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**A NSW Charter of Rights? The  
Continuing Debate**

by

**Gareth Griffith**

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# **A NSW Charter of Rights? The Continuing Debate**

by

**Gareth Griffith**

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## EXECUTIVE SUMMARY

This briefing paper reviews the current debate about bills or charters of human rights. Particular note is taken of recent developments in those jurisdictions which belong to the Westminster tradition of parliamentary government and which, in their different ways, seek to reconcile the principles of parliamentary supremacy and judicial review – Canada, New Zealand, the UK and the ACT.

The immediate background to the paper is that a charter of rights is to be introduced in Victoria, while here in NSW Attorney General Bob Debus has announced that he intends to take a similar proposal to Cabinet, ‘to invite public consultation on the values and rights Parliament should protect’.

**NSW Legislation Review Committee:** In October 2001 the Legislative Council Standing Committee on Law and Justice published a report entitled *A NSW Bill of Rights*. The report recommended against enacting a statutory Bill of Rights in NSW. Instead, it recommended that the NSW Parliament establish a joint Scrutiny of Legislation Committee, similar to the Senate Scrutiny of Bills Committee. On 15 August 2003, the Legislation Review Committee commenced its function of reviewing and reporting on all bills introduced into the Parliament. (page 2)

**Terrorism and human rights:** The 11 September terrorist attacks in the US and those that followed ushered in a new era of global terrorism, against which a new generation of counter terrorist measures have been passed, many of which have raised serious human rights concerns. (page 4)

**Controversy:** The bill of rights issue remains controversial. Opponents continue to be highly sceptical about the merits of judicial review. On the other side, in Australia influential voices have been raised in support of a bill of rights, from judicial and other circles. (pages 5-7)

**The US model:** A major flaw of the US model from the perspective of the Westminster parliamentary system of government is that it makes judges the ultimate arbiters in conflicts over human rights. US jurisprudence on capital punishment hardly makes a compelling case for a bill of rights. (pages 14-17)

**The dialogue on human rights:** One influential point of view in the ongoing debate is that both courts and legislatures have a role to play in a two-sided dialogue on human rights, one that is truly ‘liberal democratic’ in that it combines the majoritarian and representative principles embodied in democratic legislatures, on one side, with the respect for minority and individual rights expressed by the courts, on the other. It is in terms of such a ‘dialogue’, in which the claims of parliamentary supremacy are reconciled with those of judicial review, that current arguments for bills of rights at the national and State levels in Australia are framed. (page 18)

**The Canadian model:** This dialogue has its principal origins in the Canadian Charter of Rights and Freedoms of 1982. Unlike the New Zealand and British equivalents, but like its US counterpart, the Canadian Charter is constitutionally entrenched. Its most innovative

feature in terms of the dialogue between parliaments and the judiciary is the legislative override or 'notwithstanding' clause. By express enactment of ordinary legislation, the national Parliament or a provincial legislature may set aside a judicial finding of unconstitutionality, thereby preserving the supremacy of democratically elected institutions over the unelected courts. (pages 18-19)

While the Charter has certainly made an enormous impact, the relevant jurisprudence is still something of a mixed bag. Some cases suggest that judicial deference lives on, whereas others confirm the view that Canada has yet to reject the 'American equation of judicial review with judicial supremacy'. (page 31)

***The New Zealand model:*** The New Zealand *Bill of Rights Act 1990* is not constitutionally entrenched supreme law. Instead, it is an ordinary piece of legislation which can be repealed by the usual parliamentary processes. Under the Act the scope of judicial review is restricted. Unlike in Canada, the courts in New Zealand cannot strike down legislation that is inconsistent with the bill of rights. Another important difference is that the New Zealand Act provides for the pre-enactment scrutiny of legislation by members of Parliament. (page 33)

The impact made by the *Bill of Rights Act 1990* has to be considered in the context of the broader political context, notably the introduction of the Mixed Member Proportional electoral system which is said to have 'proved the more direct answer to the sorts of concerns that fuelled the call for a bill of rights in 1984'. (page 37)

***The UK model:*** The UK *Human Rights Act 1998*, which came into force in October 2000, sets up its own form of dialogue between Parliament and the courts. Basically, it incorporates the major rights found in the ECHR into domestic UK law and makes these enforceable in the courts. However, as an ordinary piece of legislation, the Act does not entrench these rights. Nor does it provide the courts with the power to declare primary legislation invalid. Instead, the higher courts are granted the power to make a 'declaration of incompatibility', the making of which can allow a Minister to seek parliamentary approval for a remedial order to amend legislation to bring it into line with Convention rights. In terms of the relationship between Parliament and the courts, this is the major structural innovation of the UK Act. Further, the pre-enactment scrutiny process has been enhanced by the establishment of the Joint Committee on Human Rights. (pages 42-48)

***The ACT model:*** The ACT's *Human Rights Act 2004* is closely modeled on the UK legislation. One innovative feature is that statutory provision is made for the parliamentary review of legislation by a standing committee. (pages 60-61)

***The proposed Victorian model:*** This combines all the structural features that facilitate dialogue between Parliament and the courts, including an 'override' clause, provision for the making of 'declarations of incompatibility' and pre-enactment scrutiny of legislation. (page 64)

***Questions:*** Is a charter of rights needed in NSW? Would a charter of rights make a difference? How significant and beneficial would its impact be? The experiences of jurisdictions discussed in this paper suggest that the answers to these questions are both complex and contested. (page 72)

## 1. INTRODUCTION

This briefing paper reviews the current debate about bills or charters of human rights. Particular note is taken of recent developments in those jurisdictions which belong to the Westminster tradition of parliamentary government and which, in their different ways, seek to reconcile the principles of parliamentary supremacy and judicial review – Canada, New Zealand, the UK and the ACT. The paper updates Briefing Paper No 3 of 2000, *The Protection of Human Rights: A Review of Selected Jurisdictions*.

The immediate background to the paper is that a charter of rights is to be introduced in Victoria, while here in NSW Attorney General Bob Debus has announced that he intends to take a similar proposal to Cabinet, ‘to invite public consultation on the values and rights Parliament should protect’.<sup>1</sup> The Attorney General is reported to have said that the proposed charter for NSW would not ‘go so far as constitutional bills of rights, such as those in the US and Canada’, which ‘allow courts to declare laws invalid’. Instead, the proposed model is closer to that in place in the UK and the ACT, with the Attorney commenting:

Parliament would be required to ensure laws complied with the charter and provide human rights impact statements. If the courts believed basic freedoms were infringed, they could declare laws were incompatible with the charter and send them back for review. This would not bind Parliament when reconsidering legislation.

Mr Debus is reported to have said that the terrorist threat had forced the Government to pass ‘extraordinary laws’, a development which in his mind has prompted the need to declare the values and rights that Parliament should protect. He said:

The times we live in are causing us to pass some laws that intrude on traditional freedoms in ways that we have not experienced in recent times. I support our laws on terrorism as they have been drafted – and the community does too – but they potentially restrict freedoms. This is a process by which the whole community discusses what it thinks are our basic values and tells the Parliament that it wants them protected.

Further, Mr Debus said a charter could promote tolerance in the wake of the Cronulla ‘riots’, with the Attorney General stating that ‘A charter would hopefully help to remind the community that all people in a society have equal rights’. While not a supporter of a full-blown bill of rights, Premier Morris Iemma is reported to be willing to consider the Attorney General’s proposal. For the Opposition, the Shadow Attorney General Chris Hartcher is said to be sceptical of the sort of charter of rights in place in the ACT, stating ‘All that will do is drag out court cases while not actually achieving anything’.<sup>2</sup> The Prime Minister has also spoken out against the proposal, describing himself as ‘an unrepentant opponent of a bill of rights’ and promising to ‘fight it fiercely’.<sup>3</sup>

<sup>1</sup> J Pearlman, ‘Charter of rights plan to be put to cabinet’, *SMH*, 20.2.2006, p 5.

<sup>2</sup> ‘Iemma willing to consider charter of rights proposal’, *AAP*, 20.3.2006.

<sup>3</sup> M Farr, ‘PM will fight states’ push for bill of rights’, *Daily Telegraph*, 27.3.2006, p 13.

## 2. RECENT DEVELOPMENTS

### 2.1 The NSW Legislative Review Committee

In October 2001 the Legislative Council Standing Committee on Law and Justice published a report entitled *A NSW Bill of Rights*. The report recommended against enacting a statutory Bill of Rights in NSW. Instead, it recommended that the NSW Parliament establish a joint Scrutiny of Legislation Committee, similar to the Senate Scrutiny of Bills Committee. It further recommended that the Scrutiny of Legislation Committee should be separate from the Regulation Review Committee 'to ensure it can give sufficient attention to its task'. The Carr Government's response was to rename the *Regulation Review Act* as the Legislation Review Act and the Regulation Review Committee as the Legislation Review Committee. The name change reflected the new role for the Committee which is now charged with the task of scrutinising bills as well as regulations. In its original form the legislation met the concerns about the Committee's workload by proposing an expanded membership of 12 instead of eight.<sup>4</sup> However, an Opposition amendment, passed without discussion and with Government approval, maintained the Committee's membership at eight.<sup>5</sup> On 15 August 2003, the Legislation Review Committee commenced its function of reviewing and reporting on all bills introduced into the Parliament.<sup>6</sup>

In his Second Reading speech for the Legislation Review Amendment Bill 2002, the Leader of the House in the Assembly, Paul Whelan, said the Government agreed with the finding of the Legislative Council Standing Committee on Law and Justice that it would not be 'in the public interest for New South Wales to have a bill of rights'. He continued:

As the Premier indicated in his submission to the standing committee's inquiry, a bill of rights transfers decisions on major policy issues from the Legislature to the judiciary. No right is absolute. Rights conflict. The right of free speech will conflict with the right to equality. The right to equality will, in turn, conflict with the right to freely exercise one's religion. A bill of rights could be interpreted only by balancing these rights interests. This balancing should be done by an elected Parliament, and not by an unelected judiciary.<sup>7</sup>

### 2.2 A bill of rights for the ACT and other developments

Since 2001 calls for the introduction of a bill of rights in NSW, as in several other Australian jurisdictions, have continued. In August 2004, Professor George Williams renewed his call for a NSW bill of rights.<sup>8</sup> In May 2005, NSW Law Society President John

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<sup>4</sup> NSWPD, 18.6.2002, p 3256.

<sup>5</sup> NSWPD, 27.6.2002, p 4157.

<sup>6</sup> For an overview of the Committee's work see – Parliament of NSW, Legislation Review Committee, *Annual Review July 2004-June 2005*, Report No 3 – 13 September 2005.

<sup>7</sup> NSWPD, 18.6.2002, p 3256.

<sup>8</sup> G Williams, 'Time for NSW to adopt its own bill of rights', *The Herald (Newcastle and Hunter)*, 2.8.2004, p 9.

McIntyre also called for the State Government to lead a debate on the introduction of such a bill.<sup>9</sup> The Government's position remained unchanged in October 2005 when the Greens MLC, Lee Rhiannon, called for a parliamentary inquiry to be established 'to investigate a bill of rights for the people of New South Wales in line with similar legislative reforms that have been undertaken by the Australian Capital Territory and currently being considered by the Victorian Government'.<sup>10</sup>

Since the Legislative Council Standing Committee on Law and Justice reported in 2001, major developments have taken place. On 1 July 2004 the ACT's *Human Rights Act 2004* came into force, the first statutory bill of rights in any Australian jurisdiction. At the local government level, on 9 March 2004 Hume City Council located in Melbourne's north-western urban-rural fringe passed its own Inaugural Citizens' Bill of Rights.<sup>11</sup> On 5 October 2004, the independent online discussion forum *New Matilda* launched its campaign for a national Human Rights Act, complete with a draft bill which it seeks to have tabled in the Commonwealth Parliament in October 2006. Speaking on its behalf were former Prime Minister Malcolm Fraser and Elizabeth Evatt, a former head of the Family Court who sat on the United Nations Human Rights Committee.<sup>12</sup> Around the same time, in response to the Government's anti-terrorism laws the Federal Opposition joined the Democrats and Greens in pushing for a statutory bill of rights, with a Private Member's bill expected in Parliament by October 2006.<sup>13</sup>

### 2.3 A Victorian Charter of Rights and Responsibilities

At the State level, in April 2005, the Victorian Government announced the creation of a Human Rights Consultation Committee, chaired by George Williams. After a six-month public consultation period, including 55 community consultation meetings, on 30 November 2005 the Committee's report was delivered to the Victorian Attorney-General, Rob Hulls. Its main recommendation was that the Victorian Parliament should enact a Charter of Human Rights and Responsibilities based, not on the US Bill of Rights, but on the more contemporary models operating in the ACT, New Zealand and the United Kingdom which seek to create a balance between parliamentary supremacy and judicial review, founded on a dialogue between parliament and the judiciary. On 20 December 2005, Mr Hulls announced that a charter, based on the Committee's report would be adopted, with relevant legislation expected to be introduced into the Victorian Parliament

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<sup>9</sup> A Mitchell, 'State drags its feet over bill of rights', *The Sun-Herald* 15.5.2005, p 34; A Burke and K Gelber, 'Can human rights save us?' (December-January 2005-06) 80 *Arena Magazine* 43-45.

<sup>10</sup> *NSWPD*, 13.10.2005, pp 18548-9.

<sup>11</sup> It includes rights that mainly relate to participating in the democratic process, such as the right to vote. The Bill does not have the legal force of a Council by-law. It does, however, represent official Council policy. Reaction to the Bill has been mixed - Gilbert and Tobin Centre of Public Law, 'Bills of Rights at the Local Government Level' - <http://www.gtcentre.unsw.edu.au/Resources/bor/localGovernmentLevel.asp>

<sup>12</sup> T Stephens, 'Stand up for your rights', *SMH*, 8.10.2005, p 27.

<sup>13</sup> J Macken, 'Bill of Rights debate back in the House', *The Australian Financial Review* 28.10.2005, p 72.

in the middle of 2006. The Tasmanian and Western Australian Governments are also currently considering whether to introduce bills of rights. Conversely, the Queensland and South Australian Governments are reported to have ruled out a similar move,<sup>14</sup> as has the Federal Attorney-General Philip Ruddock.<sup>15</sup> As noted in the introduction to this paper, the position of the NSW Government appears to have altered course in recent times, with both the Attorney General and Premier indicating support for a charter of rights.

## 2.4 Rights and responsibilities

Talk about rights invariably leads to arguments for responsibilities. The ACT is a case in point, where the Liberal Party's Bill Stefaniak claimed that a bill of responsibilities was needed to counter the 'excesses' of the *Human Rights Act*. A Charter of Responsibilities Bill was in fact introduced into the ACT Legislative Assembly in June 2004, only to be defeated by 9 votes to 5, the governing Labor Party voting against the proposal. Taking up the 'responsibilities' theme, the Prime Minister in a radio interview in March 2004 described the ACT *Human Rights Act* as 'ridiculous' and reportedly argued bills of responsibilities should be introduced at both the national and State levels in Australia.<sup>16</sup>

As suggested by its title, *Rights, Responsibilities and Respect*, the report of the Victorian Human Rights Consultation Committee traversed the same ground in the process of recommending a Charter of Human Rights and Responsibilities. For the Committee, 'rights and responsibilities can be seen as the two sides of the same coin because neither can exist without the other'.<sup>17</sup> It did not proceed from there to recommend the inclusion of separate provisions dealing with responsibilities in the proposed Charter. Instead, it recommended that the concept of responsibilities be included in the Preamble to the Charter, the draft stating 'human rights come with responsibilities and must be exercised in a way that respects the human rights of others'.

Just as it could be argued that John Howard's call for bills of responsibilities may have been nothing more than a rhetorical flourish, the Victorian Committee's recommendation may be seen by some as part of the 'window dressing' needed to support a Charter of rights.

## 2.5 Anti-terrorism legislation and the detention of asylum seekers

As suggested by the comments of the NSW Attorney General, these recent developments must be placed in a wider context. In Australia, as elsewhere, human rights issues have been high on the agenda over the last few years. The report of the Legislative Council Standing Committee on Law and Justice was released a matter of weeks after the 11

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<sup>14</sup> M Priest, 'Tasmania, WA join push for bill of rights', *The Australian Financial Review* 13.1.2006, p 46.

<sup>15</sup> R Wallace, 'Bill of rights to be a lawyers' feast: Ruddock', *The Australian* 22.12.2005, p 5.

<sup>16</sup> L Kostakidis-Lianos and G Williams, 'Bills of Responsibilities', *Alternative Law Journal*, Vol 30, 2 April 2005, p 58.

<sup>17</sup> Victorian Human Rights Consultation Committee, , *Rights, Responsibilities and Respect*, 2005, p 30.

September terrorist attacks in the US. Those attacks and others that followed ushered in a new era of global terrorism, against which a new generation of counter terrorist measures have been passed, many of which have raised serious human rights concerns. Further, in Australia, as in Europe, the detention of asylum seekers and others has been another major arena for conflicts over human rights. Indeed, with these issues very much to the fore, the UK *Human Rights Act 1998*, which came into effect on 2 October 2000, can be said to have had something of a baptism of fire.

At the same time, human rights jurisprudence has also made its own headlines, notably in the context of the Canadian Charter of Rights and Freedoms where the move to legalise same sex marriages was driven largely by the courts.

## 2.6 Controversies

As ever, the bill of rights issue remains controversial. Opponents continue to be highly sceptical about the merits of judicial review. In his critique of what he calls 'legal constitutionalism', Adam Tomkins, the John Millar Professor of Public Law at the University of Glasgow, argues that the move away from a political constitution to a legal one is a mistake in that it 'seeks to control the problem of executive discretion simply by replacing it with untrammelled judicial discretion'.<sup>18</sup> His argument is for a reinvigorated political constitution in which the distinctly Westminster doctrines of parliamentary scrutiny and accountability take centre stage.

On the other side, in Australia influential voices have been raised in support of a bill of rights, from judicial and other circles. Addressing the Law and Justice Foundation in October 2005, former Chief Justice of Australia Sir Anthony Mason presented a broad critique of the detention powers in the Federal Government's proposed anti-terrorist legislation, arguing such powers should be subject to meaningful judicial review. He is reported to have said in this context that the Federal Attorney-General is 'not a suitable guardian of individual rights'. Sir Anthony also

railed against the lip service being paid to Parliament by the executive, lamented the absence of ministerial responsibility and urged the adoption of a bill of rights...said some suspension of individual rights was necessary to combat terrorism, but the question of balance was 'too important a vehicle for superficial party political and federal-state point scoring'.<sup>19</sup>

Retiring High Court Justice Michael McHugh has added his voice to the calls for a national bill of rights. In a speech to Sydney University law students. Justice McHugh pointed to a number of failings by the High Court to prevent human rights being abused. Comparing Australian and UK decisions, he argued:

Thus, while the House of Lords could find the executive's indefinite detention of a suspected terrorist was unauthorised, the High Court of Australia was not – in the *Al-Kateb* case – equally empowered to find the executive's indefinite detention of

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<sup>18</sup> A Tomkins, *Our Republican Constitution*, Hart Publishing 2005, p 22.

<sup>19</sup> M Pelly, 'Monitoring of terrorism laws urged', *SMH*, 8.10.2005, p 8.

an asylum seeker was a similar breach of human rights. This example clearly evidences a need to place a greater focus on human rights and freedoms within Australia, and supports the argument for the introduction of a Bill of Rights.<sup>20</sup>

In the 2004 decision in *Al-Kateb v Godwin*<sup>21</sup> the High Court held by a 4:3 majority that failed asylum seekers who have nowhere to go can be kept in immigration detention indefinitely. Provided the Immigration Minister retained the intention of eventually deporting such people, detention would remain valid.<sup>22</sup>

Reflecting on the decision, Justice McHugh said:

What has been highlighted by such cases is the inability of Australian judges to prevent unjust human rights outcomes in the face of federal legislation that is unambiguous in its intent and that falls within a constitutional head of power.<sup>23</sup>

In his judgment in *Al-Kateb v Godwin*, McHugh J rejected the proposition that the Commonwealth Constitution ‘should be read consistently with the rules of international law’.<sup>24</sup> He went on to say that, ‘as desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country’.<sup>25</sup> For McHugh J, therefore, a bill of rights is not something that can be invented by judicial activism:

If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill.<sup>26</sup>

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<sup>20</sup> ‘Bill of Rights no longer academic: McHugh’, *Lawyers Weekly*, 13.2.2006 - <http://www.lawyersweekly.com.au/articles/6C/0C03816C.asp?Type=53&Category=853>

<sup>21</sup> (2004) 208 ALR 124.

<sup>22</sup> For a commentary on the case see – P Prince, *The High Court and indefinite detention: towards a national bill of rights?* Commonwealth Parliamentary Library Research Brief, No 1, 2004-05.

<sup>23</sup> ‘Bill of Rights no longer academic: McHugh’, n 20. The relevant head of power is s 51(xix) of the Commonwealth Constitution, referring to ‘Naturalization and aliens’. In a dissenting judgment in *Ruddock v Taylor* (2005) 221 ALR 32 McHugh J applied the rules of statutory construction to find on behalf of Taylor, a British citizen who had been detained pending deportation. Two decisions to cancel his visa were quashed by the High Court and Taylor subsequently sued the Commonwealth for damages for false imprisonment. By a 5:2 majority it was held that s 189 of the *Migration Act 1958* (Cth) authorized the detention of persons whom an immigration officer knew or reasonably suspected at the time of the detention to be unlawful citizens, even if this view was subsequently held to be legally inaccurate.

<sup>24</sup> (2004) 208 ALR 124.at 142.

<sup>25</sup> (2004) 208 ALR 124 at 144.

<sup>26</sup> (2004) 208 ALR 124 at 145. A statutory bill of rights could be enacted federally without the requirement for a referendum.



While the focus of these comments is on a national bill of rights, developments in the ACT and Victoria highlight relevance of the debate to other Australian jurisdictions. Many of the same controversies apply as at the federal level. For the Victorian Attorney-General Rob Hulls the proposal to introduce a Charter of Rights and Responsibilities will enhance democracy:

Far from a transfer of power from the elected legislature to the judiciary, I view the potential of a charter of the kind proposed as securing power in and with the public.<sup>27</sup>

For his part, the Federal Attorney General, Philip Ruddock, criticised Victoria's plan to introduce a charter of rights, saying it would create a 'lawyers' feast' and transfer power to unelected judges.<sup>28</sup> The case against a charter was stated in trenchant terms by James Allan, Garrick Professor of Law at the University of Queensland, and Mirko Bagaric, Head of Deakin Law School. After questioning the process by which the Victorian proposal was arrived at and arguing that the people of the State should be given the opportunity to vote for or against the Charter at a referendum, they went on to say:

While rights documents sound good in theory, they don't work well in practice. They turn political issues into legal ones. In such an environment, the people whose rights get promoted are those that yell the loudest and have the most money to spend on lawyers.

Rights documents also promote a sense of intellectual elitism that can have a stifling effect on the democratic process. This is evident from calls by civil libertarians that we need a bill of rights to protect us from counter-terrorism laws recently introduced by the federal Parliament. The fact that opinion polls showed that most of us supported the laws obviously hasn't prompted them to reconsider their analysis of the laws.<sup>29</sup>

## 2.7 Arguments for and against in summary

Sir Anthony Mason has declared his support for a statutory bill of rights, of the kind in place in the UK and New Zealand. His case for such a bill reads:

The main arguments for a bill of rights are that it would bring Australia into line with the rest of the world and it would protect basic individual rights from interference by political (legislative and executive) interference. Other advantages are that principled judicial decision-making would replace political compromise and government and administrative decision-making, on policy and other issues, would necessarily have close regard to basic individual rights.

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<sup>27</sup> R Hulls, 'Shared expression of shared values', *The Australian*, 23.12.2005, p 10.

<sup>28</sup> J Pearlman, 'Charter of rights plan to be put to cabinet', *SMH*, 20.2.2006, p 5.

<sup>29</sup> J Allan and M Bagaric, 'Bill of rights benefits judges, lawyers most', *The Australian Financial Review*, 3.2.2006, p 83.

