- any law which cannot be so construed and applied is invalid to the extent of that inconsistency.

This approach would be faithful to the “constitutional” balance and roles of parliament and courts.  

15 Such a model, similar to the 1960 Canadian Bill of Rights, was endorsed by The Hon Michael McHugh, ‘A Human Rights Act, the Courts and the Constitution’, Speech, Sydney, 5 March 2009, 35. Section 2 of the Bill of Rights provides that: “Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared”.

The potential constitutional impediments are set out below under each of the three proposed provisions.

**First proposed provision**

By way of express provision, parliament may enact legislation which is valid and operates notwithstanding any incompatibility with human rights.

This proposed provision seeks to impose a binding “manner and form” requirement for the enactment of valid legislation that is incompatible with human rights.

The requirement in question is that such legislation must be in the form of a law that includes the required “express provision” (known as a “notwithstanding clause”).

The intention that this requirement be binding is evident from the two accompanying proposed provisions, which provide that “absent such express provision, a law is not to be construed and applied in a way which abrogates, abridges or infringes human rights” and that “any law which cannot be so construed and applied is invalid to the extent of that inconsistency”.

The combined effect of the proposed provisions is that any Victorian law that lacks the “express provision” will be invalid to the extent that it cannot be construed and applied consistently with human rights.

However, section 6 of the Australia Act 1986 (Cth) probably limits the Victorian Parliament’s power to impose binding “manner and form” requirements. Section 6 states:
Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.

With respect to laws affecting rights that do not relate to the "constitution, powers or procedure of the Parliament", the proposed "manner and form" requirement probably would not be binding. For example, a law containing a "reverse onus" provision, such as the provision under consideration in the Mancilovic case currently before the High Court, probably is not a law "respecting the constitution, powers or procedure of the Parliament".

It could be argued that any law that expressly or impliedly amends or repeals a "manner and form" provision is a law respecting the powers of the Parliament. However, for the following reasons articulated by Associate Professor Anne Twomey, it is considered the preferable approach is to characterize a law according to its substance, rather than its incidental application in impliedly amending or repealing a purported "manner and form" requirement:

Arguably every manner and form provision is one affecting the ‘powers’ of the Parliament or dealing with its procedure in enacting laws. The consequence would be that every law that expressly or impliedly amended or repealed a manner and form provision is also one respecting the powers of the Parliament. The High Court in Marquet recognized the argument but expressly declined to address it. If such an analysis were correct, then laws on any subject at all could be entrenched, be they provisions of the Wild Dog Destruction Act or the Greyhound Racing Act because subsequent attempts to repeal or amend them without complying with manner and form requirements would be laws respecting the powers of the Parliament to the extent that they expressly or impliedly purported to amend or repeal the manner and form provision. This clearly was not the intention behind the enactment of s 5 of the Colonial Laws Validity Act 1865 or s 6 of the Australia Acts 1986 which were confined to matters respecting the Parliament.

The preferable approach is to characterize a law according to its substance. If, in substance, it is not one with respect to the constitution, powers or procedure of the Parliament, then its incidental application in impliedly amending or repealing a purported manner and form requirement, should not result in it being characterized as a law respecting the powers of the Parliament.¹

(Footnotes omitted)

Accordingly, the proposed provision probably would be invalid to the extent that it seeks to impose a binding "manner and form" requirement.

Second proposed provision

Absent such express provision, a law is not to be construed and applied in a way which abrogates, abridges or infringes human rights.

This proposed provision probably would be invalid to the extent that it applies to future laws (i.e. laws enacted after the enactment of the proposed provisions).

In contrast with the situation in the United Kingdom, the traditional view of the doctrine of implied repeal prevails in Australia. If a State law expressly or impliedly manifests an intention to amend or repeal an earlier law, the courts must give effect to that intention. The only qualification to that requirement is that it does not apply if the later law is invalid.

¹ Associate Professor Anne Twomey, "Does anyone really understand manner and form?" - UNSW Constitutional Law Conference – UNSW: Sydney, February 2005.
Section 118 of the Constitution requires all Australian courts to give "full faith and credit" to valid State laws in cases where it is identified (through choice of law rules) that they are the applicable law.

In the circumstances, it is doubtful that any State parliament possesses the power to require or empower the courts to give interpretations of valid future laws that are not consistent with the attributed intention of the enacting parliament.

The giving of such an interpretation probably would constitute a failure to give "full faith and credit" to a valid State law, or to duly apply or comply with such a law.

As for existing laws (i.e. laws existing at the time of the enactment of the proposed provisions), the proposed provision probably would be valid only to the extent that it does not involve any impermissible lawmaking role for the courts. The forthcoming decision of the High Court in the Momeitovic case is likely to clarify that issue. It is doubtful that the Supreme Court of Victoria can validly be empowered to re-write legislation to render it compatible with human rights.

**Third proposed provision**

*Any law which cannot be so construed and applied is invalid to the extent of that inconsistency.*

For the reasons outlined above, this proposed provision probably would be invalid to the extent that it applies to future laws.

As for existing laws, the proposed provision probably would have the effect of amending those laws to the extent that they are incompatible with human rights, but only in circumstances where it is possible for the courts to identify the involved amendment/s and sever any objectionable part/s without engaging in any impermissible lawmaking. The Victorian Parliament obviously has the power to amend Victorian legislation, but it probably cannot validly delegate that power to the Supreme Court of Victoria. Once again, the forthcoming decision of the High Court in the Momeitovic case is likely to clarify that issue.

Jim South

9 June 2011