Representing the opposing viewpoint, Sir Anthony writes:

The main arguments against a bill of right are that the majority will should prevail, whatever the circumstances, that there is no need to provide further protection for basic rights, that a bill of rights is foreign to our traditions, that it gives too much power to the judges and that it will or may add to costs.<sup>30</sup>

Arguments for or against were also presented in the 2001 report of the Legislative Council Standing Committee on Law and Justice. On behalf of a bill of rights, the Committee said the most important arguments relevant to NSW are:

- The educative value of a Bill of Rights in political debates, thereby developing greater understanding of human rights within the community;
- The inadequate protections of human rights for the community, due to gaps in current legislation and the uncertainty of the common law;
- The inadequate protection of minorities in society in the absence of a Bill;
- The international isolation of the development of domestic law in the absence of a Bill of Rights; and
- A Bill of Rights<sup>31</sup> can facilitate a constructive dialogue between the Judiciary and the Parliament.

The major arguments against a bill of rights were said to be ‘based around the change in relationships between the Parliament, the Executive and the Judiciary which would be likely to result’. These arguments were as follows:

- A Bill would increase the power of the Courts at the expense of Parliament, undermining parliamentary supremacy and leading to a politicisation of the Judiciary;
- A Bill would increase uncertainty in the law because rights are widely defined, requiring judicial interpretation to give them content;
- There is no consensus as to which rights should be protected;
- Australian courts will not be isolated from overseas developments in the absence of a local Bill;
- A bill could lead to an increase in litigation and associated costs;
- A Bill of Rights could be used to intrude upon activities of private businesses and associations; and
- A focus on rights can lead to a lack of acceptance of responsibilities.<sup>32</sup>

One submission in favour of a bill of rights, presented by John Nicholson QC, the then Senior Public Defender, argued that:

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<sup>30</sup> A Mason, ‘Rights bill a matter for judgment’, *The Age*, 29.3.2006, p 17.

<sup>31</sup> Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights*, Report 17, October 2001, p 51.

<sup>32</sup> Standing Committee on law and Justice, n 31, p 78.

A bill of rights containing in simple language fundamental rights which the Government and agencies of the Government must respect in its dealings with persons resident in the State and visiting the State is strongly supported by the New South Wales Public Defenders. Our reasons for so supporting a bill of rights are these: it would contain in one location the rights recognised and respected by government. An Act containing a bill of rights would be an education tool for the Government and its agencies in its service delivery. An Act containing a bill of rights would also be an education tool for the citizens of the States, whereby they would become aware of the standard of behaviour expected by government and agencies in dealing with members of the public. A bill of rights would be a benchmark for others not associated with government in their dealing with members of the public.<sup>33</sup>

In his submission opposing a bill of rights, Premier Carr expressed this argument:

Some of the most abusive and oppressive regimes have had extensive bills of rights. In reality, it is not a 'bill of rights' which protects rights. Nor can the courts alone adequately protect rights. The protection of rights lies in the good sense, tolerance and fairness of the community. If we have this, then rights will be respected by individuals and governments, because this is expected behaviour and breaches will be considered unacceptable. A bill of rights will only have the effect of turning community values into legal battlefields, eventually undermining the strength of those values.

A bill of rights is an admission of the failure of parliaments, governments and the people to behave in a reasonable and respectful manner. I do not believe we have failed.<sup>34</sup>

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<sup>33</sup> Standing Committee on Law and Justice, n 31 p 55.

<sup>34</sup> Standing Committee on Law and Justice, n 31, p 86.

### **3. THE MEANING AND DEVELOPMENT OF ‘HUMAN RIGHTS’**

#### **3.1 The meaning of ‘right’**

The word ‘right’ can be used in three senses: first, in the widest sense a right is a claim derived from some unspecified moral standard or rule of law; secondly, in a more restricted sense a right is a claim recognized though not necessarily enforceable by law; and thirdly, in the narrowest sense a right is a claim not only recognised by law, but for violation of which the law provides a specific remedy. All three senses of the word apply to some extent to the meaning and development of what are called ‘human rights’, this being a reflection of the fact that these rights derive from several sources, practical, philosophical and doctrinal.<sup>35</sup>

#### **3.2 Philosophical and religious origins**

Philosophically, human rights have their origins in the natural law and natural rights schools of thought that date back to Ancient Greece and Rome. Broadly and in keeping with the first sense of the word ‘right’, the main idea is that over and above the array of conventional laws, there are true and eternal laws, which embody principles that are unchanging and universal in scope and application. More than that, the Stoics and others believed that these true laws, which are part of the natural order of things, are ascertainable by reason. This line of thinking was later adopted by Christian scholars, notably Saint Thomas Aquinas who rested the validity of legal rules on their conformity with ‘eternal principles of law’.

In the English speaking world in the 17<sup>th</sup> century this natural law or natural right discourse made a major impact on what are called ‘social contract’ theories of politics, associated primarily with Hobbes and Locke. Particularly influential were Locke’s views that in the ‘state of nature’ all individuals are equal and have certain natural rights. These were said to be derived from the law of nature which is religious in character. His political theory maintained that, for these rights to be protected, the state of nature must be abandoned and a social contract entered into for the purpose of establishing civil government. To do this, individuals must surrender some but not all natural rights. Surrendered are those rights that can be exercised better collectively for the benefit of society. Retained or reserved are those rights which are the basis of the individual’s fundamental liberties, foremost among them the rights to life and liberty. In the language of modern liberalism, these might be called ‘negative liberties’, in that they afford the individual security from arbitrary and tyrannous government. The influence of Locke’s natural rights theory on 18<sup>th</sup> century political thought and constitutional practice was immense. It is encapsulated in Thomas Jefferson’s preamble to the American Declaration of Independence of 1776:

We hold these truths to be self-evident that all men and women are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness.

Likewise, the French Declaration of the Rights of Man 1789 recognised and declared

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<sup>35</sup> This account is based on N O’Neill, S Rice and R Douglas, *Retreat From Justice: Human Rights Law in Australia*, 2<sup>nd</sup> ed, The Federation Press 2004, Ch 1.

certain ‘natural, imprescriptable and inalienable rights’ as the ‘sacred rights of men and citizens’. It is in the landmark constitutional developments of the 18<sup>th</sup> century that we find for the first time ‘comprehensive catalogues of rights inhering in all persons by virtue of their humanity’.<sup>36</sup>

### 3.3 Practical and doctrinal origins

Alongside this philosophical tradition we find a more practical counterpart, which finds expression in the common law, and in certain documented sources, principal among them Magna Carta 1215 and the Bill of Rights 1689, the last reflecting the settlement arrived at in 17<sup>th</sup> century contest for power between the monarchy and Parliament.

With the second meaning of the word ‘right’ in mind, common law jurisprudence developed to protect individual rights, but only to the extent that these rights were not expressly overridden by statute law. For example, a right of lawful peaceful assembly was recognised, although no specific legal remedy was provided for where that right was violated.

With the third meaning of the word ‘right’ in mind, through Magna Carta and the Bill of Rights 1689, English law also recognised certain rights in a positive form, the most important of which provided safeguards for the individual against the unlawful deprivation of life or liberty by the state. Set amongst a range of other matters, we find in these documents protections associated with trial by jury and, in the Bill of Rights, against ‘illegal and cruel punishments’ and the setting of excessive bail or fines. Compared to Locke, these documents provided more detailed and particular protections for individual security from arbitrary and tyrannous government. Their influence is also evident in the constitutional landmarks of the 18<sup>th</sup> century, as for example in Amendment 8 to the US Constitution which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

With these building blocks in place, liberalism took a different turn in the 19<sup>th</sup> century. Under the influence of Bentham and the utilitarian school of thought, it largely set its face against the doctrine of natural rights, preferring instead to establish its reform agenda on the basis of a ‘positivist’ view of law in which the only rights worth speaking of are those that are legally enforceable. By the end of the century, guided by the principle of the ‘greatest happiness of the greatest number’, this line of thinking had fed into a commitment to state intervention, for the positive use of law to secure social and material benefits for the welfare of ordinary people. This was the origin of the welfare state, but also of the idea that the law could act as a shield against unfair discrimination on such grounds as class, race and sex. While both Magna Carta and the natural rights doctrine concentrated on ‘procedural due process’, in the form of proper adherence to the processes of the criminal law, these later developments held out the promise of what has become known as ‘substantive due process’, in which the emphasis lies on the fairness of legal and policy outcomes.

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<sup>36</sup> *Retreat From Justice: Human Rights Law in Australia*, n 35, p 9.

### 3.4 Modern developments

During and after World War II these philosophical, practical and doctrinal strands contributed to a commitment to secular ‘human rights’, not to ‘natural rights’, with their religious connotations. On one side, the strict positivist view of law was discredited by the argument that it could not establish a universal standard by which to invalidate the legitimacy of Nazi law. On the other, belief in the capacity of the liberal democratic state to actively sponsor human rights and human welfare was very much alive.

Grounded on a belief in our common humanity, set against the backdrop of the horrors of Nazism, the impulse behind the human rights movement was for the recognition of individual dignity, autonomy and well being as legal standards of universal application. Its first expression is found in the 1948 *Universal Declaration of Human Rights*, which can be read as a manifesto of Western values. Set out is a wide range of rights and freedoms, civil and political (Articles 2-21), as well as economic, social and cultural (Articles 22-27). Only in 1966 were these rights expressed in binding covenants – the International Covenant on Civil and Political Rights (ICCPR) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR).

Primarily, the ICCPR was concerned to protect the fundamental liberties of the individual against state abuse. Its safeguards are designed to protect individual against such evils as the arbitrary deprivation of life, slavery, torture, arbitrary arrest and detention and the like. To that extent it was an expression of the ‘negative’ rights embodied in classical liberal doctrine and in such documents as Magna Carta and the Bill of Rights 1689. The ICCPR also protects such rights as freedom of peaceful association, thought, religion and the right of citizens to participate in the conduct of public affairs. Regionally, similar rights were also protected under the *European Convention on Human Rights and Fundamental Freedoms* (ECHR). In contrast to the ICCPR, however, it did not specifically include protection of minority group rights, and the protection from discrimination it provided was narrower in scope.

The ICESCR reflects more the welfarist and, in some cases, socialist aspirations of many UN member states, including ‘the right to work’ and ‘the right to an education’. States which are parties to the Covenant are obliged to ‘recognise’ or ‘ensure’ such rights. The wording used in the ICESCR is either ‘The States Parties to the present Covenant recognise’ (Articles 6-7, 9-13), or ‘The States Parties to the present Covenant undertake to ensure’ (Article 8 – the right to join and form trade unions). Whereas the wording used in the ICCPR is usually either ‘Everyone has a right to’ (Articles 6, 8, 12, 14(2), for example), or ‘No one shall be subjected to’ (Articles 7, 8, 11, for example). As against these ‘individual’ rights, the ICESCR also recognises the ‘collective’ right of groups to enjoy their own culture and to participate in cultural life. Such ‘collective’ rights are referred to as ‘third generation’ rights.

The ICESCR took effect on 3 January 1976 and the ICCPR on 23 March 1976. Australia has ratified both these treaties. Other UN Conventions of note include:

- The Convention on the Rights of the Child;
- The International Convention on the Elimination of Racial Discrimination;
- The Convention Relating to the Status of Refugees;

- UN Draft Declaration on the Rights of Indigenous Peoples; and
- The Convention on the Elimination of All Forms of Discrimination Against Women.

### 3.5 Statutory interpretation and human rights instruments in NSW

The *Interpretation Act 1987* (NSW) sets out the principles to be followed in interpreting NSW statutes. Section 34, entitled ‘Use of extrinsic material in the interpretation of Acts and statutory rules’, states that in the interpretation of an Act, where the ordinary meaning of a provision is ambiguous or obscure, or if the ordinary meaning leads to a result that is ‘manifestly absurd or unreasonable’, material external to the Act itself may be used to assist in interpretation. The material which can be used for this purpose includes, at s 34(2)(d) ‘any treaty or other international agreement that is referred to *in the Act*’ (emphasis added).

As the Standing Committee on Law and Justice commented in its 2001 report, the legislation does not enable international treaties or conventions not mentioned in the *Interpretation Act* to be used to resolve ambiguities. For this, the Committee said, ‘judges need to rely upon common law rules of statutory interpretation’. The Committee recommended that s 34 be amended ‘to confirm the common law position that judges are able to consider international treaties and conventions, to which Australia is a party, when there is an ambiguity in a NSW statute’.<sup>37</sup>

This recommendation was rejected by the Government. Responding to the Committee’s report, Premier Carr said:

No other Australian jurisdiction has a provision of the kind recommended by the Committee. The Government believes that it is important to maintain maximum consistency between states and territories on issues of statutory interpretation.

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Standing Committee on Law and Justice, n 31 pp 133-39.

## 4. THE US BILL OF RIGHTS

### 4.1 The supremacy of judicial review

An interesting feature of the case that is made on behalf of the proposed Victorian Charter of Rights and Responsibilities is the distance its proponents seek to place between what is recommended and the most high profile model of national human rights law, the US Bill of Rights. Instead of the US model, emphasis is placed on the newer human rights instruments, particularly those found in New Zealand, the UK and the ACT. This is for good reason. A major flaw of the US model from the perspective of the Westminster parliamentary system of government is that it makes judges the ultimate arbiters in conflicts over human rights. Under this model of judicial review the last word is provided to the judiciary, leaving no further scope for dialogue with Federal or State legislatures. It is the apotheosis of what is called 'legal constitutionalism', where constitutional interpretation is the final prerogative of the judiciary. As Chief Justice Hughes famously remarked, 'the constitution is what the judges say it is'.<sup>38</sup>

From the standpoint of 'legal constitutionalism', law is seen as an activity that is not only distinctive from but also superior to politics. In place of the rhetorical exaggerations and competing interests of the political arena, the courts are viewed as a forum for objective reflection and decision making, founded on rational, legal principles. The contrary view of the US model is that the Supreme Court's decisions are often expressions of policy preferences of an intensely personal character. In the area of human rights, in particular, the scope for the exercise of personal judicial discretion can be very wide, as shown by the leading freedom of religion cases. One commentator writes in this respect:

Because there is more than one 'dictionary' from which they can choose, and because both history and precedent can be read in more than one way, each judge has an enormous discretion in defining which rights are protected in the First Amendment and what the practical meaning of state neutrality in matters of religion will be.<sup>39</sup>

Commenting on these issues, the report of the Legislative Council Standing Committee on Law and Justice said:

A related argument is that the rights in the US Constitution have, as a result of judicial interpretation, been used for opposite purposes to that which the drafters would have originally intended. The example most frequently cited to the Committee was the First Amendment guarantee for religion. It is argued that this has been used by opponents of organised religion to prevent prayer in schools and other expressions of religious belief on the grounds that this would constitute the establishment of a state religion.<sup>40</sup>

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<sup>38</sup> Quoted in DM Beatty, *The Ultimate Rule of Law*, Oxford University Press 2004, p 42.

<sup>39</sup> Beatty, n 38, p 42.

<sup>40</sup> Standing Committee on Law and Justice, n 31, p 28.



Particularly difficult is section 1 of the 14<sup>th</sup> Amendment of the Constitution, which was ratified on 28 July 1868. It provides:

No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Discussing the last ‘equal protection clause’, the Constitutional Commission called it an ‘open-textured provision which provides a general and indeterminate standard of equality to which the United States Supreme Court has to ascribe some content’. According to the Commission, this has resulted in uncertainties in interpretation:

One paradoxical result was that, while the purpose of the clause was to ensure racial equality, for over 60 years a system of racial segregation in the United States was found to be consistent with it. Not until 1952, in *Brown v Board of Education for Topeka County*, was the ‘separate but equal’ doctrine reversed decisively.<sup>41</sup>

The potential for subjective and highly political interpretations of the Constitution was exemplified in the most famous, or infamous, 19<sup>th</sup> century Supreme Court case – *Dred Scott v Sandford* (1857). As the slave of an army surgeon, Dr John Emerson, Scott lived on a military base in the free State of Illinois and at Fort Snelling, in what was then Missouri territory. Missouri was a slave State admitted into the Union in 1820. After Dr Emerson died Scott sued for his freedom and, in 1850, a State court in St Louis declared him free. This was challenged by John Sanford, the executor of Dr Emerson’s estate, and the matter went to the Supreme Court where it was decided by ‘the avidly pro-slavery Chief Justice Taney, who used *Dred Scott* to decide pressing political issues in favour of the South’.<sup>42</sup> His decision, which settled the issue of slavery in favour of the South, has been described as ‘a work of unmitigated partisanship, polemical in spirit though judicial in its language’.<sup>43</sup> The example is extreme, but if the appointment process is any guide the US Supreme Court remains an inherently ‘political’ institution.

This is not the place to review the record of the US Supreme Court on human rights. It is enough to note that a form of dialogue occurs between the courts on one side and legislatures at the State and Federal levels on the other. Whether the content of that dialogue constitutes some kind of model of enlightened law making is another matter. Many would contend that the protection of human rights is less than exemplary. If the record of the US Supreme Court is uneven, so too is that of the US legislatures. Neither untrammelled judicial discretion nor untrammelled majoritarianism emerges unscathed from the US experience of a constitutionally entrenched bill of rights.

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<sup>41</sup> *Final Report of the Constitutional Commission, Volume One*, AGPS 1988, p 540.

<sup>42</sup> KL Hall, *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press 2005, pp 924-32.

<sup>43</sup> Don Fehrenbacher ‘s *The Dred Scott Case* (1978), cited in *The Oxford Companion to the Supreme Court of the United States*, n 42, p 931.

## 4.2 Case study - capital punishment

Consider, for example, the issue of capital punishment, the constitutionality of which was upheld by the US Supreme Court in 1976.<sup>44</sup> True it is that a series of rulings have incrementally limited capital punishment in the US for less culpable offenders. In 1986 a bar was placed against capital punishment for the insane.<sup>45</sup> Two years later capital punishment for young offenders under the age of 16 was outlawed.<sup>46</sup> In 2002, execution of persons with mental disabilities was banned.<sup>47</sup> In the 2005 case of *Roper v Simmons* the US Supreme Court, by a 5:4 majority, abolished the death penalty for 16 and 17 year old juveniles who commit murder, a decision which has retrospective effect.<sup>48</sup> The execution of juveniles was declared unconstitutional on the ground that it contravened the Eight Amendment's prohibition against 'cruel and unusual punishment'. Still, the remarkable fact is that, at the time of the ruling, capital punishment for juveniles was permitted by 18 States, with six States carrying out such executions in practice. Of the 226 juveniles sentenced to death since 1976, 22 have been executed.<sup>49</sup> Thirteen of these were in Texas, where 29 juvenile offenders awaited execution at the time of the 2005 ruling. *The Washington Post* commented:

The court said its judgment, which overturned a 1989 ruling that upheld the death penalty for 16 and 17 year old offenders, was also influenced by a desire to end the United States' international isolation on the issue.<sup>50</sup>

## 4.3 Comment

US jurisprudence on capital punishment hardly makes a compelling case for a bill of rights. Of course, these brief reflections are not intended to be decisive arguments one way or another. The broader point to make is that, both in form and substance, the US model differs markedly from the more recent approaches discussed in this paper. The US Bill of Rights is mostly absolutist in its formulation of rights, recognising no 'justified limits'. It also formulates its guarantees in negative terms, with the First Amendment for example beginning '*Congress shall make no law...*'. Its substantive uniqueness is exemplified by its guarantee of a right to bear arms, which has no equivalent in the more contemporary human rights instruments. For critics of such instruments, the US model offers an easy target.

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<sup>44</sup> *Gregg v Georgia*, 428 US 153 (1976). By reference to the Eight Amendment's prohibition against 'cruel and unusual punishment', mandatory death penalties were held to be unconstitutional in *Woodson v North Carolina*, 428 US 280 (1976).

<sup>45</sup> *Ford v Wainwright*, 477 US 399 (1986).

<sup>46</sup> *Thompson v Oklahoma*, 487 US 815 (1988).

<sup>47</sup> *Atkins v Virginia*, 536 US 304 (2002).

<sup>48</sup> *Roper v Simmons*, 1 March 2005.

<sup>49</sup> *Bulletin of Legal Developments* (2005) Issue No 5, 14 March 2005, pp 54-5.

<sup>50</sup> C Lane, '5-4 Supreme Court Abolishes Juvenile Executions', 2 March 2005 - <http://www.washingtonpost.com/wp-dyn/articles/A62584-2005Mar1.html>

However, that rhetorical strategy only sidesteps the arguably stronger case on behalf of a bill or charter of rights that can be made in relation to the Canadian, New Zealand and British experience, referred to by some commentators as alternative Commonwealth models of constitutionalism. The hard questions remain to be answered.

## 5. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, 1982

One influential point of view in the ongoing debate is that both courts and legislatures have a role to play in a two-sided dialogue on human rights. This dialogue is said to be truly ‘liberal democratic’ in that it combines the majoritarian and representative principles embodied in democratic legislatures, on one side, with the respect for minority and individual rights expressed by the courts, on the other. It is in terms of such a ‘dialogue’, in which the claims of parliamentary supremacy are reconciled with those of judicial review, that current arguments for a charter or bills of rights at the national and State levels in Australia are framed.

### 5.1 The override or ‘opt out’ provision

This dialogue has its principal origins in the Canadian Charter of Rights and Freedoms of 1982. Unlike the New Zealand and British equivalents, but like its US counterpart, the Canadian Charter is constitutionally entrenched. It is also recognised having made an enormous impact on the development of Canadian law. For the moment, it is enough to say that its most innovative feature, certainly in terms of the dialogue between parliaments and the judiciary, was the inclusion of a legislative override or ‘notwithstanding’ clause.<sup>51</sup> Section 33(1) of the Charter provides:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

In other words, by express enactment of ordinary legislation, the national Parliament or a provincial legislature may set aside a judicial finding of unconstitutionality, thereby preserving the supremacy of democratically elected institutions over the unelected courts. The ‘override’ provision was indeed part of a political compromise to ensure the support of the provinces for the Charter, reassuring them that the Charter would not undermine the power of provincial legislatures to determine their own priorities. Section 33(1) makes it clear that not all sections of the Charter are subject to the override clause. Those rights excluded include: ss 3-5 (Democratic rights); section 6 (Mobility Rights); ss 16-22 (Official Languages of Canada); s 23 (Minority Language Educational Rights); and s 28 (Rights Guaranteed Equally to Both Sexes).

Section 33 (2) then provides:

An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

In other words, an Act constituting a declaration under s 33(2) will have effect,

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<sup>51</sup> A similar notwithstanding clause was found in the statutory Canadian *Bill of Rights 1960*, as well as in several provincial human rights codes, including the Quebec *Charter of Human Rights and Freedoms 1975*. See G Griffith, *The Protection of Human Rights: A Review of Selected Jurisdictions*, NSW Parliamentary Library Briefing Paper No 3/2000, p 28.

notwithstanding its incompatibility with a Charter provision. Under s 33 (3) each exercise of the override power has a lifespan of five years or less, after which it expires, unless Parliament or a legislature re-enacts it under s 33 (4) for a further period of five years or less.

Of the operation of s 33, Professor Patrick Monahan writes:

The inclusion of a notwithstanding clause immunizes the statute in question from a Charter challenge founded on any of those particular Charter provisions for a period of five years. Moreover, there is no need for the legislature to specify which particular Charter right is being overridden, nor is the use of the override subject to judicial review on grounds that it is unreasonable or illegitimate in the circumstances. However, section 33 cannot be utilized retroactively.<sup>52</sup>

In fact this override provision has rarely been used, never by the Federal Parliament, prompting Charter sceptics to question its value and to assert de facto judicial supremacy over the legislatures. This is discussed in more detail later in this paper. The point to make is that the override provision establishes an important structural difference between the Canadian Charter and its US counterpart, providing the potential at least for dialogue between the legislatures and the courts.

## 5.2 Justified limits and dialogue

The other major innovative feature of the Canadian Charter was the inclusion in s 1 of a general limitation clause, guaranteeing the rights and freedoms set out in the Charter ‘*subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*’. This was the first general provision of this kind to be included in a binding human rights instrument.<sup>53</sup> Before then the norm had been for rights to be accompanied by specific qualifications, as in the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR)<sup>54</sup> and the International Covenant on Civil and Political Rights 1966 (ICCPR).

The leading Canadian case on s 1 is the 1986 *R v Oakes*<sup>55</sup> decision, further to which the basic components of s 1 justifications require that legislation: (a) pursue an important objective which is ‘pressing and substantial’ and consistent with democratic values (the legitimate objective test); (b) be rationally connected with the objective (the rational connection test); (c) be designed carefully enough to satisfy judicial notions of proportionality, so that it impairs the right as little as reasonably possible (the minimal

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<sup>52</sup> P Monahan, *Constitution Law*, 2d ed, Irwin Law 2002, p 422.

<sup>53</sup> A model for the ‘justified limits’ clause is found in Article 29(2) of the UN Universal Declaration on Human Rights 1948. This Declaration, which is non-binding in nature, was intended as a first step in the drafting of an international bill of rights.

<sup>54</sup> However, the wording of section 1 of the Charter was influenced by the ECHR, with Article 9 of the latter, for instance, referring to ‘such limitations as are prescribed by law and are necessary in a democratic society’.

<sup>55</sup> [1986] 1 SCR 103.

impairment test); and (d) does not use means where the burdens imposed outweigh the salutary effects the objective is intended to serve (the proportionate effect test).<sup>56</sup> This third test was stated in *Thomson Newspapers v. Canada (Attorney General)*<sup>57</sup> to be concerned with ‘whether the benefits which accrue from the limitation are proportional to its deleterious effects’. Summarising this process, McLachlin CJ said in *Sauvé v Canada (Chief Electoral Officer)*:

To justify the infringement of a Charter right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified... This two-part inquiry – the legitimacy of the objective and the proportionality of the means – ensures that a reviewing court examine rigorously all aspects of justification. Throughout the justification process, the government bears the burden of proving a valid objective and showing that the rights violation is warranted – that is, that is rationally connected, causes minimal impairment, and is proportionate to the benefits achieved.<sup>58</sup>

In the first 15 years of the operation of the Charter, up to 1997, of the statutes that were found to violate rights 97% were held to be reasonable by the Canadian Supreme Court. Most limitations that failed the *Oakes* test did so under the minimum impairment test (43 of 50 violations).<sup>59</sup>

Again, the point to make is that s 1 constitutes another a structural difference between the Canadian and US models, one that facilitates dialogue between the courts and parliaments. Julie Debelijak writes in this respect:

If, in the view of the judiciary, the impugned legislation was not the least rights-restrictive way of achieving the otherwise legitimate objective, the executive and legislature have room to manoeuvre: ‘it will usually be possible for the policymakers to devise a less restrictive alternative’ which will still achieve the objective and ‘is practicable’. Thus, legislative policy is seldom overridden by rights imposed by the judiciary. The rights ‘generally operate at the margins of legislative policy, affecting issues of process, enforcement, and standards, all of which can accommodate most legislative objectives.’<sup>60</sup>

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<sup>56</sup> JL Hiebert, ‘Why must a Bill of Rights be a contest of political and judicial wills? The Canadian alternative’ (1999) 10 *Public Law Review* 22 35.

<sup>57</sup> [1998] 1 S.C.R. 877.

<sup>58</sup> [2002] 3 SCR 519 at para 7.

<sup>59</sup> PW Hogg and AA Bushell, ‘The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn’t such a bad thing after all’ (1997) 35 *Osgoode Hall Law Journal* 75 at 100.

<sup>60</sup> J Debelijak, ‘The Human Rights Act 2004 (ACT); a significant yet incomplete step forward toward the domestic protection and promotion of human rights’ (2004) 15 *Public Law Review* 169 at 171-2.

Likewise, Associate Professor Janet Hiebert comments:

The Charter's general limitation clause in section 1 has encouraged judges to place more emphasis on evaluating the reasonableness of the means chosen to pursue a legislative objective rather than on the merits of the objective itself. Thus, the combination of the Charter's structure and the judiciary's approach to judicial review...focuses a considerable part of the parliamentary/judicial exchange on how to pursue legislative objectives in a manner that is consistent with the courts' 'reasonableness' concerns and interpretation of proportionality rules.<sup>61</sup>

### 5.3 Charter supporters

It was Hogg and Bushell in 1997 who adopted the metaphor of dialogue in this context, arguing that the Charter 'can act as a catalyst for a two-way exchange between the judiciary and legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of democratic institutions'.<sup>62</sup> The dialogue metaphor was later adopted by the Canadian Supreme Court in *Vriend v Alberta*,<sup>63</sup> a case in which a teacher's employment at a college was terminated because of his homosexuality. The impugned Alberta anti-discrimination legislation did not include 'sexual orientation' as a protected ground. This omission was held to infringe s 15 (equality rights) of the Charter, an infringement that could not be justified by reference to s 1 (justified limits). To remedy the deficiency in this 'underinclusive legislation', the words 'sexual orientation' were read into the prohibited grounds of discrimination. On the relationship between the Court and Parliament, Iacobucci J observed:

As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance...In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives...By doing this, the legislature responds to the courts; hence the dialogue among the branches.<sup>64</sup>

### 5.4 Charter sceptics

Whether this conception of 'dialogue' is enough to satisfy the Charter sceptics is another matter. Different commentators have offered a variety of opinions. Beatty argued in 1999 that, 'after an initial flurry of activity', the Supreme Court of Canada has 'adopted a highly deferential even submissive posture towards the other two branches of government. Caution, restraint and a very attenuated standard of review are widely acknowledged to be the

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<sup>61</sup> JL Hiebert, *Charter Conflicts: What is Parliament's Role?* McGill-Queens University Press 2003, pp 47-8.

<sup>62</sup> Hogg and Bushell, n 59, p 81.

<sup>63</sup> [1998] 1 SCR 493.

<sup>64</sup> [1998] 1 SCR 493 at para 138.

leitmotif of Canadian constitutional law'.<sup>65</sup>

Another line of reasoning suggests that the record differs depending on the type of case at issue, in particular where the outcomes of judicial decisions have major resource implications. Encapsulating this argument, KD Ewing, a noted sceptic when it comes to evaluating the merits of human rights legislation, writes that

a sophisticated analysis of the Canadian experience has concluded that 'the courts are disposed to recognition claims but inclined against redistribution ones'...The former cover claims by groups 'who are subject mainly to cultural and symbolic injustice' (such as gays and lesbians), while the latter covers those whose claims are 'primarily political and economic' (such as labour unions).<sup>66</sup>

It is noted, too, that it is not only the rights of individuals that are protected under the Canadian Charter. Legal as well as natural persons can assert human rights claims, with the result that, although rights may operate to protect vulnerable minorities, they can also work to protect the interests of the advantaged, including multinational corporations. Ewing quotes the 'colourful' view that 'About the only groups in society that have clearly benefited from the Charter are constitutional and criminal lawyers, drug traffickers and transnational corporations'.<sup>67</sup> On this last point, under the *ACT Human Rights Act 2004*, corporations are barred from asserting their 'human rights' in this way, which suggests that the Canadian Charter is not the last word on the dialogue between the courts and parliaments.

The case studies that are presented next in this paper cannot hope to be completely representative of the total body of jurisprudence that has developed under the Charter. They can only try to offer a taste of the procedural and substantive issues encountered in the evolving case law.

## 5.5 Case study – voting rights for prisoners

In 1993, in *Sauvé v Canada (Attorney General)*,<sup>68</sup> the Canadian Supreme Court held that s 51(e) of the *Canada Elections Act 1985*, which prohibited all prison inmates from voting in federal elections, regardless of the length of their sentences, was unconstitutional. In particular, the provision was held to be an unjustified denial of the right to vote guaranteed by s 3 of the Charter of Rights and Freedoms. The government's argument that s 51(e) was

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<sup>65</sup> D Beatty quoted in K Ewing, 'Human rights' in *The Oxford Handbook of Legal Studies* edited by P Crane and M Tushnet, Oxford University Press 2005, p 313.

<sup>66</sup> Ewing, n 65, p 313. His reference is to J Fudge, 'The Canadian Charter of Rights: Recognition, Redistribution and the Imperialism of the Courts' in T Campbell, KD Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights*, Oxford University Press 2001.

<sup>67</sup> Ewing, n 65, pp 313-4. In 1999 the Constitution Unit of University College London, reported that 74% of Charter cases were in the area of criminal law in the first four years of its operation, with a success rate of 31%; by 1999, 25% of all appeals to the Canadian Supreme Court were still on criminal law Charter cases - Standing Committee on Law and Justice, n 31, p 97.

<sup>68</sup> [1993] 2 SCR 438.



saved by the ‘justified limits’ clause under s 1 of the Charter was rejected. This was on the basis that s 51(e) was drawn too broadly and that it failed to meet the proportionality test, particularly the minimal impairment component of the test.

Continuing the dialogue between the legislature and the courts, the Canadian Parliament responded to this finding by amending s 51(e), limiting its denial of the right to vote to all inmates serving sentences of two years or more. It was this new provision that was litigated in 2002, in *Sauvé v Canada (Chief Electoral Officer)*.<sup>69</sup> By a majority 5 to 4 decision, the Supreme Court held that this new provision was also unconstitutional. At issue was the validity of this provision when scrutinised by reference to s 1 (justified limits), s 3 (democratic rights) and s 15 (equality rights) of the Charter. Section 3 provides:

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The argument turned on whether the Court should show due ‘deference’ to the Parliament and Executive on the ground that the right to vote for prisoners ‘is a matter of social and political philosophy’. For the minority, Gonthier J proposed a deferential approach to infringement and justification, arguing that there is no reason to accord special importance to the right to vote, and that the Court should defer to Parliament’s choice among a range of reasonable alternatives. In justifying limits on the right to vote, he further argued, that the Court owed deference to Parliament because it was dealing with ‘philosophical, political and social considerations’, because of the abstract and symbolic nature of the government’s stated goals, and because the law at issue represented a step in a dialogue between Parliament and the courts.<sup>70</sup>

The majority disagreed, with McLachlin CJ arguing that while deference may be appropriate on a decision involving competing social and political policies, it is not appropriate on a decision to limit fundamental rights. The framers of the Charter signaled the special importance of the right to vote, it was said, not only by its broad, untrammelled language, but by exempting it from legislative override under the s 33 notwithstanding clause. Specifically, s 51(e) was found to fail all three limbs of the proportionality test: the government failed to establish a rational connection between the provision’s denial of the right to vote and such stated objectives as promoting civic responsibility and respect for the law; the provision was too broad and therefore did not minimally impair the right to vote; and the negative effects of denying citizens this right would greatly outweigh the tenuous benefits that might ensue. McLachlin CJ left for another occasion the question of

whether some political activities, like standing for office, could be justifiably denied to prisoners under s 1. It may be that practical problems might serve to justify some limitations on the exercise of derivative democratic rights. Democratic participation is not only a matter of theory but also of practice, and legislatures retain the power to limit the modalities of its exercise where this can be justified.<sup>71</sup>

<sup>69</sup> [2002] 3 SCR 519.

<sup>70</sup> [2002] 3 SCR 519 at para 8 (McLachlin CJ’s summary of the decision of Gauthier J).

<sup>71</sup> [2002] 3 SCR 519 at para 62.

## 5.6 Case study – same-sex marriage

The history of same-sex marriage laws in Canada will be discussed in detail in a forthcoming Briefing Paper. The present discussion can be limited to the following points:

- In 2005 the Canadian federal Parliament passed legislation legalizing same-sex marriages – the *Civil Marriage Act*.
- Same-sex marriage was already legal in 8 of the 10 Canadian provinces, as well as one of Canada’s 3 territories. The new federal law made same-sex marriages legal nationwide.
- Indicative of the controversial nature of the issue was the fact that, in 2000, Alberta amended its *Marriage Act* to add a specific reference to the opposite-sex meaning of marriage and a ‘notwithstanding’ or ‘override’ clause, stating that the Act ‘operates notwithstanding (a) the provisions of section 2 and 7 to 15 of the Canadian Charter of Rights and Freedoms’.
- The federal *Civil Marriage Act* of 2005 was prompted by several Court decisions at the provincial level. Courts in 7 out of Canada’s 10 provinces had already ruled that the traditional definition of marriage as between a man and a woman violated s 15 (equality rights) of the Charter of Rights and Freedoms.
- The first of these rulings occurred in 2003 in Ontario, where the Court of Appeal in *Halpern v Canada (Attorney General)*<sup>72</sup> concluded that the violation of s 15 was not justified under the justified limits clause of s 1 of the Charter. According to the unanimous judgment:

The AGC [Attorney General of Canada] has not demonstrated that the objectives of excluding same-sex couples from marriage are pressing and substantial. The AGC has also failed to show that the means chosen to achieve its objectives are reasonable and justified in a free and democratic society.<sup>73</sup>
- The Ontario Court of Appeal explained that, as the restriction of marriage to opposite-sex couples failed to satisfy the first ‘legitimate objective’ test, strictly speaking there was no need to engage in the three-limbed proportionality analysis. It did so only because that approach ‘has become the norm’.<sup>74</sup> The first purpose of marriage advanced by the Attorney General was that it united the opposite sexes, to which the Court of Appeal responded that this suggested that ‘uniting two persons of the same sex is of lesser importance’. It found this to be a purpose that ‘demeans the dignity’ of same-sex couples, something that in principle ‘is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial’.<sup>75</sup>
- Prior to the passing of the *Civil Marriage Act*, the federal Government sought an

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<sup>72</sup> [Halpern v. Canada \(Attorney general\), 2003 CanLII 26403 \(ON C.A.\) - http://www.canlii.org/on/cas/onca/2003/2003onca10314.html](http://www.canlii.org/on/cas/onca/2003/2003onca10314.html)

<sup>73</sup> Ibid at para 142.

<sup>74</sup> Ibid at paras 125-6.

<sup>75</sup> Ibid, paras 118-9.

advisory opinion<sup>76</sup> from the Canadian Supreme Court on a number of specific questions of law, including whether the proposed law was within the legislative power of the Federal Parliament and, if so, was the proposal to extend the capacity to enter into a civil marriage to same-sex couples consistent with the Charter? The answer to both these questions was ‘yes’. In finding that the proposed same-sex marriage provision was consistent with the Charter, the Court had to consider the potential for a ‘collision of rights’, as between s 15 (equality rights) and s 2(a) (freedom of religion). Its conclusion in this respect was that, while conflicts might arise, this does not imply conflict with the Charter itself. Rather, ‘the resolution of such conflicts generally occurs within the ambit of the Charter itself by way of internal balancing and delineation’.<sup>77</sup>

- The Supreme Court also held that the guarantee of religious freedom in s 2(a) is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.<sup>78</sup>
- Further to these developments, in August 2005 a British Columbia Supreme Court judge granted a woman a divorce after her husband had an affair with another man, thereby extending ‘adultery’ to same-sex affairs. Adultery is not defined by federal legislation.<sup>79</sup>

This same-sex marriage issue is of interest from several standpoints, but primarily as an illustration of how, in this instance, the language of dialogue was replaced by the imperatives of judicial review. In these circumstances, the Federal legislature was placed in the position where, it either had to enact a specific override clause exempting its marriage laws from the Charter obligations, or else it was compelled to fall into line with the judicial exposition of those obligations. The same could be said of the provincial legislatures, except that in their case the override question became irrelevant once the Supreme Court had determined that the Federal Parliament had the jurisdiction required to pass nationwide laws in this context.

### 5.7 Case study – cross-examination of rape victim and the right to a fair trial

The rights of victims of crime and the accused is a difficult and controversial area of the law, never more so than in relation to the cross-examination of victims of sexual assault. In terms of the dialogue between parliamentary supremacy and judicial review, this is also an area where the courts have intervened to strike down legislation providing a blanket prohibition on the introduction of evidence of prior sexual behaviour. As discussed later in this paper, this applies both to Canada and the UK.

The first leading Canadian case is *R v Seaboyer*<sup>80</sup> where the blanket prohibition was

<sup>76</sup> *Supreme Court Act 1985* (Canada), s 53.

<sup>77</sup> *Reference re Same-Sex Marriage* [2004] 3 SCR 698 at para 52.

<sup>78</sup> *Reference re Same-Sex Marriage* [2004] 3 SCR 698 at para 60.

<sup>79</sup> *Bulletin of Legal Developments*, Issue No 17, 12 September 2005, pp 198-9.

<sup>80</sup> [1991] 2 SCR 577.

declared invalid as an infringement of s 11(d) (right to a fair trial) of the Charter. Further, the Court laid down guidelines for the reception and use of sexual conduct evidence. The Parliament duly amended s 276 of the Canadian Criminal Code in accordance with these guidelines. The issue was reprised in *R v Darrach*<sup>81</sup> where the constitutionality of both the substantive and procedural aspects of s 276 were challenged. The Court held that the procedure created by the amended provision, taken as a whole, was consistent with the principles of fundamental justice and protected the defendant's constitutional rights. Far from being a 'blanket' prohibition, s 276 only prohibited the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences, namely, that a complainant is more likely to have consented to the alleged assault and that she is less credible as a witness by virtue of her prior sexual experience.

### 5.8 Case study – the right to silence

Bills and charters of rights are often criticized as affording too much protection to criminals from the normal processes of the law. Conversely, they are also defended for providing adequate protection to the vulnerable individual against the might of the state. Either way, legal rights are indeed a significant feature of any bill or charter of this sort. The Canadian example is no exception, with sections 7 to 14 guaranteeing various rights of this kind, including against unreasonable search and seizure (s 8), arbitrary arrest or detention (s 9) and self-incrimination (s 13).

Section 7 of the Charter guarantees

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The first Charter case to recognize that the right to silence is a s 7 right was *R v Herbert*<sup>82</sup> in 1990. In that instance, accused, who had been arrested and advised of his rights, refused to provide a statement to the police after consulting counsel. He was then placed in a cell with an undercover officer posing as a suspect under arrest. During the course of their conversation, the accused incriminated himself. The question before the Court was whether the statement to the undercover officer was admissible. A majority held that it was not because it violated the accused's right to silence in s 7 of the Charter.

Since then the limits of this right have been tested on several occasions, most recently in *R v Turcotte*,<sup>83</sup> where the s 7 right was affirmed, as was the further point that adverse inferences may be drawn from the accused's silence only in a narrow range of circumstances. The facts of the case were that Turcotte attended a police station and requested that police visit the farm where he lived and worked. On arrival, the police found the bodies of three other residents. The evidence against Turcotte was circumstantial and at the trial the prosecution submitted that an inference of guilt could be drawn from his refusal to answer questions regarding the incident when he initially attended the police station.

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<sup>81</sup> [2000] SCC 46; (2000) 191 DLR (4<sup>th</sup>) 539.

<sup>82</sup> [1990] 2 SCR 151.

<sup>83</sup> [2005] 2 SCR 519.

Turcotte's explanation at trial was that he was suffering from the effects of shock after discovering the bodies. However, the trial judge instructed the jury that the accused's failure to respond to police questions was 'post-offence conduct' from which they could infer guilt.

For the Court, Abella J dismissed the Crown's argument that the right to silence is engaged only when the accused comes within 'the power of the state'. The unanimous view of the Court was that:

In general, absent a statutory requirement to the contrary, individuals have the right to choose whether to speak to the police, even if they are not detained or arrested. The common law right to silence exists at all times against the state, whether or not the person asserting it is within its power or control.<sup>84</sup>

It was acknowledged that were circumstances in which the right to silence must 'bend', for example, in a joint trial in which a defendant had given a full statement to the police and his counsel wished to cross-examine his co-accused on his refusal to do so, or when an accused failed to disclose an alibi in an adequate or timely manner.<sup>85</sup>

Canadian cases on voting rights for prisoners and same-sex marriage can be said to illustrate how jurisprudence in that country has tended, under the influence of the Charter, to develop towards a US approach to judicial review. On the other hand, the cases on the right to silence seem very similar to the corresponding jurisprudence in Australia, this in circumstances where the Charter is seen to protect a right already recognized at common law. In this situation, familiar questions must be answered within a more or less familiar legal setting, thus suggesting that the impact made by a bill or charter of rights will tend to vary from one area of the law to another.

## 5.9 Case study – censorship law and discretionary powers

Familiar, too, in many respects are the landmark Canadian cases on censorship, both in their adoption of traditional notions of 'harm' caused by certain 'obscene' material and, in one case, in the Court's reluctance to intervene in the administration by the public service of discretionary powers.

The first case, *Butler v R*,<sup>86</sup> dates from 1992. At issue was whether the definition of 'obscenity' in the Criminal Code infringed s 2(b) (freedom of expression etc) of the Charter. The answer arrived at by the Supreme Court was that, by prohibiting certain types of expressive activity, the relevant provision did infringe s 2(b), but that the infringement was justified under s 1 of the Charter. The overriding objective of the provision, it was held, was not moral disapprobation but the avoidance of harm to society, and this was a sufficiently pressing and substantial concern to warrant a restriction on freedom of expression.

<sup>84</sup> [2005] 2 SCR 519 at para 51.

<sup>85</sup> [2005] 2 SCR 519 at para 48. This summary is based on 'Right to silence – Canada' [2006] *Criminal Law Review* 91-2. For a critical comment on *Turcotte* see – G Ferguson, 'Is silence "post-offence conduct"?' (2006) 30(2) *Criminal Law Journal* 113.

<sup>86</sup> [1992] 1 SCR 452.

Specifically, the Supreme Court held that certain kinds of pornography, namely explicit sex with violence, horror or cruelty or explicit sex in which one or more of the participants is degraded or dehumanised could be banned on the grounds that such material will ‘necessarily fail’ the community standards test of tolerance. Such pornography was contrasted with the legally acceptable form depicting explicit sex without violence which is neither degrading nor dehumanising.<sup>87</sup> By its reference to ‘community standards’ tests and to the ‘harm’ caused by some pornography, the Supreme Court arrived at conclusions familiar enough to Australian courts, even if in doing so it traversed somewhat novel ground associated with Charter jurisprudence. While the decision in *Butler* was warmly praised by feminist critics of pornography, Charter sceptics might say that the Court found a long-winded way of arriving at a predictable outcome.

The second landmark censorship case is *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*.<sup>88</sup> This involved a freedom of expression challenge to the way in which Canadian customs officials were exercising their discretionary authority to confiscate allegedly obscene material being imported into Canada, mostly from the US. It was claimed that the authorities were violating s 2(b) of the Charter in their systematic seizure of gay and lesbian literature. There were a number of aspects to the decision of the Supreme Court:

- It struck down a provision of the Customs Act which placed the onus of proof on the importer to establish that its materials were not obscene. Blocking importation of books, including erotica, infringed the constitutional right to freedom of expression (s 2(b)), and the onus should be on the state to justify such infringements.
- Otherwise, however, the constitutionality of the impugned legislation was upheld. The whole Court agreed that the *Butler* community standards and harm test for obscenity did not make a distinction between homosexual and heterosexual erotica. Rather, the test incorporated the principle of equality and the tolerance of homosexual erotica. It could not be said, therefore, that the seizures had infringed the equality rights (s 15) of the bookstore or its customers.
- However, it was agreed by the whole Court that systematic violations of the importer’s freedom of expression had occurred. Where the majority and minority differed was over the remedy to be applied.
- For the majority, it could not be said that the powers delegated to Canada Customs to inspect and seize books amounted to an infringement of constitutional rights. The standard set by Parliament was consistent with and linked to the Criminal Code definition of obscenity, which was itself a justifiable infringement on the freedom of expression, and was subject to safeguards including times limits and judicial review.
- For the majority, a distinction was made in this respect between the legislation and its administration by the Customs service. It was acknowledged that, under the

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<sup>87</sup> In fact the court discussed three tests of “obscenity” (i) the community standards test, which refers to what Canadians would not tolerate other Canadians being exposed to; (ii) the ‘degradation or dehumanization’ test, which refers to material which places women (and sometimes men) in positions of subordination, servile submission or humiliation and runs against the principles of equality and dignity of all human beings; and (iii) the internal necessities test, which constitutes the artistic defence for problematic depictions required for the serious treatment of a theme.

<sup>88</sup> [2000] 2 SCR 1120.

legislation, a large measure of discretion was granted at the administrative level which, in practice, had resulted in the systemic violations complained of. The regulatory power contained in the legislation had not been utilised to provide appropriate machinery and guidelines for the exercise of the discretionary power available to the Customs service. However, the legislation itself was not therefore invalid. It was not for the Court to force Parliament to legislate to create this machinery. The capacity existed under the legislation for the Executive to do this by way of regulation and guidelines. Basically, the view was taken that ‘the fact that a regulatory power lies unexercised provides no basis in attacking the validity of the statute that conferred it’.<sup>89</sup>

- For the minority, the legislation should have been struck down for its failure to provide ‘an adequate process to ensure that Charter rights are respected when the legislation is applied at the administrative level’.<sup>90</sup> The scheme in place was neither minimally intrusive nor, bearing in mind the high rate of error, could its benefits be said to outweigh its deleterious effects.

Apart from anything else, the case suggests the complexity of much Charter jurisdiction. What is clear, however, is that questions of constitutional validity under the Charter are distinct from administrative law questions which are to be dealt with in relation to such standards as the duty to act reasonably. In this respect, the Charter can raise issues arising from the exercise of discretionary power on to a different level of jurisprudence associated with the protection of fundamental human rights.

In terms of outcomes, the majority view in *Little Sisters* indicates the Court’s readiness to show deference to Parliament and the Executive in the exercise of discretionary powers. However, that is not to say that this approach has always been adhered to. Professor David Mullan writes in this respect:

There is no doubt that where discretionary powers in legislation are couched in terms that violate directly the terms of the Canadian Charter, the courts have in the name of the Charter struck down such provisions in their entirety, severed offensive portions, read down the terms of the legislation so as not to permit Charter violations, and even read in Charter protections. This has had an impact on many administrative regimes.<sup>91</sup>

One example discussed by Mullan is *R v Morgentaler*,<sup>92</sup> about which he writes:

The Criminal Code provision authorizing therapeutic abortion committees to approve abortions inevitably in all of its exercise engaged and involved the potential for infringement of the Charter rights of women seeking abortions. Given

<sup>89</sup> [2000] 2 SCR 1120 at para 135.

<sup>90</sup> [2000] 2 SCR 1120 at para 204.

<sup>91</sup> D Mullan, ‘A comparison of the impact of the New Zealand Bill of Rights and the Canadian Charter of Rights and Freedoms on judicial review and administrative action’ (2003) 1 *New Zealand Journal of Public and International Public Law* 115 at 142.

<sup>92</sup> [1988] 1 SCR 30.

the lack of structuring of the discretion that it conferred, the correct remedy, according to the Court, was striking down, not simply relief to individual women denied abortions in violation of their Charter rights.<sup>93</sup>

### 5.10 Case study – freedom of religion and the wearing of a ceremonial dagger

A more recent example of the relationship between constitutional and administrative law is found in *Multani v Commission Scolaire Marguarite-Bourgeois*.<sup>94</sup> In this case the Supreme Court ruled that a Quebec School Board infringed a 12-year old Sikh's boy's guarantee of freedom of religion (s 2(a)) by forbidding him from wearing his ceremonial dagger, the kirpan, as required by his faith, in the classroom. The decision of the Supreme Court reinstated a lower court ruling that allowed Sikhs to wear the dagger subject to certain conditions, including that it be wrapped in heavy cloth, inside a wooden case and worn underneath clothing as is the normal practice. In November 2001 the dagger had fallen to the ground at the boy's elementary school, at which time he had preferred to leave school rather than accept his principal's direction that the dagger should be removed. In arriving at its conclusion, the Supreme Court overturned the ruling of the Quebec Court of Appeal which found that the dagger was dangerous, that it had the makings of a weapon, and that although its ruling would restrict religious freedom, community safety came first.<sup>95</sup>

While all the justices of the Supreme Court agreed on the outcome of the case, they arrived at their conclusion by different means. It was accepted that the case involved a decision made by an administrative body, in this instance the School Board's Council of Commissioners. The question was whether the restriction imposed by the Council was a limit 'prescribed by law' within the meaning of s 1 of the Charter. If not a 'law', then the limit might be treated as an administrative decision to which the principles of administrative, not constitutional, law were to be applied. This was the view adopted by Deschamps and Abella JJ who argued that the administrative law approach should be retained for reviewing decisions and orders made by administrative bodies. In arriving at the conclusion that the Council applied the relevant code of conduct without sufficient thought to the freedom of religion, Deschamps and Abella JJ applied the standard of 'reasonableness', not the interpretive principles associated with the justified limits clause of the Charter.

The main joint judgment was delivered by Charron J who argued that the Council was a creature of statute, that the Parliament could not pass a statute that infringes the Charter and nor could it, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker. Applying a constitutional law approach, Charron J maintained that 'where the decision maker has acted pursuant to an enabling statute, since any infringement of a guaranteed right that results from the decision maker's actions is also a limit "prescribed by law" within the meaning of s 1'.<sup>96</sup>

<sup>93</sup> Mullan, n 91, pp 143-4.

<sup>94</sup> 2006 SCC 6 (CanLII) - <http://www.canlii.org/ca/cas/scc/2006/2006scc6.html>

<sup>95</sup> This summary is based on – *Bulletin of Legal Developments*, Issue No 5, 13 March 2006, pp 55-6.

<sup>96</sup> The *Little Sisters* case was distinguished, with Charron J saying 'when the delegated power is not exercised in accordance with the enabling legislation, a decision not authorized by



The upshot was that, for Charron J, the prohibition against the wearing of a Sikh ceremonial dagger had to be tested in the context of the ‘justified limits’ clause (s 1). It was acknowledged that freedom of religion is not absolute and that it can be limited when a person’s freedom to act in accordance with their beliefs may cause harm to or interference with the rights of others. It was also accepted that the object of ensuring safety in schools is a ‘pressing and substantial one’. Where the School Board failed was in convincing the Court that absolute prohibition against wearing a kirpan minimally impaired the student’s rights. Crucially, in the circumstances of the case the claims that security at school would be jeopardised were dismissed. Total prohibition, it was said, would also send the message that some ‘religious practices do not merit the same protection as others’, in which circumstances the deleterious effects of a total prohibition would also outweigh its salutary effects.

### 5.11 Comment

While these case studies cannot be taken to be representative of the totality of Canadian Charter jurisprudence, they do suggest that it is really something of a mixed bag. As in the last case, the contest or dialogue between parliamentary supremacy and judicial review is not always to the fore. Where it is, different outcomes can be reached. Some cases suggest that judicial deference lives on, whereas others confirm Hiebert’s view that Canada has yet to reject the ‘American equation of judicial review with judicial supremacy’.<sup>97</sup>

Deference was certainly set aside in the 2003 case of *Figueroa v Canada (Attorney General)*,<sup>98</sup> in which the Supreme Court declared invalid a provision of the *Canada Elections Act* requiring that political parties must nominate in at least 50 electoral districts to qualify for public electoral funding. The 50-candidate threshold infringed s 3 (the right to vote) of the Charter on several grounds, including by decreasing the capacity of the members and supporters of the disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders. In effect, by denying to small parties the privileges that were granted to large parties, the law gave a competitive advantage to large parties that made it more difficult for the supporters of small parties to be heard in the electoral debate. By the time of the appeal, the 50-candidate threshold had been reduced to 12, and while the new threshold was not in issue, Iacobucci J acknowledged that ‘the thrust of the reasons is that no threshold requirement is acceptable’.<sup>99</sup>

Likewise, deference was expressly abandoned in the 2005 case of *Chaoulli v Quebec (Attorney General)*,<sup>100</sup> where the right to life and security of the person was held to be

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statute is not a limit ‘prescribed by law’ and therefore cannot be justified by s 1’ (at para 22).

<sup>97</sup> JL Hiebert, ‘Parliamentary Bills of Rights: an alternative model?’ (2006) 69(1) *Modern Law Review* 7 at 11.

<sup>98</sup> [2003] 1 SCR 912.

<sup>99</sup> [2003] 1 SCR 912 at para 92. LeBel J said that ‘at least one candidate and perhaps more’ would be acceptable (para 149).

<sup>100</sup> [2005] 1 SCR 791. Although the seven-judge bench was unanimous that the law caused a

infringed by the lack of timely health care where this can result in death. In a decision that is pregnant with implications for public policy, it was decided that, by passing legislation prohibiting private health insurance that would permit ordinary Quebeckers to access private health care while failing to deliver health care in a reasonable manner, the Quebec government had infringed the right to security of the person by increasing the risk of complications and death. On the question of deference, Deschamps J commented that the courts 'leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the...[the Canadian and Quebec Charters], the courts cannot shy away from considering them'. She continued:

Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a sociopolitical philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens.<sup>101</sup>

The impact made by the Canadian Charter has been enormous. This applies not only to Canada itself. Charter jurisprudence has proved influential, substantively, but also procedurally with variations on the *Oakes* test for legitimacy and proportionality resonating widely in judicial reasoning on human rights questions.

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breach of security of the person, there was an even (three-three) split on whether the law was a breach of the principles of fundamental justice under s 7. One judge (Deschamps J) confined her decision to the Quebec Charter of Human Rights and Freedoms, which contains guarantees similar to those of the Canadian Charter, but does not use the phrase 'fundamental justice' She held there was a breach of the Quebec Charter. This became the majority position.

<sup>101</sup> [2005] 1 SCR 791, para 96.

## 6. THE NEW ZEALAND BILL OF RIGHTS ACT 1990

### 6.1 A statutory bill of rights

Different again is the New Zealand *Bill of Rights Act 1990*. In terms of the substantive rights it protects, its content is similar to the Canadian Charter. It also mirrors the Charter by the adoption in s 5 of a ‘justified limitations’ clause. However, the New Zealand Act differs from the Canadian model in two significant ways. First, the New Zealand Act is not constitutionally entrenched supreme law. Instead, it is an ordinary piece of legislation which can be repealed by the usual parliamentary processes. Secondly, under the Act the scope of judicial review is restricted. Unlike in Canada, the courts in New Zealand cannot strike down legislation that is inconsistent with the *Bill of Rights Act 1990*. The Act operates only as a statement of preferred interpretation in relation to public legislation and public actions. It cannot override other inconsistent legislation, either expressly or by implication. These structural features clearly set the New Zealand model apart from its Canadian counterpart.

### 6.2 Pre-enactment scrutiny

Another important difference between the New Zealand and Canadian models is that the former includes the pre-enactment scrutiny provision under which members of Parliament are able to consider whether a Bill is inconsistent with the rights protected under the *Bill of Rights Act 1990*. By s 7 the Attorney General must alert the Parliament to any provision of a Bill ‘that appears to be inconsistent’ with the Bill of Rights. In the case of Government Bills this must occur on the introduction of the Bill in question, or in any other case as soon as practicable after the Bill’s introduction. Under the Standing Orders of the House of Representatives the Attorney-General must supply the House with reasoned reports as to a Bill’s inconsistency or otherwise.

In fact this provision for pre-legislative scrutiny is based on a Canadian model. Section 3 of the Canadian *Bill of Rights 1960* requires the Minister of Justice to examine every regulation and Bill to ensure consistency with both the 1960 enactment and the Charter. The real difference appears to be more in practice than in law, with only one Ministerial report for inconsistency recorded in respect to the 1960 Canadian enactment and none in the history of the Charter. In New Zealand, on the other hand, between 1990 and 2004 there were 29 reports under s 7 of the Bill of Rights.<sup>102</sup> A year later it was reported that, in total, there had been 18 reports on government bills and 35 reports altogether.<sup>103</sup>

The structural requirement in the New Zealand model for this kind of pre-enactment scrutiny is an important mechanism by which human rights issues are brought to the attention of Parliament, thereby presenting it with the first opportunity to deliberate on potential inconsistencies. Such scrutiny can be seen as adding another layer to a multi-faceted dialogue on human rights, one that fosters an enhanced parliamentary role to evaluate the rights dimension of proposed legislation, as an opportunity to develop a ‘rights

<sup>102</sup> P Rishworth, ‘Common law rights and navigation lights: judicial review and the New Zealand Bill of Rights’ (2004) 15 *Public Law Review* 103 at 117.

<sup>103</sup> JL Hiebert, n 97, p 26.

culture' within Parliament itself. Significantly, the New Zealand model does alert us to the fact that the impact and influence of a bill of rights cannot be judged solely in terms of its treatment by the courts. Building a 'rights culture' is a complex enterprise, encompassing schooling the Executive in the language and imperatives of human rights and making Parliament itself an active partner in the protection of rights, as a scrutineer of proposed legislation. That, at least, is the ideal.

The downside of this argument is that, unlike the UK and the model developed in the ACT, New Zealand does not have a parliamentary committee to evaluate legislation for consistency with rights. The point to make is that, without a commitment of resources to a committee of this kind, the actual effectiveness of pre-enactment scrutiny, in terms of its thoroughness and comprehensiveness, must be open to question.<sup>104</sup>

### 6.3 Judicial review

On its face at least, the New Zealand model offers an emasculated version of judicial review. A dialogue between the courts and Parliament is envisaged, in which the balance appears to have been struck firmly in favour of parliamentary supremacy. The approach to the interpretation of the New Zealand bill of rights is set out in ss 4, 5 and 6 of the Act.

- The key provision is *s 6* which requires that an interpretation consistent with the Bill of Rights is to be preferred. In other words, in the interpretation of any enactment a court is to prefer a meaning that is consistent with the Bill of Rights to any other meaning.
- However, this needs to be read alongside *s 4* which provides that no court may 'hold any provision of [an] enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective' or to 'decline to apply any provision of the enactment' by 'reason only that the provision is inconsistent with any provision of this Bill of Rights'.
- *Section 5*, the justified limitations clause, which states that the rights protected under the Act may be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', is then made 'Subject to section 4...'

The interpretation of this matrix of provisions can be said to provide scope for judicial discretion, even judicial activism by some reckoning. Paul Rishworth, Associate Professor of Law at Auckland University writes in this context of factors 'constitutionalising' the *Bill of Rights*. He comments on judicial approaches to interpretation, including what he interprets as the assertion by the Court of Appeal in *Moonen v Film and Literature Board of Review*<sup>105</sup> of the power to declare legislation inconsistent with the *Bill of Rights*.<sup>106</sup> The

<sup>104</sup> For an account of the Legislation Advisory Committee see – D Oliver, 'Improving the scrutiny of bills: the case for standards and checklists' [Summer 2006] *Public Law* 219. Oliver notes that the Legislation Advisory Committee is 'formally a ministerial department but it is in effect independent of government and its views are not expected to be consistent with those of the government' (page 235).

<sup>105</sup> [2000] 2 NZLR 9. P Rishworth et al, *The New Zealand Bill of Rights*, Oxford University Press 2003, p 33.

<sup>106</sup> Rishworth's interpretation has been called 'contentious' – JL Hiebert, n 97, p 15.

general tendency of this analysis is to suggest the ways in which the *Bill of Rights* acts in practice to limit untrammelled parliamentary supremacy, by what might be termed *de facto* entrenchment of superior law. Rishworth writes:

But also, even in the Westminster tradition of flexible constitutionalism, some statutes are proving to be more equal than others: those discerned to have a constitutional dimension may exert a controlling influence over lesser statutes.<sup>107</sup>

#### 6.4 Indications and declarations of inconsistency

In the *Moonen* case, in *obiter dicta* the New Zealand Court of Appeal endorsed the idea that courts should ‘indicate’ when legislation is inconsistent with the Bill of Rights. In respect to s 5 (the ‘justified limits’ provision) of the Bill, Tipping J commented that its purpose

necessarily involves the court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to the proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society... In light of the presence of s 5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the courts will indicate whether a particular legislative provision is or is not justified thereunder.<sup>108</sup>

One commentator argues that such ‘indications’ of inconsistency will ‘help shape, if not determine, Parliament’s agenda’. Grant Huscroft writes:

Tipping J’s use of the term ‘indication’ underestimates the significance of his remarks, which can only be read as an assertion of the importance of judicial interpretation of the Bill of Rights despite the limitations imposed on the court’s power by s 4. Parliament may have the last word, but in *Moonen* the Court of Appeal asserts that the question of consistency is essentially a legal question.<sup>109</sup>

Taking account of these and other developments, notably in the UK, the *Human Rights Amendment Act 2001* (NZ) establishes a procedure by which a formal declaration of inconsistency can be made in a limited range of cases. The procedure is only available for complaints alleging the legislation infringes the right to freedom from discrimination (s 19). Adopting the procedure in place in the UK, following the making of such a declaration, the Minister responsible for the New Zealand *Human Rights Act* must report the declaration to the House of Representatives, together with a statement of the Government’s proposed response.

<sup>107</sup> P Rishworth, n 102, p 104.

<sup>108</sup> [2000] 2 NZLR 9 at 17.

<sup>109</sup> G Huscroft, ‘Civil remedies for breach of the Bill of Rights’ in Rushworth et al, n 105, p 835.

Writing in 2003, Huscroft commented that it was ‘too early to say how significant the declaration remedy will turn out to be’. Reflecting on the relationship between judicial review and parliamentary supremacy, he went on to say:

Parliament’s response following a decision announcing an ‘indication of inconsistency’ will be important to the future development of the remedy. The more such indications are acted upon by Parliament, the more likely it is that conventional constraints on the courts will continue to erode. Conversely, Parliamentary hostility to such indications may discourage the Court from making more adventurous decisions.<sup>110</sup>

## 6.5 The broader political context

Although limited in legal effect, the impact the 1990 Bill of Rights Act made in its first decade surprised many observers. Writing in 1998, Taggart noted the sheer volume of case law involving the Bill of Rights and of the Court of Appeal’s insistence that its terms are to be ‘interpreted and applied generously and purposively, rather than narrowly and technically’.<sup>111</sup> He went on to say that ‘in a series of early landmark cases, the Court of Appeal “constitutionalized” rights relating to search, arrest and detention’.<sup>112</sup> According to Petra Butler, Senior Lecturer in Law at Victoria University of Wellington:

The first big leap of ‘judicial activism’ probably could be seen when the Court of Appeal created a public law compensatory remedy in the case of *Simpson v Attorney General (Baigent’s case)*.<sup>113</sup> In this case the Court not only created a new remedy but also did a balancing act of statutory interpretation.

Not everyone has welcomed the Court of Appeal’s more adventurous excursions. Putting the case for the legislature, in his speech on 24 May 2004 to the special sitting of the New Zealand Parliament to commemorate its 150<sup>th</sup> anniversary, Deputy Prime Minister Dr Michael Cullen sought to reassert the ascendancy of Parliament against those who look to the judiciary rather than the legislature for the vindication of fundamental human rights. Subsequently, Dr Cullen commented in *The New Zealand Law Journal*:

Creating alternative sources of law making, one representative and one judicial, may be an attractive option for those who are promoting minority interests and who fear the majoritarian nature of Parliament may be inimical to their goals. However, the evidence on this point is inconclusive; whereas the confusion that can be caused by an activist judiciary is very apparent. No democratic institutions will be perfect; but the answer is to improve them by broad public involvement in the political

<sup>110</sup> Huscroft, n 109, p 837.

<sup>111</sup> M Taggart, ‘Tugging on Superman’s cape: lessons from experience with the New Zealand Bill of Rights Act 1990’ [1998] *Public Law* 266 at 274.

<sup>112</sup> Taggart, n 111, p 275.

<sup>113</sup> [1994] 3 NZLR 667. It was held that immunities from damages granted to the Crown and police officers in legislation did not apply in an action based on the Bill of Rights Act since this was an action in public law and not in tort at which the immunities were aimed.

process, not to hamstring them by undue limitations which involve the exercise of discretionary powers by unelected officials.<sup>114</sup>

This entire debate belongs to a wider context. Hiebert is right to remind us that it has been conducted against a background of broader political changes, notably with the introduction in 1993 of the Mixed Member Proportional (MMP) electoral system.<sup>115</sup> Not only has this resulted in coalition government, it has also ‘increased the number of political parties and dramatically strengthened the influence of parliamentary select committees’.<sup>116</sup> Rishworth makes a similar point, noting that MMP, by reducing the government’s control over Parliament, has ‘proved the more direct answer to the sorts of concerns that fuelled the call for a bill of rights in 1984: a unicameral House dominated by government members and thus by Cabinet’.<sup>117</sup>

Philip Joseph has added his voice to this debate, saying that MMP and the bill of rights were among a raft of responses to the ‘belief that governments had become distant and unresponsive’. Bringing the courts back into this equation, he went on to say that the Constitution was on the ‘brink of a subtle rebalancing of the political-judicial pact’, arguing in 2001 that the judiciary was ‘poised to redefine the political-judicial pact under the implied remedial jurisdiction of the Bill of Rights’. He continued:

A declaration of incompatibility throws responsibility on to Parliament to make a deliberate, transparent and informed decision – whether or not to remedy a legislative intrusion on the right or freedom concerned. Under our system of government, the final decision on legislation rests with Parliament, not the courts.<sup>118</sup>

## 6.6 Case study – same-sex marriage

Unlike in the Canadian Charter of Rights and Freedoms, the New Zealand Bill of Rights does not contain a provision protecting ‘equality rights’. The language of equality was deliberately omitted from the New Zealand statute in favour of the ‘ostensibly simpler right to freedom from discrimination’. This ‘freedom’ is found in s 19 of the Bill of Rights which, in its original form, did not extend protection from discrimination on the ground of ‘sexual orientation’. This only occurred in 1993 when protection was extended to cover sexual orientation and disability.

The first case to consider s 19 was *Quilter v Attorney General*,<sup>119</sup> which concerned

<sup>114</sup> M Cullen, ‘Parliamentary sovereignty and the courts’ (July 2004) *The New Zealand Law Journal* at 242.

<sup>115</sup> The first MMP election was held in 1996. The change had been agreed to at a referendum in 1993.

<sup>116</sup> Hiebert, n 97, p 26.

<sup>117</sup> Rishworth, n 102, p 119.

<sup>118</sup> PA Joseph, *Constitutional and Administrative Law in New Zealand*, 2<sup>nd</sup> ed, Brookers, 2001, pp 5-6.

<sup>119</sup> [1998] 1 NZLR 523.

applications from three lesbian couples for marriage licences. They argued that limiting marriage to opposite-sex couples infringed the right to freedom from discrimination on the grounds of sex and sexual orientation. Their hope was that the Court of Appeal would condemn the *Marriage Act 1955*, which does not allow same-sex marriage, for inconsistency with the Bill of Rights, even if it was required to enforce that Act by virtue of s 4. According to Rishworth:

The argument was faintly credible, for the Act spoke of marriage as something that two ‘persons’ entered into. But there were strong clues that Parliament envisaged one of these persons would be male and the other female: in 1955 male homosexual sexual acts were unlawful. All judges recognized that the *Marriage Act* was not intended to permit same sex marriage, and even Thomas J, who concluded that there ought to be same sex marriage, would not extend its language to do so.

Butler comments: ‘The Court was very clear that it could not rewrite the law contrary to Parliament’s wish. To interpret the *Marriage Act 1955* to include same-sex couples would be to assume the role of lawmaker’. Butler adds,

the Court could have overcome Parliament’s 1955 intention by emphasizing Parliament’s 1990 intention, shown when enacting section 6 of the Bill of Rights, that legislation should be read in a Bill of Rights compliant way. However, the Court felt that this was a decision for Parliament; in so holding it placed great emphasis on the limits of judicial decision-making.<sup>120</sup>

*Quilter* is a good example of where, despite claims of judicial activism by the New Zealand Court of Appeal, in practice a strong sense of restraint remains the order of the day, with due deference being shown to the supremacy of Parliament.

## 6.7 Case study – censorship law and interpretation

The *Moonen* case was concerned primarily with the interpretation of the Bill of Rights. At issue was the relationship between freedom of expression (s 14) and the censorship of ‘objectionable’ publications under the *Films, Videos and Publications Act 1993* (NZ). A substantive decision on this matter was to be made by an expert tribunal, the Film and Literature Review Board, from which appeals were restricted to questions of law. The relevant question before the Court of Appeal was whether both the Board and the High Court had erred in law by failing to consider the relevant provisions of the Bill of Rights in interpreting the censorship legislation. The Court of Appeal found that the Board and the

<sup>120</sup> P Butler, ‘Human rights and parliamentary sovereignty in New Zealand’ [2004] *Victoria University of Wellington Law Review* 12 - <http://www.worldlii.org/nz/journals/VUWLR/2004/12.html>

Same-sex civil unions are allowed under the *Civil Union Act 2004* (NZ). Eligibility requirements apply, notably that both persons must be 18 years of age, or are 16 or 17 and have the consent of their guardians or the Family Court. Civil unions are to be registered under the *Births, Deaths, and Marriages Registration Act 1995* and they are to be dissolved under the *Family Proceedings Act 1980* (s. 4 of the *Civil Union Act*). By section 18, opposite sex couples that form a civil union can convert their civil union into a marriage. The same does not apply for same sex couples.



High Court had erred in this way and returned the substantive issue to the Board for re-determination. In other words, the Court did not trespass upon substantive questions of censorship, leaving this to the Board.

In doing so, the Court of Appeal formulated a five-step approach to the application of sections 4, 5 and 6 in those situations when it is claimed that the provisions of another statute abrogate or limit the rights affirmed in the Bill of Rights. This approach can be reconstructed as follows: (a) the words of the other Act must be interpreted to discover if there is only one possible meaning, in which case that must be adopted or, alternatively, it must be discovered if more than one meaning is available; (b) if more than one meaning is available, further to section 6 it must be determined which constitutes the least possible limitation on the relevant right or freedom, that being the meaning the Court must adopt; (c) having adopted the appropriate meaning, the Court must then identify the extent, if any, to which that meaning limits the right in question; (d) next, for the purposes of section 5, it must be asked whether the extent of any limitation can be demonstrably justified in a free and democratic society, a question which must be answered by means of an inquiry into the objective of the legislation concerned and into whether the means used to achieve that objective are in reasonable proportion to its importance; and (e) the Court can then indicate whether the limitation is or is not justified – ‘If that limitation is not justified, there is an inconsistency with s 5 and the Court *may* declare this to be so, albeit bound to give effect to the limitation in terms of s 4’ (emphasis added). In other words, the court may make a declaration of incompatibility, but under section 4 the offending statute must remain in force.<sup>121</sup>

As discussed earlier, *Moonen* is a landmark case in defining the evolving relationship between the courts and Parliament in New Zealand. The full extent of its impact is not yet clear. Rishworth’s view is that declarations of inconsistency will become a major feature of Bill of Rights litigation. However, as he reported in 2004, ‘there have not been any declarations; at least, none issued in a judgment with majority support’.<sup>122</sup>

## 6.8 Case study – retrospective criminal laws and the doctrine of implied repeal

Rishworth did add, however, that ‘subtle declarations’ have been made in two cases – *R v Poumako*<sup>123</sup> and *R v Pora*.<sup>124</sup> Both cases concerned a provision in the *Criminal Justice Act 1985* that was retrospective in application. The provision, which related to home invasions, was inserted into the legislation in 1999. Rishworth writes that ‘all Court of Appeal judges were united in their premise that this was a Bill of Rights violation’, but that in both cases an alternative route was found to resolve the appeal. This was because the *Criminal Justice Act 1985* contained another provision expressly prohibiting the retrospective application of the criminal law. Normally, the doctrine of implied repeal would result in the subordination of this earlier provision to the later retrospective section

<sup>121</sup> In *Moonen v Film and Literature Board of Review* [2002] NZCA 69 the Court emphasized that, while this five-step approach may be helpful, ‘Other approaches are open’ (at para 15).

<sup>122</sup> Rishworth, n 102, p 114.

<sup>123</sup> [2000] 2 NZLR 695.

<sup>124</sup> [2001] 2 NZLR 37.

passed in 1999. In other words, Parliament's latest intention would prevail. This approach to statutory interpretation was not preferred by a majority of the Court of Appeal in either case, the view being taken that the 'fundamental' human right against retrospective criminal laws could only be displaced by an express statement of parliamentary intention. For the 1999 amendment to have repealed the earlier provision an express repeal or an unambiguous wording would have been needed. The following words were found not to be sufficiently explicit: 'even if the offence concerned was committed before that date'.

While these were not Bill of Rights cases in a strict sense, the interpretive techniques applied were based on that jurisprudence, leading Rishworth to conclude that the decision in *Pora* 'illustrates the strength of rights protection accomplished by ordinary statutes, especially when linked with interpretative rules that purport to give one statute precedence'.<sup>125</sup> In this instance, the dialogue between Parliament and the Court was continued when, in 2002, the *Sentencing Act* was amended to clarify that an offender has the right, if convicted of an offence for which the penalty has been increased between the commission of the offence and sentencing, to benefit of the lesser penalty.<sup>126</sup>

In 1999 the Constitution Unit of University College London reported that 90% of cases under the New Zealand bill of rights were estimated to be in the area of criminal law.<sup>127</sup>

## 6.9 Comment

The argument that a review of a small number of selected cases cannot be truly representative of the whole field of relevant jurisprudence applies with equal force in this context as it did in its Canadian equivalent. Still, there are good grounds for suggesting that the New Zealand Bill of Rights is another mixed bag, with some Court of Appeal decisions pointing towards 'activism', although not at the same level or to the same degree as applies in Canada. The constraints of New Zealand's statutory Bill of Rights are real enough. It is also the case that, despite the reputation for activism gained in the initial period of the Bill of Rights, for the most part the New Zealand Court of Appeal has approached its task with considerable circumspection. Further, in some areas of the law the *Bill of Rights Act 1990* has not made as big an impact as predicted. In particular, it is argued that the Act has

barely caused a ripple in New Zealand administrative law...the predicted deluge of administrative law litigation arising out of the Bill of Rights has yet to occur in either the procedural fairness or abuse of discretion domains...there are few judgments in which the New Zealand courts have reviewed, let alone set aside, exercises of executive and administrative discretions by reference to the provisions of the Bill of Rights.<sup>128</sup>

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<sup>125</sup> Rishworth, n 102, p 116.

<sup>126</sup> Butler, n 120.

<sup>127</sup> Standing Committee on Law and Justice, n 31, p 97.

<sup>128</sup> Mullan, n 91, pp 136-7.

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Following a comprehensive review of the case law, Butler concluded:

The New Zealand Court of Appeal is, in comparison to the House of Lords, far more careful in regard to construction of statutory provisions...Generally, New Zealand judges are very aware that they are not to tread into Parliament's arena. The courts can instead be understood as supplementing Parliament's intention by filling gaps in legislation and defining open terms rather carefully.<sup>129</sup>

## 7. THE UK HUMAN RIGHTS ACT 1998

With the Canadian and New Zealand models in place, the UK's adoption of human rights legislation in 1998 offered a further opportunity for refinement. The UK *Human Rights Act 1998*, which came into force in October 2000, sets up its own form of dialogue between Parliament and the courts. Basically, it incorporates the major rights found in the ECHR into domestic UK law and makes these enforceable in the courts. However, as an ordinary piece of legislation, the Act does not entrench these rights. Nor does it provide the courts with the power to declare primary legislation invalid. If the Canadian Charter is a relatively 'strong' model of judicial review and its New Zealand counterpart a comparatively 'weak' one (on paper at least) then the system in the UK stands somewhere between the two. The opportunity for Parliament to play a more active role in the protection of rights is certainly accorded more formal recognition under the legislative scheme in place in the UK.

### 7.1 Pre-enactment scrutiny

Whereas in Canada and New Zealand the parliamentary role for evaluating rights is 'relatively marginal', in the UK Parliament is expected to have an influential role scrutinizing legislation from a rights perspective.<sup>130</sup> Significantly, a joint parliamentary committee was established for this purpose – the Joint Committee on Human Rights. This can be distinguished from the position in New Zealand which does not have a parliamentary committee to evaluate legislation for consistency with rights. In Canada on the other hand both Houses of the Federal Parliament have a standing committee 'that regularly evaluates bills that have legal or constitutional implications'.<sup>131</sup> According to Hiebert, these parliamentary review committees have a 'limited influence' on bills, 'largely because the government treats the issue of Charter consistency as an executive rather than a parliamentary responsibility'.<sup>132</sup>

The situation in the UK is acknowledged to be very different. Established in 2001, it has 12 members, six drawn from each House, with the membership constituting 6 Labor, 3 Conservatives, 2 Liberal Democrats and one crossbencher. Its main work consists of reporting on bills that involve issues of human rights. It may do so of its own motion or as a result of representations made by others. Its work on bills commences at an early stage. With assistance from an independent legal advisor, every government bill is examined to establish whether significant questions of human rights are raised by any of its provisions. When such questions do arise, the joint committee will seek explanation or elucidation from the relevant department, although it also seeks out the views of non-governmental organizations, specialized groups and individual experts. Where a possible human rights violation is perceived, the joint committee drafts specific questions to the Minister

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<sup>130</sup> JL Hiebert, 'Interpreting a Bill of Rights: the importance of legislative rights review' (2005) 35 *British Journal of Political Science* 235 at 251.

<sup>131</sup> These are the House of Commons Standing Committee on Justice and Legal Affairs and the Standing Senate Committee on Legal and Constitutional Affairs.

<sup>132</sup> Hiebert, n 130, p 249. Hiebert writes that 'there are few instances of Parliament pressuring for Charter-inspired amendments to legislation'. One instance related to the anti-terrorist legislation introduced in response to the events of 11 September 2001 (Bill C-36).

responsible to determine whether the provision at issue is compatible with protected rights. Writing in 2004, Michael Zander, Emeritus Professor of Law at the LSE, commented that the joint committee's

work rate is prodigious. Between July 2001 and February 2002, for instance, it conducted consultations and reported on the human rights implications of the Homelessness Bill, the Anti-terrorism, Crime and Security Bill, the Proceeds of Crime Bill, the Sex Discrimination (Election Candidates) Bill, the Tobacco Advertising and Promotions Bill and the Animal Health Bill. In the same period it considered without writing reports fifty-five other public bills and four private bills.<sup>133</sup>

In a similar vein, Klug and Starmer report:

The establishment of the Joint Committee on Human Rights (“JCHR”) in 2001 has undoubtedly enhanced awareness of the HRA (Human Rights Act) within Parliament. The Committee has been indefatigable, producing 88 full reports and 3 special ones in four years...Some of its reports have clearly been influential, in a few instances leading to a small, but significant, changes in the final shape of legislation. The JCHR has also succeeded in persuading the government to expand slightly the written information it supplies with a s 19 ‘statement of compatibility’ on the face of new Bills.<sup>134</sup>

In its own assessment of its first four years of operation, from 2001 to 2005, the joint committee commented on the difficulties it had encountered, notably in relation to the volume of legislation introduced and the speed with which it is taken through both Houses, concerns familiar enough to any Parliament. Further concerns expressed by the joint committee were that it: does not get any advance view of bills, or of amendments with human rights implications tabled to bills; has no specific powers to slow down the timing of a passage of a bill; has only finite resources and must therefore prioritise between bills; and time constraints limit the use that can be made of external submissions.<sup>135</sup> On the positive side, the joint committee commented:

In many cases we have been successful in causing the Government to bring forward specific amendments to legislation, or to accept amendments moved by others, to take account of human rights considerations. We have also succeeded on occasions in getting the Government to agree to change guidance or codes of practice, or to change draft legislation before introducing it as a bill, rather than amending primary legislation itself.<sup>136</sup>

Assessing the impact made by the Joint Committee, Hiebert says that the best examples of

<sup>133</sup> M Zander, *The Law-Making Process*, 6<sup>th</sup> ed, Cambridge University Press 2004, p 88.

<sup>134</sup> F Klug and K Starmer, ‘Standing back from the Human Rights Act: how effective is it five years on?’ [2005] *Public Law* 716 at 718.

<sup>135</sup> HL/HC, Joint Committee on Human Rights, n 135, p 7.

<sup>136</sup> HL/HC, Joint Committee on Human Rights, n 135, pp 19-20. A selected list of examples is appended to the joint committee's discussion.

its use of the Human Rights Act to check government behaviour occurred in its assessment of anti-terrorist measures, beginning with the Anti-terrorism, Crime and Security Bill of 2001:

Many of the committee's concerns provided the context for robust parliamentary deliberation in both Houses about the merits of the government's anti-terrorist measures. The government made some amendments in response to these concerns. For example, it introduced a legal requirement for reasonableness relating to a decision to certify a person as a suspected international terrorist, modified the overly-broad definition of a terrorist suspect, and introduced a sunset clause.<sup>137</sup>

Under the UK *Human Rights Act 1998* this pre-enactment scrutiny process is grounded in a formal process of parliamentary review. By s 19 of the Act, when legislation is introduced into either House for a Second Reading, the Minister responsible must make a written statement that he considers the Bill is compatible with the Convention rights, or that he is unable to make such a statement but wishes Parliament to proceed with the Bill anyway. In respect to the s 19, the Cabinet Office Guidance to Departments requires a two-stage process. According to Zander:

At the policy approval stage, a general assessment has to be made to alert ministers to any ECHR issues. Once the bill is drafted, a more formal compatibility document is prepared by departmental lawyers in consultation with the Law Officers and the Foreign and Commonwealth Office. The Guidance states that before making a s 19 statement of compatibility 'a Minister must be clear that, at a minimum, the balance of argument supports the view that the provisions are compatible' and that the contents of the bill will stand up to challenge on Convention grounds.<sup>138</sup>

While acknowledging that governments 'will still chance their arm' on occasions, the first legal adviser to the Joint Committee on Human Rights, Professor David Feldman, presents a positive assessment of the new 'rights culture' at work within the British civil service, writing that 'provisions are now drafted and justified...with more sensitivity to their human rights implications than they were three years ago'.<sup>139</sup>

## 7.2 Judicial review

The UK *Human Rights Act 1998* incorporates the major rights found in the ECHR into domestic UK law and makes these enforceable in the courts. By doing so it does not grant the higher courts the power to strike down primary legislation, only to make a 'declaration of incompatibility'. These declarations constitute the Act's main structural innovation as regards the balance between parliamentary supremacy and judicial review, prompting as they do further parliamentary consideration. Another innovation is that, where it is found to be inconsistent with Convention rights, subordinate legislation can be quashed by the

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<sup>137</sup> JL Hiebert, 'Interpreting a Bill of Rights: the importance of legislative rights review' (2005) 35 *British Journal of Political Science* 235 at 253.

<sup>138</sup> Zander, n 133, p 89.

<sup>139</sup> D Feldman, 'The impact of human rights on the UK legislative process' (2004) 25(2) *Statute Law Review* 91 at 93.

courts. The schema of the Act can be summarized as follows:

- the Act requires UK courts and tribunals to take account of Convention case law. They will also be bound to develop the common law compatibly with the Convention rights (s 2);
- the Act also requires all legislation to be interpreted and given effect as far as possible compatibly with the Convention rights (s 3);
- where it is possible to do so, a court may quash or disapply subordinate legislation;<sup>140</sup> or if it is a higher court, make a declaration of incompatibility for primary legislation (s 4);
- the Act gives precedence to s 3 in that a declaration of incompatibility under s 4 can only be made where a compatible interpretation is not possible;
- such a declaration does not affect the continuing validity and enforcement of the primary legislation in question (s 4); and
- however, the making of such a declaration allows a Minister to seek parliamentary approval for a remedial order to amend the legislation to bring it into line with the Convention rights. This discretionary power is only used if the Minister is satisfied that there is a compelling reason to do so (s 10 and Schedule 2, clause 2.).<sup>141</sup>

### 7.3 Interpretation

As in New Zealand, the interpretation of the main provisions of the UK Act has been the cause of considerable debate. This is particularly true of s 3 which requires all legislation to be interpreted and given effect as far as possible compatibly with the Convention rights. Unfortunately, s 3 itself is ‘not free from ambiguity’. As Lord Nicholls recognized in *Ghaidan v Godin-Mendoza*<sup>142</sup>, the difficulty lies in the word ‘possible’, an ambiguous word which allows s 3 to be interpreted restrictively or expansively. A narrow view is that s 3 is limited to resolving ambiguities in statutory words, so that, where doubt exists, words

<sup>140</sup> Section 3(2)(c) preserves the validity of incompatible subordinate legislation where the primary legislation under which it was made ‘prevents removal of the incompatibility’. This is only likely to apply in exceptional circumstances.

<sup>141</sup> A remedial order is a form of subordinate legislation which has the power to amend primary legislation in the circumstances specified in the *Human Rights Act 1998*. The relevant provisions are contained in ss 4 and 10 of, and Schedule 2 to, the Act. By s 10(1)(b) remedial orders can also be used to remove incompatibilities identified by the European Court of Human Rights. By Schedule 2 of the Act a draft of the remedial order must be approved by a resolution of each House of Parliament 60 days after the draft was laid before Parliament. This requirement can be set aside in urgent cases, although if it is to remain in force the original order (or a replacement) must subsequently be approved by each House within 120 days. For a commentary on remedial orders see - HL/HC, Joint Committee on Human Rights, n 135, pp 15-6; *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23<sup>rd</sup> ed, Lexis Nexis 2004, pp 694-98.

<sup>142</sup> [2004] 2 AC 557.

should be given a meaning which best accords with the Convention rights. A broader view is that s 3 requires the courts to depart from the intention of Parliament when enacting the legislation, permitting it to read in words which change the meaning of the enacted legislation, so as to make it Convention compliant. Lord Nicholls continued:

In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning and hence the effect, of primary and secondary legislation.<sup>143</sup>

Significantly, in *Ghaidan* two limits were placed on the power of the courts under s 3. One limitation was that Convention-compatible interpretations are impossible when the interpretation concerns an area that is unsuited to the court, presumably where decisions have wide ramifications for social policy. Secondly, the courts cannot adopt a meaning that is ‘inconsistent with a fundamental feature of legislation’. Lord Nicholls commented: ‘That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant’. Adopting a more ‘purposive’ approach to interpretation, the courts can only read in a meaning that is ‘compatible with the underlying thrust of the legislation being construed’. As Lord Earlsferry said, s 3 does ‘not allow the courts to change the substance of a provision completely, to change a provision from where Parliament says that *x* is to happen into one saying that *x* is not to happen’.<sup>144</sup>

Using Julie Debelijak as a guide, the interpretation of s 3 can be said to require the following steps:

- the court must decide whether, regardless of the s 3 interpretive obligation, the legislation violates a right by comparing the right and justified limitations thereto with the impugned legislation;
- if a violation would occur, the court must alter the meaning of the legislative words, although that alteration must ‘limit the extent of the modified [legislative] meaning to that which is necessary to achieve compatibility’. For this purpose, s 3 allows the courts to clarify the effect of ordinary legislative words, to express legislative words in different language, to read down over-broad legislation and to read in legislative provisions.
- the court must decide whether the altered legislative interpretation is ‘possible’. In doing so, the court cannot legislate for itself. Section 3 is limited to interpretation only, which excludes the power to enact or amend legislation. The section cannot save incompatible legislation if its use would contradict the express or implicit will of the Parliament.

As Debelijak writes:

The extent to which judges are willing to stretch legislative language in order to avoid incompatibility is crucial. The line between interpreting and legislating is not

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<sup>143</sup> [2004] 2 AC 557 at 571-2.

<sup>144</sup> [2004] 2 AC 557 at 596.



clear, and this may result in allegations of illegitimate judicial activism and law-making.<sup>145</sup>

As Lord Nicholls acknowledged in *Ghaidan*: ‘The courts, including your Lordships’ House, are still cautiously finding their way forward as experience in the application of section 3 gradually accumulates’.<sup>146</sup> The underlying question is how far are the courts to go in seeking an interpretation of a statute that is consistent with the Convention rights? In the earlier case of *R v A (No 2)* Lord Steyn suggested that, if necessary, the judges must be prepared to override clear parliamentary intention in the statute in order to give precedence to the requirements of the ECHR.<sup>147</sup> Commenting later in *R (Jackson) v Attorney General* on the direction to the courts in s 3(1) to read and give effect to legislation in a way that is compatible with Convention rights, Lord Hope said:

So long as it is possible to do so, the interpretive obligation enables the courts to give a meaning to legislation which is compatible even if this appears to differ from what Parliament had in mind when enacting it.<sup>148</sup>

#### 7.4 Declarations of incompatibility and parliamentary supremacy

According to Zander, in recent cases the House of Lords seems to have backed away from ‘over-zealous’ interpretation, having decided ‘in favour of restricting its use of s 3 and correspondingly availing itself more readily of s 4 declarations of incompatibility’.<sup>149</sup> The relationship between sections 3 and 4 has certainly been the subject of considerable debate. The point is made that declarations of incompatibility under s 4 were intended to be ‘a measure of last resort’, with most potential violations of rights being dealt with by the courts under s 3. In *Ghaidan v Godin-Mendoza*<sup>150</sup> Lord Steyn attached to his speech an appendix detailing all the cases in which a breach of the ECHR had been found where the court went on to consider whether to apply s 3 or alternatively to make a declaration of incompatibility under s 4.<sup>151</sup> There were 10 cases in which the court had proceeded under s 3 and 15 in which it issued a declaration of incompatibility.<sup>152</sup> For Lord Steyn this raised the question ‘whether the law has taken a wrong turning’, bearing in mind that s 3 was supposed to be the ‘principal remedial measure’ and that s 4 was supposed to be a ‘last

<sup>145</sup> J Debelijak, n 60, pp 173-4. For another overview see – H Charlesworth, ‘Human rights and statutory interpretation’ in *Interpreting Statutes* edited by S Corcoran and S Bottomley, The Federation Press 2005, Ch 7.

<sup>146</sup> [2004] 2 AC 557. at 570.

<sup>147</sup> [2002] 1 AC 45; M Zander, n 133, pp 184-5.

<sup>148</sup> [2005] 3 WLR 733 at 768.

<sup>149</sup> Zander, n 133, p 188.

<sup>150</sup> [2004] 2 AC 557.

<sup>151</sup> See Appendix A to this paper where Lord Steyn’s list of interpretations under s 3(1) is set out in full.

<sup>152</sup> In five of the 15 cases, the decision was reversed. In 4 of the 5 the Appeal Court held that there was no incompatibility, whereas in the fifth case the basis of the decision was unclear.

resort’?<sup>153</sup>

An alternative view is that s 4 declarations leave the issue to be decided by Parliament, reliance on which is to be welcomed in terms of a striking an appropriate balance between judicial review and parliamentary supremacy. As Klug and Stamer say:

It could be argued that the greater reliance on s 4 declarations than was originally predicted by some commentators is more a reflection of a ‘right interpretation of original intention’ than a ‘wrong turn’.<sup>154</sup>

## 7.5 Judicial deference – critique

In the UK opposition to the *Human Rights Act 1998* has taken a curious turn. Whereas in several other jurisdictions, including Canada and New Zealand, critics are apt to claim that the courts have embraced too wide and active an approach to judicial review, thereby transgressing on to parliamentary supremacy. In the UK many high profile critics of the ‘rights revolution’ have taken the opposite stance, arguing that the courts failed to afford sufficient protection to human rights.

Prominent among such critics is KD Ewing, Professor of Public Law at King’s College, London who writes of the ‘futility’ of the *Human Rights Act*. His argument is not that the civil liberties have been well protected traditionally in the UK. He pointed to the:

- forced feeding of the suffragettes in the first decade of the 20<sup>th</sup> century;
- intolerance of anti-war activists during the First World War;
- persecution and prosecution for sedition of communists in the 1920s;
- brutal policing of the General Strike in 1926;
- crackdown on unemployed marchers in the 1930s;
- internment of various groups of peoples during the Second World War;
- exclusion of communists and the prosecution of peace activists during the Cold War; and
- obsessive secrecy surrounding the security services in the 1960s and 1970s.<sup>155</sup>

Ewing’s thesis is that prior to the enactment of the *Human Rights Act* in 1998 judges failed to use the means already at their disposal to defend human rights. When issues of national security, in particular, were to be decided the courts deferred to the judgment of the Executive, a tendency Ewing claims has continued to the present day. Writing in 2004,

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<sup>153</sup> Zander, n 133, p 188.

<sup>154</sup> F Klug and K Stamer, n 134, p 722.

<sup>155</sup> KD Ewing, ‘The futility of the Human Rights Act’ [2004] *Public Law* 829 at 833.

Ewing commented:

We now have a Bill of Rights...but we live in a period of unparalleled restraint on our liberty, with more restraints on the way. There is an inexorable process underway which sees a pouring of liquid from the bottle marked liberty into the glass marked security...<sup>156</sup>

Ewing is prepared to accept that the *Human Rights Act* has made an impact on the courts, procedurally if not substantively. His argument is that, when push comes to shove and the individual comes face to face with the might of the state in such sensitive areas as the indefinite detention of foreign nationals suspected of being international terrorists, the courts have failed to use the new rights weaponry at their disposal. According to Ewing, we find that:

- Convention rights cannot stop the inexorable drive in the direction of more and more state powers, whether it be identity cards, police powers of stop and search, or greater emergency powers.
- In times of crisis, the courts do not and will not protect the individual from the state whether the crisis be caused by external or internal threats, whether it be world war, cold war or war against terror.<sup>157</sup>

A similar argument is presented by Adam Tomkins as part of his critique of 'legal constitutionalism'. Basically, he contends that the courts are ineffective guardians of rights for a range of technical and other reasons. For example, judges are generally required to decide cases on the basis only of submissions made to them by counsel. One result is that big issues of public and social policy can be made to turn in the courts on narrow questions of law, with Tomkins pointing to the example of *R v Secretary of State for the Home Department, ex parte Simms*.<sup>158</sup> Moreover, litigation is haphazard and the courts can only deal with those matters that are brought before them. The contrast with Parliament is stark, Tomkins writes: 'Parliament may legislate on any issue, for any reason and at any time'.<sup>159</sup>

Tomkins also refers to the issue of judicial deference in this context, arguing that that the courts 'are simply not very good at doing what the legal constitutionalists desire them to do'. Referring to a catalogue of 'repressive common law decisions' prior to 1998, he argues that the courts 'are neither as liberal nor as eager to intervene as they would be required to be for the model of legal constitutionalism to be effective as a check on illiberal

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<sup>156</sup> Ewing, n 155, p 836.

<sup>157</sup> Ewing, n 155, p 851.

<sup>158</sup> [2000] 2 AC 115. Tomkins writes that *Simms* was concerned with a 'big question: to what extent should convicted prisoners enjoy the same opportunities the rest of us have as regards making contact with, and expressing ourselves through, the media'. In the case the question was 'reduced to a far narrower one: where a prisoner requests an oral interview with a journalist, is a prison governor entitled to withhold permission in the event that the journalist concerned refuses to sign an undertaking that he will not publish the interview?': Tomkins, n 18, p 29.

<sup>159</sup> Tomkins, n 18, p 27.

government'. For Tomkins, the argument is reaffirmed by two post-1998 cases, namely, *Secretary of State for the Home Department v Rehman*<sup>160</sup> and *R v Shayler*.<sup>161</sup>

In *Rehman*, a case involving a Pakistani national who was refused indefinite leave to remain in the UK and instead deported on the ground that he was a danger to national security, the House of Lords held that the interest of national security is a matter exclusively for the government of the day, the courts being simply 'not entitled' to disagree with the government's verdict. This verdict was reached notwithstanding the fact that the House of Lords acknowledged that 'it cannot be proved...that [Rehman] has carried out any individual act which would justify the conclusion that he is a danger'.<sup>162</sup>

*Shayler* is a freedom of expression case, protection for which is afforded by Article 10 of the ECHR. At issue were provisions of the Official Secrets legislation preventing a member or former member of the security and intelligence services from disclosing any information acquired in a professional capacity. Tomkins points out that no damage to Britain's national security, actually (or potentially), need be caused by the disclosure and it is no defence that the disclosure was in the public interest. Notwithstanding the scope of this provision (s 1 of the *Official Secrets Act 1989* (UK)), the House of Lords found it did not breach Article 10 of the ECHR. Tomkins concluded:

The message to be gleaned from cases such as these is that the model of legal constitutionalism promises more than it is able to deliver: that in practice it is able neither to safeguard liberty nor to act as an effective check on the government of the day.<sup>163</sup>

## 7.6 Judicial review – defence

The claims made by Tomkins have been vigorously contested. Tomkins' work was reviewed by a leading proponent of legal constitutionalism, TRS Allan, Professor of Public Law and Jurisprudence at Pembroke College, Cambridge. Briefly, against Tomkins, he mounts a case on behalf both of the method of judicial reasoning and its substantive outcomes. Taking on the argument that the courts have been too ready to accept government justification for infringements of liberty, Allan states:

The well-known *Rehman* (2003) and *Shayler* (2003) cases are offered as illustrations of the judges' failure to safeguard essential freedoms in the face of governmental concerns about national security. But this line of complaint threatens the coherence of the author's [Tomkins] position. If we cannot yet rely on the courts to uphold liberty in the cases where the individual is most vulnerable, like the foreign resident suspected of terrorist sympathies, the institutions of legal constitutionalism need to be strengthened rather than dismantled. It is hardly

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<sup>160</sup> [2003] 1 AC 153.

<sup>161</sup> [2003] 1 AC 247.

<sup>162</sup> [2003] 1 AC 153 at para 65; Tomkins, n 18, p 30.

<sup>163</sup> Tomkins, n 18, p 31.

plausible to imagine that elected politicians will readily come to the rescue.<sup>164</sup>

Nor have Ewing's claims escaped criticism. Anthony Lester,<sup>165</sup> a campaigner for 30 years for the incorporation of the ECHR into UK law, moved against Ewing on several fronts. One criticism was aimed at Ewing's 'squinty vision' which failed to take account of the pre-enactment mechanisms in place under the *Human Rights Act 1998* and the beneficial influence this had had on the 'legislative and executive branches and the quality of public administration'.<sup>166</sup> Lester's main concern, however, was to defend the record of the courts. In this respect he singled out Ewing's negative verdict on the Court of Appeal's 'deferential' decision in *A v Secretary for the Home Department*,<sup>167</sup> upholding the legality of the indefinite detention without trial of foreign suspected terrorists. As Lester points out:

It proved to be an over-hasty verdict. Soon after the publication of...[Ewing's] article, the Court of Appeal's decision was overturned by the Law Lords in terms which should cause Ewing to reflect on the fairness and accuracy of his overall judgment in this area.<sup>168</sup>

Lester explained that, by a majority of eight to one, the Law Lords quashed the order empowering the executive to derogate from Article 5 of the ECHR, and made a declaration under s 4 of the *Human Rights Act 1998* that s 23 of the *Anti-terrorism, Crime and Security Act 2001* is incompatible with Articles 5 (right to liberty) and 14 (right against discrimination) of the Convention. In his judgment, Lord Bingham discussed the submission of the Attorney General arguing that it 'was for the Parliament and the executive to assess the threat facing the nation, so it was for these bodies and not the courts to judge the response necessary to protect the security of the public'. According to the Attorney General, 'These were matters of a political character calling for an exercise of political and not judicial judgment'.<sup>169</sup> Saying he did not accept the distinction the Attorney General had drawn between 'democratic institutions and the courts', Lord Bingham observed:

[T]he function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself....The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected...and the remedy lies with the appropriate minister...who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic

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<sup>164</sup> TRS Allan, 'Book reviews – Our Republican Constitution by Adam Tomkins' [2006] *Public Law* 172 at 173.

<sup>165</sup> Lord Lester of Herne Hill.

<sup>166</sup> A Lester, 'The utility of the Human Rights Act: a reply to Keith Ewing' [2005] *Public Law* 249 at 257.

<sup>167</sup> [2004] QB 335.

<sup>168</sup> Lester, n 166, p 253.

<sup>169</sup> [2005] 2 WLR 87 at para 37.

mandate. As Professor Jowell has put it: ‘The courts are charged by Parliament with delineating the boundaries of a rights-based democracy’.<sup>170</sup>

Quoted in full by Lester was this statement by Lord Hope of Craighead:

[T]he margin of discretionary judgment that the courts will accord to the executive and Parliament where this right [to liberty] is in issue is narrower than will be appropriate in other contexts. We are not dealing here with matters of social or economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to government and to the legislature. We are dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate. It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society which respects the principle that minorities, however unpopular, have the same rights as the majority.<sup>171</sup>

Lester’s positive conclusion is that:

Since October 2000...our courts have generally demonstrated their ability in interpreting and applying the broad, open-textured text of the Convention and in weaving the Convention rights into the fabric of our written and unwritten law. They have developed new principles of public law and ensured that individual rights are fairly balanced with community interests. They have not usurped the role of the executive and legislative branches or fallen into the trap of legalism. Their record is as good as the record of other enlightened Commonwealth courts in Canada, India, South Africa and New Zealand.<sup>172</sup>

A list of those cases in which declarations of incompatibility were made under s 4 of the *Human Rights Act 1998* before April 2005 is set out at Appendix B. This includes those cases where findings of incompatibility were subsequently overturned on appeal.

## 7.7 Case study – prisoners’ right to vote<sup>173</sup>

In 2001 in *Hirst v HM Attorney General*<sup>174</sup> the High Court ruled it was compatible with Article 3 (free elections) of the First Protocol of the ECHR for prisoners to be denied the right to vote. By s 3 of the *Representation of the People Act 1983* (UK) all prison inmates

<sup>170</sup> [2005] 2 WLR 87 at para 42.

<sup>171</sup> [2005] 2 WLR 87 at para 108.

<sup>172</sup> Lester, n 166, p 258.

<sup>173</sup> For a summary see – I White and A Rees, *Convicted Prisoners and the Franchise*, House of Commons Library, SN/PC/1764.

<sup>174</sup> Three applications were heard together and reported as – *R v (1) Secretary of State for the Home Department (2) Two Election Registration Officers, Ex parte (1) Pearson (2) Martinez; Hirst v HM Attorney General* (2001) EWHC Admin 239.

are declared to be incapable of voting at any parliamentary or local government election. While this is not strictly a Human Rights Act case,<sup>175</sup> it is interesting as a classic statement of judicial deference, with the High Court stating:

As Parliament has the responsibility for deciding what shall be the consequences of conviction by laying down the powers and duties of a sentencing tribunal or other body it necessarily follows that lines have to be drawn, and that on subsequent examination a case can be made in favour of the line being drawn somewhere else, but in deference to the legislature courts should not easily be persuaded to condemn what has been done, especially where it has been done in primary legislation after careful evaluation and against a background of increasing public concern about crime.<sup>176</sup>

The decision was appealed to the European Court of Human Rights which, in 2004, found on behalf of Hirst. A further appeal, this time on behalf of the UK Government, was rejected by 12 votes to 5 in October 2005 by the Grand Chamber of the European Court of Human Rights, it being said in *Hirst v United Kingdom (No2)*<sup>177</sup> that the entitlement to vote was a right and not a privilege and any limitation on the right to vote had to be pursuant to a legitimate aim and proportionate. The impugned Act pursued a legitimate aim but was not proportionate, since there had been no evidence that Parliament had ever sought to weigh the competing interests and the blanket prohibition in s 3 was too ‘blunt’ an instrument to achieve the aim in question.<sup>178</sup> The Court held it should be left to the UK Parliament to decide on the choice of means for securing the rights guaranteed by Article 3 of the First Protocol.<sup>179</sup>

## 7.8 Case study – prisoners’ rights and administrative law

In *R v Secretary of State for the Home Department, ex parte Daly*<sup>180</sup> the applicant (a prisoner) challenged the policy that prison officers could examine prisoners’ legally privileged correspondence in their absence. The House of Lords held that the policy infringed both the prisoner’s common law rights to legal professional privilege and the protection afforded to private correspondence under Article 8(1) of the ECHR. It was found that the policy interfered with a prisoner’s exercise of his rights under Article 8(1) to an extent much greater than necessity required. The policy was declared unlawful and void.

The case is of interest from a number of standpoints. One is that it illustrates the

<sup>175</sup> But note that counsel for Hirst had originally sought a declaration of incompatibility under s 4 of the *Human Rights Act 1998*.

<sup>176</sup> (2001) EWHC Admin 239 at para 20.

<sup>177</sup> [2005] ECHR 681 (6 October 2005).

<sup>178</sup> [2005] ECHR 681 at para 82.

<sup>179</sup> As noted, by s 10(1)(b) of the *Human Rights Act 1998* remedial orders can be used to remove incompatibilities identified by the European Court of Human Rights.

<sup>180</sup> [2001] 3 All ER 433.

complementary relationship between the common law and the Convention rights. It also confirms that, where Convention rights are to be determined, a higher level of scrutiny is to be applied than those traditionally associated with the standards of administrative law. Instead of applying the tests based on the *Wednesbury* ground of review (unreasonableness),<sup>181</sup> the principles to be applied are those of legitimate aims and proportionality, as developed in the Canadian context and beyond.<sup>182</sup> As to the significance of the *Daly* case, Carolyn Evans, Senior Lecturer in Law at the University of Melbourne, comments:

the *Daly* case outlined a new test for review that sees judges playing a far greater role in assessing the balance struck by the primary decision-maker and assessing the relative weight to be given to the interests at stake (while denying a role for the courts in merit review as such).<sup>183</sup>

## 7.9 Case study – transsexuals and the right to marry

In *Bellinger v Bellinger*<sup>184</sup> a post operative male to female transsexual appealed to the House of Lords against a decision that she was not validly married to her husband, by virtue of the fact that at law she was a man. One claim submitted by the petitioner was that, so far as it made no provision for the recognition of gender reassignment, s 11(c) of the *Matrimonial Causes Act 1973* (UK) was incompatible with Articles 8 (right to respect for private and family life) and 12 (right to marry) of the ECHR. The House of Lords upheld the appeal, making a declaration of incompatibility under s 4 of the *Human Rights Act 1998*.

The main judgment was delivered by Lord Nicholls of Birkenhead who traversed the relevant case law, including that in New Zealand and Australia.<sup>185</sup> Especially influential was the decision of the European Court of Human Rights in *Godwin v United Kingdom*,<sup>186</sup> identifying the absence of any legal system for legal recognition of gender change as a breach of Articles 8 and 12 of the ECHR. Significant, too, was that the British Government had announced it would amend the legislation to achieve compliance with the ruling in *Godwin*. Taking this into account, the House of Lords decided against formulating a Convention-compatible interpretation of the s 11(c) of the *Matrimonial Causes Act 1973* – the option available to it under s 3 of the *Human Rights Act 1998*. Lord Nicholls said this

<sup>181</sup> The classic test of unreasonableness, as propounded by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223, states that an abuse of power occurs when an exercise of power is so unreasonable that no reasonable person could have so exercised the power.

<sup>182</sup> [2001] 3 All ER 433 at 446 (Lord Steyn).

<sup>183</sup> C Evans, 'Responsibility for rights: the ACT Human Rights Act' (2004) 32 *Federal Law Review* 291 at 304.

<sup>184</sup> [2003] 2 AC 467.

<sup>185</sup> *Attorney General (Cth) & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FamCA 94 (21 February 2003).

<sup>186</sup> [2002] 35 EHRR 447.



would, in any event, involve giving the expressions ‘male’ and ‘female’ in the marriage law ‘a novel, extended meaning’, such as to represent ‘a major change in the law, having far reaching ramifications’, including questions of ‘social policy and administrative feasibility’. Lord Nicholls said:

The issues are altogether ill-suited for determination by courts and court procedures. They are preeminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.<sup>187</sup>

On the other hand, as already noted the House of Lords was prepared to make a declaration of incompatibility under s 4 of the *Human Rights Act 1998*. Although steps were already in train to amend the law, Lord Nicholls thought it ‘desirable that in a case of such sensitivity this House, as the final court of appeal in this country, should formally record that the present state of the law is incompatible with the Convention’.<sup>188</sup> That incompatibility was subsequently removed by the *Gender Recognition Act 2004*.

In *Bellinger*, the House of Lords also considered the question of same-sex marriage, as this was argued to be one way to resolve the problem confronting the petitioner. On this point, it concluded that such an approach

would involve a fundamental change in the traditional concept of marriage. Here again, this raises questions which ought to be considered as part of an overall review of the most appropriate way to deal with the difficulties confronting transsexual people.<sup>189</sup>

### 7.10 Case study – cross-examination of rape victim and the right to a fair trial

If *Bellinger* is an instance of where the House of Lords was not prepared to re-write statutory provisions to make them comply with Convention rights, the case of *R v A (No 2)*<sup>190</sup> is an illustration of where the Court applied a less deferential approach. At issue was s 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK) which made it very difficult to cross-examine a rape victim about her prior sexual conduct with the defendant. The question was whether this provision was compatible with Article 6 (right to a fair trial) of the ECHR. It was held that the blanket exclusion of evidence of prior sexual conduct in s 41 was disproportionate. By the application of s 3 of the Human Rights Act it was decided that s 41 should not apply when the evidence was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6. This decision was arrived at

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<sup>187</sup> [2003] 2 AC 467 at 478.

<sup>188</sup> [2003] 2 AC 467 at 482

<sup>189</sup> [2003] 2 AC 467 at 480.

<sup>190</sup> [2002] 1 AC 45.

despite the fact that this “rape shield” provision had been introduced because of the problems that arose when judges were given discretion about the circumstances in which past sexual history was relevant.<sup>191</sup>

As discussed earlier in this paper, the outcome in *R v A (No 2)* is similar to the equivalent cases in Canada, suggesting that the courts will tend to set deference aside where the core issues of criminal justice are at issue.

### **7.11 Case study – homosexual relationships and the right against discrimination**

Another example of the expansive use of s 3 is found in the 2004 case, *Ghaidan v Godin-Mendoza*<sup>192</sup>, where the House of Lords confirmed that the surviving member of a long-term homosexual couple was a statutory tenant under the *Rent Act 1977*. Under that Act such a tenancy was only granted to persons living with the original tenant ‘as his or her wife or husband’. On its ordinary meaning this was found to treat survivors of homosexual partnerships less favourably than survivors of heterosexual partnerships without any rational or fair ground for such a distinction. As such, the relevant provision of the Act infringed Articles 8 (right to respect for private and family life) and 14 (right against discrimination). Further, it was held that s 3 of the *Human Rights Act 1998* required that legislation be given a Convention-compliant meaning, which in this case made it ‘possible’ for the provision in question to be read as extending to same-sex partners.

The implications of *Ghaidan* for the interpretation of s 3 were discussed earlier in the paper, where it was said that the courts can only read in a meaning that is ‘compatible with the underlying thrust of the legislation being construed’. While this statement of a ‘purposive’ approach to interpretation is helpful, it still leaves considerable room for doubt about the relationship between parliamentary supremacy and judicial review in any particular instance.

### **7.12 Case study – anti-terrorist ‘control orders’ and fair hearing**

On 12 April 2006 a single judge of the High Court ruled that the control order made under the new anti-terrorist laws were incompatible with the Human Rights Act, as it denied the suspect’s right to a fair hearing under Article 6 of the ECHR. Under these laws, control orders issued by the Home Secretary to limit the freedom of suspected terrorists can be imposed without any judicial hearing. They can be imposed for up to 12 months and can be renewed indefinitely at the request of the Home Secretary. In the case at issue, the suspect, referred to in court documents as ‘S’ and by his solicitor as ‘MB’, became the first British citizen to be placed under virtual house arrest when his control order was imposed by the Home Office on 5 September 2005. He was suspected of wanting to travel to Iraq to fight against British and American soldiers.

In the High Court, Justice Sullivan said that it would ‘be an understatement’ to say the orders deny those affected the right to a fair hearing. Setting deference aside, he stated:

The thin veneer of legality...cannot disguise the reality that controlees’ rights under

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<sup>191</sup> C Evans, n 183, p 307.

<sup>192</sup> [2004] 2 AC 557.

the Convention are being determined not by an independent court...but by executive decision-making untrammelled by any prospect of effective judicial supervision.<sup>193</sup>

A Home Office spokesman said that the Home Secretary planned to appeal the decision in *S*, and insisted that the ruling would not affect the operation of the control orders regime.

### 7.13 Comment

Confronting the issues raised by such sceptics as Ewing and Tomkins, the decisions in *Ghaidan*, in *A v Secretary for the Home Department*<sup>194</sup> and the last case of *S* suggest a less deferential approach on the part of the House of Lords and other UK courts to Parliament and, more particularly, the Executive. Whether this constitutes a trend of some kind remains to be seen. In the case of *Ghaidan* it may suggest that the courts are likely to show less deference in some types of cases than others, where more symbolic 'recognition claims' are at issue for example, as against those cases involving substantive social policy implications. In the case of *A v Secretary for the Home Department*, as well as in the decision on the anti-terrorist 'control orders', it appears to indicate a tougher line on questions relevant to the liberty and security of the person.

More recently, in *R(Jackson) v Attorney General*<sup>195</sup> fundamental questions were raised about the scope and nature of the doctrine of parliamentary supremacy. Most forthright was Lord Steyn who, contradicting the assertions of the Attorney General, acknowledged that the UK does not any longer have an 'uncontrolled constitution' to which the doctrine of parliamentary supremacy applies in the pure and absolute form envisaged by Dicey. In a passage with quite radical legal overtones, Lord Steyn contemplated implied limitations on the powers of Parliament to pass 'undemocratic' measures. As for the constitutional impact made by the ECHR, he said that by the operation of the *Human Rights Act 1998* this 'created a new legal order'. Lord Steyn continued:

One must not assimilate the European Convention on Human Rights with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction.<sup>196</sup>

Such talk of controlled constitutions and limits on parliamentary supremacy is familiar enough to Australian ears, in a federal system where 'sovereignty' is divided between the

<sup>193</sup> This account is based on - D Fickling, 'High court rules orders infringe human rights', *Guardian Unlimited*, 12 April 2006; S Knight, 'UK terror suspect wins challenge against control order' *TimesOnline*, 12 April 2006; and 'Government's control orders ruled unlawful', *News.Telegraph*, 12 April 2006.

<sup>194</sup> [2004] QB 335.

<sup>195</sup> [2005] 3 WLR 733. The case concerned the validity of the ban on fox-hunting in the *Hunting Act 2004* (UK), legislation that was enacted pursuant to the *Parliament Act 1911* (UK). For a commentary see - A Twomey, 'Implied limitations on legislative power in the United Kingdom' (2006) 80 *ALJ* 40; M Paxton, 'The concept of legislation: Jackson v Her Majesty's Attorney General' (2006) 69(2) *The Modern Law Review* 249.

<sup>196</sup> [2005] 3 WLR 733 at 767-8.

Parliaments of the Commonwealth, States and Territories, a system that is governed by a written constitution, predicated on the rule of law, and from which implied limits on parliamentary powers can be derived. For the UK, however, for such views to be expressed in the House of Lords may suggest that, by the influence of the Human Rights Act, a subtle change is being worked in the traditional relationship between parliamentary supremacy and judicial review, a change away from deference on the part of the courts and towards a more robust assertion of legal constitutionalism. Lord Steyn's observations might even go one step further than contemporary Australian law, by indicating that the courts could review legislation for compliance with certain fundamental standards, even if the ECHR were not asserted at all.<sup>197</sup>

Whether that is an entirely fair comment on which to end this review of the *Human Rights Act 1998* is hard to say. Appendix A sets out those earlier instances where interpretations under s 3(1) of the Act were preferred by the courts, a catalogue which hardly suggests that a judicial revolution is underway. The truth is that human rights jurisprudence in the UK remains in a developmental state. There is nothing new in that. The common law is always evolving. What is different is that the development of human rights jurisprudence in the UK has now taken on the character of a statutory and constitutional imperative.

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Plaxton, n 195, p 260.

## 8. THE ACT HUMAN RIGHTS ACT 2004

The aim of balancing responsibility for rights between the legislature, the executive and the judiciary was one of the general principles informing the work of the ACT Consultative Committee established to inquire into a bill of rights for the Territory. In its report of May 2003 the Committee commented:

In the context of the ACT, the Consultative Committee considers that a model that preserves a balance between the legislature, the executive and the judiciary in relation to the protection of rights is preferable to one that defers almost completely to the legislature and the executive (as in the current Australian legal system) or one that allows the judiciary effectively to trump the legislature and to invalidate laws (as in the United States Bill of Rights).<sup>198</sup>

According to the Consultative Committee:

The legislation should be designed to encourage a dialogue between the branches of government and the community about the protection of human rights, rather than to allow a judicial or legislative monologue on rights.<sup>199</sup>

In terms of the relationship between parliamentary supremacy and judicial review, structurally the ACT *Human Rights Act 2004* does not add anything new to the models already discussed in this paper. Like the Canadian Charter it includes a general ‘justified limits’ provision (s 28). Unlike the Canadian model, by s 6 the Act legislation confers human rights only on individuals or groups of individuals, thereby excluding corporations from claiming violations of their human rights, as occurred under the Canadian Charter when tobacco companies complained that legislative restrictions on advertising and requirements to issue health warnings was an unjustified violation of their freedom of expression.<sup>200</sup>

Generally, the Act legislation is closely modelled on the UK *Human Rights Act 1998*. It is an ordinary piece of legislation, rather than an entrenched bill of rights. The ‘last say’ on human rights is assigned to the legislature. While judges cannot invalidate Territory laws, including statutory instruments, they are able to give an opinion that a law is incompatible with the ACT *Human Rights Act*.

### 8.1 Interpretation and incompatibility

Part 4 of the ACT legislation sets out the rules for the statutory interpretation of human rights, with s 30 providing:

(1) In working out the meaning of a Territory law, an interpretation that is

<sup>198</sup> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report for the ACT Bill of Rights Consultative Committee*, May 2003, p 54.

<sup>199</sup> ACT Bill of Rights Consultative Committee, n 198, p 2.

<sup>200</sup> *RJR-MacDonald v Canada (Attorney General)* [1995] 3 SCR 199; J Debelijak, n 60, p 170.

consistent with human rights is as far as possible to be preferred.

(2) Subsection (1) is subject to the Legislation Act, section 139.

(3) In this section:

***working out the meaning of a Territory law*** means –

resolving an ambiguous or obscure provision of the law; or

confirming or displacing the apparent meaning of the law; or

finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or

finding the meaning of the law in any other case.

This key provision has been described as ‘poorly drafted and ambiguous’, resulting in the kind of ‘legislative fuzziness’ which will give judges ‘a high degree of discretion’ in the interpretation of statutes. With its reference to ‘as far as possible’, s 30(1) is modelled on s 3 of the UK *Human Rights Act 1998*. The difficulties involved in the interpretation of that provision were discussed earlier in this paper. In the context of the ACT legislation, these difficulties are added to by the inclusion of a reference to s 139 of the *Legislation Act 2001* (ACT) which requires that an interpretation that would best achieve the purposes of a law be preferred to *any other* interpretation.<sup>201</sup> As Carolyn Evans comments:

Thus the primary interpretive rule becomes purposive. It is not clear where this leaves sub-s 1. And the circumstances set out in sub-s 3 help not at all given their variety, obscurity...and particularly given the catch-all final provision of ‘finding the meaning of the law in any other case’. It is thus not even clear what degree of ambiguity, if any, is required before the interpretive provisions in the other two subsections operate.<sup>202</sup>

As in the UK, by s 32(1) where the ACT Supreme Court is satisfied that a Territory law is not consistent with a human right, the court may make a declaration of incompatibility. This declaration does not, of itself, have any effect. Instead, a copy of it must be given promptly to the Attorney General (s 32(3)-(4)), who must in turn present it to the Legislative Assembly within 6 sitting days (s 33(2)). Within 6 months a written response to the declaration of incompatibility must be prepared by the Attorney General and presented to the Assembly (s 33(3)).

## 8.2 Parliamentary review of bills

Part 5 of the ACT legislation sets out the regime for pre-legislative scrutiny of bills. All bills presented to the Assembly must include a ‘compatibility statement’ prepared by the Attorney General (s 37(2)), stating whether the bill is consistent with human rights. If a bill is not consistent with human rights, the inconsistency must be explained (s 37(3)). In practice, this ‘compatibility statement’ is said to be ‘unreasoned and generally only one

<sup>201</sup> A note in the legislation states, ‘Legislation Act, s 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test)’.

<sup>202</sup> C Evans, n 183, pp 305-6.

sentence long'.<sup>203</sup>

Perhaps the one structural innovation of the Act legislation is that it makes statutory provision for the parliamentary review of legislation by a standing committee (s 38). At present this is the Standing Committee on Legal Affairs, although this may be changed by a declaration of the Speaker.

By s 39, a failure to comply with the pre-legislative scrutiny requirements of sections 37 and 38 does not affect the 'validity, operation or enforcement of any Territory law'. This provision is presumably intended to apply to urgent legislation, where the pre-legislative scrutiny requirements are to be partly or completely by-passed.

### 8.3 Omission – the problem of application

In her wide-ranging critique of the ACT's *Human Rights Act 2004*, Carolyn Evans points out that its implications for administrative law are unclear, a lack of clarity that is compounded by 'the inexplicable absence of any provision that explains to whom the Act applies'. Is its application to be restricted to public authorities, for instance, or is its intended operation to be broader in scope? Evans continues:

In the case of administrative law this leaves some complex issues in the hands of the judiciary. For example, to what extent are private bodies exercising public powers to be subjected to the Act? What are public powers in this context? Does the court apply to Cabinet decisions and deliberations? Does it extend to exercise of non-statutory executive powers?<sup>204</sup>

A further point is that the ACT judiciary cannot expect much guidance from other human rights instruments in this regard. The application of the UK's Human Rights Act 1998 is restricted to 'public authorities', a term which has caused considerable debate. In its Nineteenth Report in 2005 the Joint Committee on Human Rights said the

courts had been inclining to a more restrictive and narrow interpretation of the meaning of public authority, potentially depriving numerous people, often vulnerable people, from the human rights protection afforded by the HRA, especially where public services are contracted out.<sup>205</sup>

Different again is the scope of application of the New Zealand and Canadian human rights

<sup>203</sup> S Evans, 'Improving human rights analysis in the legislative and policy process' (2005) 29 *Melbourne University Law Review* 665 at 677. Simon Evans adds that a more substantial statement was provided in the case of the Mental Health (Treatment and Care) Amendment Bill 2005 (ACT). He notes that the statement was provided by the Chief Executive of the Department of Justice and Community Safety, rather than by the Attorney General.

<sup>204</sup> C Evans, n 183, p 304.

<sup>205</sup> Joint Committee on Human Rights, n 135, para 147. The Committee said it was 'alarmed' at these developments and recommended the Government should intervene as a third party in cases where it would be able to press for a broad, functional interpretation of the meaning of public authority.

instruments. By s 3 the New Zealand Bill of Rights Act applies to acts done by the 'legislative, executive, or judicial branches of the government of New Zealand' or 'By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law'. By s 32 the Canadian Charter applies to the 'Parliament and government of Canada' and each Province. According to Evans, 'there is no consensus in other common law countries about issues such as the applicability of human rights provisions to Parliament, the courts or individuals acting in a public capacity'.<sup>206</sup>

#### 8.4 Comment

Clearly, the ACT legislation seeks to incorporate the best features of the Canadian, New Zealand and UK models. The above comments suggest this may not always be a recipe for complete clarity in the law. The 'interpretation' provisions in the UK and New Zealand human rights instruments have produced considerable uncertainty and ample space for the operation of judicial discretion. Their ACT equivalent may yet follow suit.

Like its New Zealand and UK counterparts, the ACT *Human Rights Act 2004* does establish the structural requirements for a dialogue between the Parliament and the courts. The ACT has enacted an ordinary statute which means that the rights it seeks to protect are not constitutionally entrenched. Rather, those rights are granted a special status in the interpretation of statutes, with preference being given to an interpretation that is consistent with the *Human Rights Act*. Only where such an interpretation is not possible is a declaration of incompatibility to be made, thereby inviting but not mandating parliamentary amendment. What is mandated is an opportunity for parliamentary review, by which means a dialogue between the legislature and the courts is encouraged. What emerges from this dialogue and from the human rights jurisprudence generally in the ACT remains to be seen. It is simply too early to tell.<sup>207</sup>

For the record, in November 2005 the Victorian Human Rights Consultation Committee reported:

In its first year of operation, the ACT *Human Rights Act 2004* was cited in 14 Supreme Court cases. In most cases, the Act was used in the interpretation of laws.

For example in the case of *R v Upton*<sup>208</sup> the Court took into account the right to a trial without unreasonable delay (section 22 of the Act) in considering whether to order a stay in proceedings. It is important to remember that the Court already had existing statutory and common law powers to order stays in such matters. The difference in this case was that the *Human Rights Act 2004* was used to assist in the deliberations. The Judge held that the granting of a stay was appropriate and

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<sup>206</sup> C Evans, n 183, p 305.

<sup>207</sup> For various assessments on the early operation of the Act see – ANU Centre for International Governance and Justice, *Assessing the First Year of the ACT Human Rights Act*, 29 June 2005 - [http://cigj.anu.edu.au/link\\_documents/Jon\\_Stanhope.pdf](http://cigj.anu.edu.au/link_documents/Jon_Stanhope.pdf)

<sup>208</sup> [2005] ACTSC 52.



proportionate in the case because of the low order of the offence and the two year delay of the trial.

The Act was also considered in one administrative matter<sup>209</sup> where the decision of the public authority was confirmed.

No declarations of incompatibility have yet been made in the ACT.<sup>210</sup>

From their review of the limited case law, Charlesworth and McKinnon conclude:

The use of the *Human Rights Act* in ACT courts and tribunals has overall been cautious and sporadic, perhaps a result of the judiciary's and the profession's unfamiliarity with international human rights law and standards.<sup>211</sup>

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<sup>209</sup> *Merritt and the Commissioner for Housing* [2004] ACTAAT 37.

<sup>210</sup> Victorian Human Rights Consultation Committee, n 17, p 118.

<sup>211</sup> H Charlesworth and G McKinnon, *Australia's First Bill of Rights: The ACT's Human Rights Act*, Law and Policy Paper 28, The Federation Press and the Centre for International and Public Law, 2006, p 14.

## 9. THE PROPOSED VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT

### 9.1 Dialogue between Parliament and the courts

As with the ACT's *Human Rights Act 2004*, the draft Charter of Human Rights and Responsibilities formulated by the Victorian Human Rights Consultation Committee builds on those comparable models already in place. In particular, in terms of the dialogue between parliamentary supremacy and judicial review it includes all the major structural features found in those models, while also adding a few twists of its own.

***Pre-enactment scrutiny*** – by draft s 27 statements of compatibility *must* be made by the Attorney General on government bills. By draft s 28 similar statements of compatibility *may* be made by the sponsor of a non-government bill. However, by draft s 29 a failure to comply with s 27 or s 28 will not affect the validity of the relevant statute.

***Pre-enactment scrutiny and Human Rights Scrutiny Committee*** – by draft s 30 this proposed committee *must* consider and report on all bills. No exception or qualification is made for non-compliance with this requirement, a position that sets the Victorian proposal apart from the arrangements in place under ss 37-39 of the ACT legislation. It would seem therefore that the requirement for Committee involvement in the pre-enactment process is not to be compromised by considerations of urgency. The Consultation Committee recommended that the new Human Rights Scrutiny Committee 'should be able to report on Bills within ten sitting days of their introduction into Parliament or before their enactment, whichever is the later'.<sup>212</sup> To this was added a plea for adequate resources.

***Override by Parliament*** – by draft s 31 the Victorian Parliament is provided with the power to expressly declare that an Act or a provision in an Act has effect despite anything contained in the Charter. This is modelled on s 33 of the Canadian Charter of Rights and Freedoms. No comparable provision is found in the UK, New Zealand or ACT human rights statutes.

***Declarations of incompatibility*** – as in the UK and ACT, by draft s 37 express provision is made for the making of declarations of incompatibility. Subject to any relevant override provision, these declarations will apply to a 'statutory provision' that is not compatible with a human right. Such declarations will not affect the validity or operation of the statutory provision in question.

***Action on declaration of incompatibility*** – by draft s 38 provision is made for action to be taken by both the Attorney General and by the proposed Human Rights Scrutiny Committee. A novel feature is that the Committee is to review each declaration and report to each House of Parliament within 3 months, thereby enhancing the direct engagement of the Parliament with human rights issues. Within 6 months, the Attorney General must prepare a written response and cause this to be laid before each House and published in the Government Gazette.

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<sup>212</sup>

Victorian Human Rights Consultation Committee, n 17, p 80.

## 9.2 Justified limits

Like all the contemporary human rights instruments, the proposed Victorian Charter includes in draft s 6 a ‘justified limits’ clause. A novel feature of this draft provision is that it formulates the tests or ‘factors’ to be taken into account. These non-exclusive factors are derived largely from the Canadian jurisprudence associated with the *Oakes* case and are based on the notions of legitimate aims and proportionality. By draft s 6(2) the courts are directed therefore to consider:

- (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.

‘Factor’ (b) above is equivalent to ‘the legitimate objective test’ in Canada, whereas factors (c)-(e) are all variations on the *Oakes* proportionality tests. Specifically, (d) is a variation on ‘the rational connection’ test; while (e) is based on ‘the minimal impairment’ test.

By making these ‘factors’ non-exclusive, the draft proposal does invite broader inquiry by the courts, thereby eschewing the stricter approach to these ‘tests’ adopted in Canada where their application has become the model for the consideration of all justified limits in Charter jurisprudence. The choice of the word ‘factors’ is significant in this respect, pointing the courts away from their mechanical application.

## 9.3 Interpretation

As in the UK, New Zealand and ACT models, the proposed Victorian Charter includes an ‘interpretation’ provision. This is found in draft s 32 which combines elements of the relevant UK and ACT provisions, while adding a few refinements of its own.

Draft s 32 (1) provides:

So far as it is possible to do so consistently *with their purpose*, all statutory provisions must be read and given effect to in a way that is compatible with human rights. (emphasis added)

This is based on s 3 of the UK legislation, except that (i) no distinction is made between primary and secondary legislation and (ii) a reference is included to the ‘*purpose*’ of a statutory provision. According to the Committee’s report, the intention here was to provide the courts ‘with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question’. This is said to be consistent with the approach adopted in the House of Lords decision in *Ghaidan* (see earlier discussion), where ‘a more purposive approach to interpretation was favoured’.<sup>213</sup>

<sup>213</sup>

Victorian Human Rights Consultation Committee, n 17, pp 82-3.

Consistent with s 31 of the ACT legislation, draft s 32(2) invites consideration of international law and relevant foreign jurisprudence, in the hope of establishing ‘a uniform approach to questions of interpretation’.<sup>214</sup>

Draft s 32(3) then sets out what is meant by ‘reading and giving effect to a statutory provision’. These meanings, which are embellishments upon s 30(3) of the ACT legislation, seek by to avoid some of the criticisms directed against their ACT equivalent.

#### 9.4 Application

Echoing s 6 of the ACT legislation, by draft s 5(1) ‘Only persons have human rights’. The word ‘person’ is defined to mean an ‘individual, and does not include a body politic or corporate’. Corporations would therefore excluded from seeking the remedies available under the proposed Victorian Charter.

Whereas the ACT legislation omits to state against whom the Act applies, by s 5(2) the proposed Victorian Charter makes it clear that it would apply to: (a) Parliament in relation to the scrutiny of new legislation and the override provision, the effect being to make the parliamentary processes associated with draft Divisions 1 and 2 of Part 3 justiciable; (b) courts and tribunals in relation to the override provision and the interpretation of laws: and (c) ‘public authorities to the extent that they have duties and powers under Division 4 of Part 3’. By draft s 39(1) 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.<sup>215</sup>

‘Public authority’ is defined to include government departments, statutory authorities, local government bodies, Victoria Police, and entities performing public functions on behalf of the State. The term does not include Parliament, courts or tribunals except when acting in an administrative capacity, or any entity declared by the regulations not to be a public authority for the purposes of the proposed Charter.

#### 9.5 Which rights would be protected?

The rights to be protected under the proposed Victorian Charter are for the most part familiar enough, spanning civil and political rights and legal process rights. More distinctively, as with its ACT counterpart, the Victorian Charter refers to the right to ‘privacy and reputation’, ‘freedom from forced work’ and ‘taking part in public life’. This last right is divided in two parts in the Victorian Charter. By draft s 17(1) ‘*every person*’ in the State would have a right to take part in ‘the conduct of public affairs directly or through freely chosen representatives’ and to ‘participate in public life’, whereas by draft s 17(2) ‘*every eligible person*’ has a right to vote and be elected in a democratic election and to have access to work for the State public service. The distinction may not make much

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<sup>214</sup> Victorian Human Rights Consultation Committee, n 17, p 83.

<sup>215</sup> By draft s 39(3) acts or decisions of a ‘private nature’ are excluded.

intuitive sense. Presumably, it would permit young children to participate in public life but not to be ‘eligible’ to stand for election. The distinction also leaves the door open for prisoners (or some classes of prisoners), for example, to be classified as ‘ineligible’ persons and therefore to be denied the vote and the right to run as a candidate in an election. A distinction of this kind is absent from the equivalent ACT provision (s 17), which provides ‘every citizen’ with the right ‘to take part in the conduct of public affairs’ and ‘vote and be elected at periodic elections’ and have access to work for the public service.

Controversially, the *ACT Human Rights Act 2004* include a ‘right to life’ and against the arbitrary deprivation of life (s 9). Crucially, it adds ‘This section applies to a person from the time of birth’, by which means the drafters hoped to insulate the legislation from the abortion debate. With the same aim in mind, a different qualification is provided in draft s 8(2) of the Victorian Charter which states ‘For the purpose of this Charter, sub-section (1) applies to a person from the time of his or her birth’. With the abortion issue in mind, the Consultative Committee commented that an ‘outcome’ would not be ‘imposed by the Charter’, leaving it instead to ‘political debate and individual judgment’.<sup>216</sup>

Unlike the ACT legislation, the draft Victorian Charter includes express protection for ‘cultural rights’ (draft s 18) and ‘property rights’ (draft s 19).<sup>217</sup>

## 9.6 Comment

Central to the case made by the Consultation Committee on behalf of a charter of rights and responsibilities is that the ‘law does need to be changed to better protect human rights’.<sup>218</sup> Based on submissions it received, the Consultation Committee cited the following arguments for a Charter:

- The current protection of human rights is inadequate.
- Additional protection is needed for disadvantaged and marginalised people.
- A charter would deliver practical benefits by setting minimum standards for government.
- A charter would modernise our democracy and give effect to Australia’s human rights obligations.
- A charter would educate people about their rights and responsibilities.<sup>219</sup>

The Consultation Committee was not convinced by arguments that: our human rights are already adequately protected; a charter would make no practical difference; or that a charter would give too much power to judges. One area where the Committee believed a charter ‘might contribute to better decision-making’ was in respect to terrorism. In the

<sup>216</sup> Victorian Human Rights Consultation Committee, n 17, p 34.

<sup>217</sup> For a commentary on property rights see – S Evans, ‘Should Australian bills of rights protect property rights?’ (2006) 31(1) *Alternative Law Journal* 19. The article concludes by noting that a property rights guarantee ‘does not reflect a human right recognised under general international law’ (at 20).

<sup>218</sup> Victorian Human Rights Consultation Committee, n 17, p 18.

<sup>219</sup> Victorian Human Rights Consultation Committee, n 17, p 4.

Committee's view, new institutional checks and balances would apply in the consideration of terrorist laws, clearer parameters would be provided to the States in their cooperation with the Commonwealth, and vulnerable communities might be comforted that they are 'not being singled out on racial or religious grounds'.<sup>220</sup>

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Victorian Human Rights Consultation Committee, n 17, pp 11-12.

## 10. ISSUES IN THE DEBATE

### 10.1 Human rights and the courts

Is a charter or bill of rights needed in NSW? If so, would human rights be better protected than at present? The only answer to this last question is that we do not know. Experience from comparable overseas jurisdictions may, or may not, point to one likely conclusion or other, but it is impossible to say definitively. What is clear is that a charter of rights would provide the courts with a new structural role in the protection of human rights, one that would offer more opportunity for these decisions to be made on the basis of principle and not by the uncertain processes of majoritarian politics. Critics might add that greater opportunity would also be provided for costly litigation, much of it operating on the margins of what many would consider to be fundamental human rights. Critics might also argue that a charter of rights would produce a more convoluted process of judicial reasoning which is unlikely to make much of a substantive difference on the central questions of the relationship between the individual and the state.

Whether the courts in Australia would be constrained by the same considerations of deference to parliamentary supremacy as has been noted in the UK in particular is hard to say. Unlike the UK and New Zealand, the courts are accustomed to operating within a federal system where the 'sovereignty' of Parliament was never an absolute doctrine and where, in the context of a written constitution, the courts are used to striking down statutes for unconstitutionality.

Would Australian courts tend to be less constrained about adopting a form of 'judicial activism in human rights matters? If so, would this be a good or a bad thing? Critics of human rights legislation might argue either way, that the courts are likely to be too or not sufficiently deferential. Either way, the supporters of such legislation would contend that, by such devices as 'declarations of incompatibility', the supremacy of Parliament could be retained, thereby undercutting the familiar argument that a bill of rights leads to unelected judges setting themselves up as law makers in defiance of the popular will. On offer from this standpoint is what is claimed to be the best of both the political and judicial processes of decision making. In the new language of this debate, what is argued for is a 'dialogue' between legislatures and the courts.

### 10.2 Human rights in the legislative and policy process

A facet of this debate is that the building of a 'culture of rights' is multi-dimensional in nature, affecting not only the courts but also the Parliament and the Executive. Especially important in this respect are the structures in place in the jurisdictions studied in this paper for the pre-enactment scrutiny of legislation, notably in the form of statements of compatibility with human rights, to be presented to Parliament by the Attorney General in the ACT and elsewhere, and the establishment of specialised human rights standing committees to oversee the legislative process.

The irony is that, in the case of legislation committees at least, these scrutiny mechanisms were pioneered in Australia, in what might be called a bill of rights free zone.<sup>221</sup> From a

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For an overview of 'models of scrutiny of legislation in Australia' see - Standing Committee on Law and Justice, n 31, pp 117-23.

NSW perspective, with the work of the Legislative Review Committee in mind, it might be argued that such pre-enactment scrutiny of bills can be achieved without a bill or charter of rights (indeed, as discussed earlier, this Committee was deliberately created as an alternative to a bill of rights). The same might be said at the Commonwealth level of the Senate's Standing Committee for the Scrutiny of Bills. These matters were considered by the Victorian Consultation Committee which recommended an expanded role for the existing Scrutiny of Acts and Regulations Committee which

should be conferred with additional terms of reference to consider and report on matters arising under the Charter of Human Rights and Responsibilities, including questions referred to it by either House of Parliament, whether legislation is compatible with the Charter and consideration of any Declaration of Incompatibility made by a court.<sup>222</sup>

A charter of rights could arguably embellish the scrutiny process in a number of ways, especially at earlier stages in the legislative process by requiring compatibility statements to be made to Parliament and by other means. The policy process could also be influenced by the growth of a 'rights culture', as a new awareness of rights related issues develops in the public service and by more formal means, such as the making of guidelines for policy formulation. Developments of this kind are evident in the UK, the ACT and New Zealand. On the other hand, as Simon Evans comments

Outside Queensland and the Australian Capital Territory, no legislation and none of the publicly available Cabinet Handbooks and Legislation Handbooks require officials or ministers to consider rights issues at the policy formulation or approval stages for primary legislation.<sup>223</sup>

Queensland is an interesting exception in that it shows again that the development of such mechanisms is not dependent on a charter or bill of rights. In Queensland, Simon Evans writes:

Cabinet submissions are required to identify, *and seek Cabinet approval for*, departures from fundamental legislative principles (or 'FLPs'). Legislative drafters must consider whether proposed legislation is consistent with Australia's international obligations and fundamental legislative principles set out in the *Legislative Standards Act 1992* (Qld). The Office of Queensland Parliamentary Counsel works to ensure conformity with fundamental principles by drafting a 'fundamental legislative principles standard designed as an information document for all persons preparing legislation to inform them in particular of the views of the Scrutiny of Legislation Committee'; advising departments on fundamental legislative principles; and educating departments 'to encourage compliance with FLPs by developing provisions that achieve both policy objectives and compliance with the principles'.<sup>224</sup>

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<sup>222</sup> Victorian Human Rights Consultation Committee, n 17, p 80.

<sup>223</sup> S Evans, n 203, pp 673-4.

<sup>224</sup> S Evans, n 203, pp 675-6.



While such developments are likely to be facilitated by a charter of rights, the Queensland experience shows that they can occur independently, in the form of mechanisms designed to encourage dialogue between the Executive and Parliament. Admittedly, this dialogue may speak in a louder voice when conducted in the structured context provided by a charter of rights.

### **10.3 Human rights and bicameralism**

One reflection on the bill of rights in New Zealand is that many of the concerns that led to its introduction have been answered by political means, notably as a consequence of the MMP electoral system. In the context of a unicameral Parliament, this has resulted in the formation of coalition governments, by which means the extreme centralisation of power under the old winner-takes-all electoral system has been modified. Alongside the bill of rights, new checks and balances of a political kind have been established, a process of legislation by negotiation.

While Queensland is an exception, it might be argued that similar political restraints on Executive power have been established in most Australian jurisdictions by the institutional arrangements associated with bicameralism. This argument applies particularly to those Upper House elected by proportional representation where the balance of power is held by the crossbenches and where the mechanisms associated with parliamentary accountability are more likely to thrive. This has been true of NSW since 1988. Until the most recent federal election in 2005 it also applied to the Commonwealth, where the Senate routinely subjected the government's legislative program to careful and critical scrutiny. The weakness of the argument is that no such restraints apply to a government that commands a majority in both Houses, as is the case for the present Howard Government. While bicameralism can be a powerful and effective protector of human rights, it is one that is vulnerable to shifts in electoral outcomes.

### **10.4 Human rights and federalism**

The significance of federalism for human rights can be considered from a number of perspectives. One is that the States can act as countervailing powers to the Commonwealth, acting as checks on its legislative ambitions, especially where these depend upon referrals of power from the States, as in the case of the new anti-terrorism laws. Just how effective a check the States can be in the modern era is another matter.

From another perspective, while in a practical sense the powers of the States are in decline *vis a vis* the Commonwealth, it remains the case that in legislative and administrative terms the potential for the States to impact upon human rights is enormous. An experiment with a charter of rights in one or more of the States would be significant in this respect.

## 11. CONCLUSION

This paper does not present a case for or against a charter or bill of rights. This is a question that must be answered by the ongoing political debate. What can be said is that a charter or bill of rights, statutory in form and not constitutionally entrenched, is likely in the long term to make a significant impact of one sort or another. Some will define this in terms of a drift towards what Tomkins calls ‘legal constitutionalism’ and away from the traditional checks and balances on government power associated with the system of parliamentary accountability. Others will be inclined more to the language of ‘dialogue’, in which the different branches of government, the legislative, executive and judicial, will play distinct yet complimentary roles. What is not on the table at present in NSW is the model in place in the US, where judges are made the ultimate arbiters in conflicts over human rights. The change that is contemplated is more modest, in line with the UK, New Zealand and the ACT. Critics may view this as a first step by human rights lobbyists, one stage along the road to a fully entrenched bill of rights at a national level. Conversely, from a human rights perspective, the argument is that the traditional mechanisms for the protection of rights are in need of reform in an age when the contest between liberty and security is particularly intense.

The questions remain – is a charter of rights needed in NSW? Would a charter of rights make a difference? How significant and beneficial would its impact be? Commenting on the UK experience, and arguing for a charter of rights, Professor George Williams writes that the courts have a ‘very limited role’ under the *Human Rights Act 1998*, the passing of which has led to ‘almost no increase in litigation and under which ‘Parliament has the last say’.<sup>225</sup> Reflecting on the same experience but arguing against such a charter, Professor James Allan states that ‘A statutory bill of rights may leave Parliament with the last word in name, but it gives judges a steroid-enhanced power of interpretation. They get to use a new “human rights-friendly” method to interpret Parliament’s words. In effect, they get a blank cheque’.<sup>226</sup> The experiences of jurisdictions discussed in this paper suggest that the answers to the questions posed above are both complex and contested.

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<sup>225</sup> G Williams, ‘Human rights charter will save time and money’, *The Daily Telegraph*, 13.4.2006, p 27.

<sup>226</sup> J Allen, ‘All bets are off when a bill of rights comes in’, *Sydney Morning Herald*, 18.4.2006, p 11.





APPENDIX A

INTERPRETATIONS UNDER SECTION 3 (I) OF THE  
*HUMAN RIGHTS ACT 1998* (UK)

FROM THE OPINION OF LORD STEYN IN *Ghaidan v Godin-Mendoza*  
[2004] 2 AC 557

INTERPRETATIONS UNDER SECTION 3 (I)

| Case  | ECHR provision   | Provision in issue   | Interpretation adopted  |
|---|------------------|--|---|
| <i>R v Offen</i> [2001] 1 WLR 253, CA                                     | Articles 3, 5, 7 | Crime (Sentences) Act 1997, s 2                                      | The imposition of an automatic life sentence as required by s 2 could be disproportionate if the defendant poses no risk to the public, thereby breaching articles 3 and 5. The phrase "exceptional circumstances" was to be given a less restrictive interpretation.   |
| <i>R v A (No 2)</i> [2001] 1 AC 45  | Article 6        | Youth Justice and Criminal Evidence Act 1999, s 41                   | Prior sexual contact between the complainant and the defendant could be relevant to the issue of consent. The blanket exclusion of this evidence in s 41 was disproportionate. By applying s 3, the test of admissibility was whether the evidential material was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6.  |
| <i>Cachia v Faluyi</i> [2001] 1 WLR 1966, CA                              | Article 6 (1)    | Fatal Accidents Act 1976, s 2(3)                                     | The restriction that "not more than one action shall lie for and in respect of the same subject matter of complaint" served no legitimate purpose and was a procedural quirk. "Action" was therefore interpreted as "served process" to enable claimants, whose writs had been issued but not served, to issue a new claim.   |
| <i>R v Lambert</i> [2002] 2 AC 545  | Article 6        | Misuse of Drugs Act 1971, s 28                                       | The legal burden of proof placed on the defendant pursuant to the ordinary meaning of the phrase "if he proves" in the s 28 defences was incompatible with article 6. Accordingly it is to be read as though it says "to give sufficient evidence".   |
| <i>Goode v Martin</i> [2002] 1 WLR 1828, CA                               | Article 6        | Civil Procedure Rules, r 17.4(2)                                     | To comply with article 6[1], the rule should be read as though it contains the words in italics: "The court may allow an amendment whose effect will be to add ... a new claim, but only if the new claim arises out of the same facts or substantially the same facts as <i>are already in issue on</i> a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."  |
| <i>R v Carass</i> [2002] 1 WLR 1714, CA                                   | Article 6 (2)    | Involency Act 1986, s 206  | There is no justification for imposing a legal rather than evidential burden of proof on a defendant accused of concealing debts in anticipation of winding up a company, who raises a defence under s 206(4). Accordingly "prove" is to be read as "adduce sufficient evidence".   |
| <i>R (Van Hoogstraten) v Governor of Belmarsh Prison</i> [2003] 1 WLR 263 | Article 6        | Prison Rules 1999, r 2 (1)   | Reading the rule compatibly with s 3, a prisoner's legal adviser, defined in r 2(1) as "his counsel or solicitor, and includes a clerk acting on behalf of his solicitor ... "must embrace any lawyer who (a) is chosen by the prisoner, and (b) is entitled to represent the prisoner in criminal proceedings to which the prisoner is a defendant and therefore includes an Italian "avvocato" who falls within the definition of "EEC lawyer" in the European Communities (Services of Lawyers) Order 1978 (SI 1978/1910). |
| <i>Sheldrake v Director of Public Prosecutions</i> [2004] QB 487, DC      | Article 6(2)     | Road Traffic Act 1988, s 5 (1) (b) (2)                               | The s 5 (2) defence to the offence of driving while under the influence of alcohol over the prescribed limit, which requires the defendant to meet the legal burden of proving that there was no likelihood of his driving the vehicle while over the limit, it to be read down as imposing only an evidential burden on the defendant.   |
| <i>R (Sim) v Parole Board</i> [2004] QB 1288                              | Article 5        | Criminal Justice Act 1991, s 44A(4)                                  | In order to be compatible with article 5, s 44A(4) should be read as requiring the Parole Board to direct a recalled prisoner's release unless it is positively satisfied that the interests of the public require that his confinement should continue.  |
| <i>R (Middleton) v West Somerset Coroner</i> [2004] 2 AC 182              | Article 2        | Coroners Act 1988, s 11(5) (b) (ii); Coroners Rules 1944, r 36(I)(b) | "How" in the phrase "how, when and where the deceased came by his death" is to be read in a broad sense, to mean "by what means and in what circumstances" rather than simply "by what means".  |

APPENDIX B

JOINT COMMITTEE ON HUMAN RIGHTS (UK) – NINETEENTH REPORT,  
APRIL 2005

MEMORANDUM FROM THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

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TABLE OF DECLARATIONS OF INCOMPATIBILITY MADE UNDER S 4 OF THE  
HUMAN RIGHTS ACT 1998

| Case Name and Description  | Date        | Content of the Declaration  | Comments  |
|--|-------------|---|---|
| <p>R (on the application of H) v Mental Health Review Tribunal for the North and East London Region &amp; The Secretary of State for Health (Court of Appeal) [2001] EWCA Civ 415</p> <p>The case concerned a man who was admitted under section 3 of the Mental Health Act 1983 and sought discharge from hospital.</p> | 28 Mar 2001 | <p>Sections 72 and 73 of the Mental Health Act 1983 were incompatible with Article 5(1) and 5(4) in as much as they did not require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention.</p>                                       | <p>The legislation was amended by the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001 No.3712) (In force 26 Nov 2001)</p>                       |
| <p>International Transport Roth GmbH v Secretary of State for the Home Department (Court of Appeal, upholding Sullivan J) [2002] EWCA Civ 158</p> <p>The case involved a challenge to a penalty regime applied to carriers who unknowingly transported clandestine entrants to the UK.</p>                               | 22 Feb 2002 | <p>The penalty scheme contained in Part II of the Immigration and Asylum Act 1999 was incompatible with Article 6 because the fixed nature of the penalties offended the right to have a penalty determined by an independent tribunal. It also violated Article 1 of Protocol 1 as it imposed an excessive burden on the carriers.</p> | <p>The legislation was amended by the Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8. (In force 8 Dec 2002)</p>            |
| <p>McR's Application for Judicial Review (Kerr J) [2003] N.I 1</p> <p>The case concerned a man who was charged with the attempted buggery of woman. He argued that the existence of the offence of attempted buggery was in breach of Article 8.</p>   | 15 Jan 2002 | <p>Section 62 of the Offences Against the Person Act 1861 (attempted buggery), which continued to apply in Northern Ireland, was incompatible with Article 8 to the extent that it interfered with consensual sexual behaviour between individuals.</p>   | <p>Section 62 was repealed in NI by the Sexual Offences Act 2003, sections 139, 140, Schedule 6 paragraph 4 and Schedule 7. (In force 1 May 2004)</p> |



| <b>Case Name and Description</b>  | <b>Date</b>        | <b>Content of the Declaration</b>  | <b>Comments</b>   |
|---|--------------------|--|---|
| <p>R (on the application of Wilkinson) v Inland Revenue Commissioners (Court of Appeal, upholding Moses J) [2003] EWCA Civ 814<br/>The case concerned the provision of Widows Bereavement Allowance to widows but not widowers.</p>   | <p>18 Jun 2003</p> | <p>Section 262 of the Income and Corporation Taxes Act 1988 was incompatible with Article 14 when read with Article 1 of Protocol 1 in that it discriminated against widowers in the provision of Widows Bereavement Allowance.</p>  | <p>The section declared incompatible was no longer in force at the date of the judgment having already been repealed by the Finance Act 1999 sections 34(1), 139, Schedule 20. (In force in relation to deaths occurring on or after 6 Apr 2000)</p>      |
| <p>R (on the application of Anderson) v Secretary of State for the Home Department (House of Lords) [2002] UKHL 46<br/>The case involved a challenge to the Secretary of State for the Home Department's power to set the minimum period that must be served by a mandatory life sentence prisoner.</p> | <p>25 Nov 2002</p> | <p>Section 29 of the Crime (Sentences) Act 1997 was incompatible with the right under Article 6 to have a sentence imposed by an independent and impartial tribunal in that the Secretary of State decided on the minimum period which must be served by a mandatory life sentence prisoner before he was considered for release on licence.</p> | <p>The law was repealed by the Criminal Justice Act 2003, sections 303(b)(I), 332 and Schedule 37, Pt 8. Transitional and new sentencing provisions were contained in Chapter 7 and Schedule 21 and 22 of that Act. (Date power repealed 18 Dec 2003)</p> |
| <p>R v Secretary of State for the Home Department, ex parte D (Stanley Burnton J) [2002] EWHC 2805<br/>The case involved a challenge to the Secretary of State for the Home Department's discretion to allow a discretionary life prisoner to obtain access to a court to challenge</p>                 | <p>19 Dec 2002</p> | <p>Section 74 of the Mental Health Act 1983 was incompatible with Article 5(4) to the extent that the continued detention of discretionary life prisoners who had served the penal part of their sentence depended on the exercise of a discretionary power by the executive branch of government to grant access to a court.</p>                | <p>The law was amended by the Criminal Justice Act 2003 section 295. (In force 20 Jan 2004)</p>   |

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| their continued detention. |  |  |  |
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| Case Name and Description  | Date        | Content of the Declaration  | Comments  |
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| R (on the application of Hooper and others) v Secretary of State for Work and Pensions (Court of Appeal, upholding Moses J) [2003] EWCA Civ 875 The case concerned an application for a declaration that failing to make payments to men equivalent to the Widowed Mother's Allowance which was only paid to women was contrary to Article 14. | 18 Jun 2003 | Sections 36 and 37 of the Social Security Contributions and Benefit Act 1992 were in breach of Article 14 in combination with Article 8 and Article 1 of Protocol 1 in that benefits were provided to widows but not widowers.  | The law had already been amended at the date of the judgment by the Welfare Reform and Pensions Act 1999, section 54(1). (In force 9 Apr 2001) An appeal by the Secretary of State to the House of Lords was heard in Feb 2005 and judgment is awaited. |
| Blood and Tarbuck v Secretary of State for Health (Sullivan J). Unreported This case concerned the rules preventing a deceased father's name from being entered on the birth certificate of his child.   | 28 Feb 2003 | Section 28(6)(b) of the Human Fertilisation and Embryology Act 1990 was incompatible with Article 8, and/or Article 14 taken together with Article 8, to the extent that it did not allow a deceased father's name to be given on the birth certificate of his child. | The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003. (In force 1 Dec 2003)  |
| Bellinger v Bellinger (House of Lords) [2003] UKHL 21<br>A post-operative male to female transsexual appealed against a decision that she was not validly married to her husband, by virtue of the fact that at law she was a man.   | 10 Apr 2003 | Section 11(c) Matrimonial Causes Act 1973 was incompatible with Articles 8 and 12 in so far as it makes no provision for the recognition of gender reassignment.  | In the case of Goodwin v UK 11 Jul 2002, the European Court of Human Rights identified the absence of any system for legal recognition of gender change as a breach of Articles 8 and 12. The position will be  |

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|  |  |  | remedied by the Gender Recognition Act 2004, which comes into force on 4 Apr 2005. |
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| <b>Case Name and Description</b>   | <b>Date</b> | <b>Content of the Declaration</b>  | <b>Comments</b>  |
|--|-------------|--|--|
| <p>R (on the application of M) v Secretary of State for Health (Maurice Kay J) [2003] EWHC 1094</p> <p>The case concerned a patient who lived in hostel accommodation but remained liable to detention under the Mental Health Act 1983. Section 26 of that Act operated to automatically designate her adoptive father as her "nearest relative". However, her clinical team was aware that he had abused her as a child and the legislative scheme did not allow the patient or anyone else to challenge his status as nearest relative.</p> | 16 Apr 2003 | Sections 26 and 29 of the Mental Health Act 1983 were incompatible with Article 8, in that the claimant had no choice over the appointment or legal means of challenging the appointment of her nearest relative.  | The Government intends to amend the law through the Mental Health Bill, which has recently undergone pre-legislative scrutiny in Parliament. |
| <p>R (on the Application of Sylviane Pierrette Morris) v Westminster City Council &amp; First Secretary of State (Keith J) [2004] EWHC 2191</p> <p>The case concerned a single mother who was a British citizen and sought local authority accommodation for herself and her child, who was subject to immigration control.</p>  | 7 Oct 2004  | Section 185(4) of the Housing Act 1996 was incompatible with Article 14 to the extent that it requires a dependent child who is subject to immigration control to be disregarded when determining whether a British citizen has priority need for accommodation. | Leave to appeal to the Court of Appeal has been granted and the appeal has been listed for two days on 4-5 Jul 2005.                         |
| <p>R (on the Application of MH) v Secretary of State for Health (Court of Appeal)</p>  | 3 Dec 2004  | Section 2 of the Mental Health Act 1983 is incompatible with   | Leave to appeal to the House of Lords was given  |

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| <p>[2004] EWCA Civ 1609<br/>The case concerned a patient who was detained under section 2 of the Mental Health Act 1983 and was incompetent to apply for discharge from detention. Her detention was extended by operation of provisions in the Mental Health Act 1983.</p> |  | <p>Article 5(4) of the ECHR in so far as:<br/>(i) it is not attended by provision for the reference to a court of the case of an incompetent patient detained under section 2 in circumstances where a patient has a right to make application to the MHRT but the incompetent patient is incapable of exercising that right; and<br/>(ii) it is not attended by a right for a patient to refer his case to a court when his detention is extended by the operation of section 29(4).</p> | <p>on the 22 Feb 2005. The case is listed for hearing on the on the 25-26 Jul 2005.</p> |
|---|--|---|---|

| <b>Case Name and Description</b>  | <b>Date</b>        | <b>Content of the Declaration</b>  | <b>Comments</b>   |
|---|--------------------|--|---|
| <p>A and others v Secretary of State for the Home Department (House of Lords) [2004] UKHL 56<br/>The case concerned a challenge by persons detained under the Anti-terrorism, Crime and Security Act 2001 section 23. The detainees were all foreign nationals who had been certified by the Secretary of State as suspected international terrorists. They could not be deported since that would have involved a breach of Article 3. They were detained without charge or trial in accordance with a</p> | <p>16 Dec 2004</p> | <p>That the Human Rights Act 1998 (Designated derogation) Order 2001 be quashed because it was not a proportionate means of achieving the aim sought and could not therefore fall within Article 15. The court also declared that section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with Articles 5 and 14 as it was disproportionate and permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.</p> | <p>Unless renewed, section 23 will expire on the 13 Mar 2005. Meanwhile the Government published the Prevention of Terrorism Bill on 21 Feb 2005.</p> |

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| derogation from Article 5(1) provided by the Human Rights Act 1998 (Designated Derogation) Order 2001. |  |  |  |
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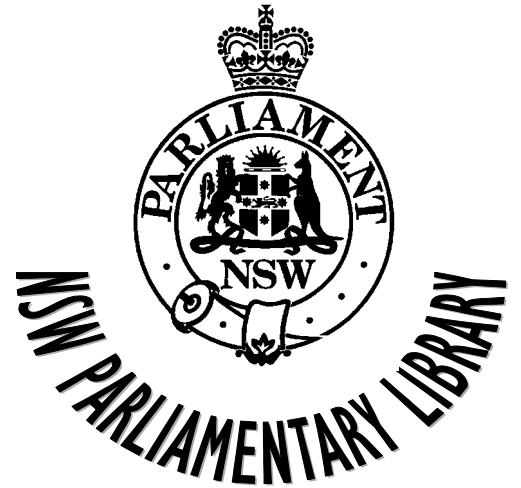
**Declarations of Incompatibility made but overturned on appeal**

| <b>Case Name &amp; Court that made the declaration.</b>  | <b>Date of Original decision</b> | <b>Substance of declaration of incompatibility</b>  | <b>Court that overturned declaration</b>                                  |
|--|----------------------------------|---|---|
| R. (Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions (Divisional Court, Harrison J & Tuckey L.J) [2001] H.R.L.R. 2<br>The Secretary of State's powers to determine planning applications were challenged on the basis that the dual role of the Secretary of State in formulating policy and taking decisions on applications inevitably resulted in a situation whereby applications could not be disposed of by an independent and impartial tribunal. | 13 Dec 2000                      | The Secretary of State's powers to determine planning applications were in breach of Article 6(1), to the extent that the Secretary of State as policy maker was also the decision-maker.<br>A number of provisions were found to be in breach of this principle, including the Town and Country Planning Act 1990, sections 77, 78 and 79. | The House of Lords overturned the declarations. 9 May 2001 [2001] UKHL 23 |
| Wilson v First County Trust Ltd (No.2) (Court of Appeal) [2001] EWCA Civ 633<br>The case concerned a pawnbroker who entered into a regulated loan agreement but did not properly execute the agreement so that the permission of the court was required to enforce it.   | 2 May 2001                       | Section 127(3) of the Consumer Credit Act 1974 was declared incompatible with the Article 6 and Article 1 Protocol 1 by the Court of Appeal to the extent that it caused an unjustified restriction to be placed on a creditors enjoyment of contractual rights.  | The House of Lords overturned the declaration. 10 Jul 2003 [2003] UKHL 40 |

|                                   |                |                                 |                   |
|-----------------------------------|----------------|---------------------------------|-------------------|
| <b>Case Name &amp; Court that</b> | <b>Date of</b> | <b>Substance of declaration</b> | <b>Court that</b> |
|-----------------------------------|----------------|---------------------------------|-------------------|

| <b>made the declaration.</b>  | <b>Original decision</b> | <b>of incompatibility</b>  | <b>overturned declaration</b>   |
|---|--------------------------|--|---|
| <p>Matthews v Ministry of Defence (QBD, Keith J) [2002] EWHC 13</p> <p>The case concerned a navy engineer who came into contact with asbestos lagging on boilers and pipes. As a result he developed pleural plaques and fibrosis. The Secretary of State issued a certificate that stated that M's injury had been attributable to service and made an award of no fault compensation. The effect of the certificate, made under section 10 of the Crown Proceedings Act 1947, was to preclude the engineer from pursuing a personal injury claim for damages from the Navy due to the Crown's immunity in tort during that period. The engineer claimed this was a breach of Article 6.</p> | 29 May 2002              | Section 10 of the Crown Proceedings Act 1947 was incompatible with Article 6 of the ECHR in that it was disproportionate to any aim that it had been intended to meet.   | The House of Lords upheld the Court of Appeal decision to overturn the declaration. 13 Feb 2003 [2003] UKHL 4 |
| <p>R (Uttley) v Secretary of State for the Home Department (Moses J) [2003] EWHC 950</p> <p>The case concerned a prisoner who argued that his release on licence was an additional penalty to which he would not have been subject at the time he was sentenced.</p>  | 8 Apr 2003               | Sections 33(2), 37(4)(a) and 39 of the Criminal Justice Act 1991 were incompatible with the claimant's rights under Article 7, insofar as they provided that he would be released at the two-thirds point of his sentence on licence with conditions and be liable to be recalled to prison. | The House of Lords overturned the declaration. 30 Jul 2004 [2004] UKHL 38                                     |

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| <i>Privatisation of Prisons</i> by Lenny Roth  | 3/04 |
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