

**INTERPRETIVE PROVISIONS IN
HUMAN RIGHTS LEGISLATION:
A COMPARATIVE ANALYSIS**

**BENEDICT COXON
MAGDALEN COLLEGE**

**DPHIL
TRINITY TERM 2013**

ABSTRACT

INTERPRETIVE PROVISIONS IN HUMAN RIGHTS LEGISLATION:

A COMPARATIVE ANALYSIS

BENEDICT COXON, MAGDALEN COLLEGE

DPHIL, TRINITY TERM 2013

This thesis considers interpretive provisions in human rights legislation in the United Kingdom (UK), New Zealand and two Australian jurisdictions: the Australian Capital Territory and the State of Victoria. It deals with the relationship between certain common law interpretive principles which protect human rights and the rules under the interpretive provisions. It also considers what effect the interpretive provisions have on the overall approach to statutory interpretation, particularly in terms of their impact on the roles of intention and purpose. One of the themes of the thesis is that it is possible to identify a common methodology for the application of the various interpretive provisions. This is facilitated by an emphasis on the concept of purpose, which is flexible and capable of being identified and applied at higher levels of abstraction than the concept of intention as commonly applied by the courts. Despite this common methodology, the results of attempts at legislative rights-consistent interpretation in the relevant jurisdictions differ. We shall see that the UK courts have taken a broader interpretive approach than have their New Zealand and Australian counterparts. This will be explained by reference to the respective contexts of the human rights legislation in each jurisdiction, particularly in terms of legislative history. It will be argued that the purpose of the UK legislation to provide remedies in domestic courts for breaches of the European Convention on Human Rights provides the basis for the UK courts' approach. The absence of this factor is the primary point of distinction between the UK on the one hand, and New Zealand and Australia on the other, though other issues will be explored. Finally, while as a matter of the interpretation of the UK legislation, and especially of the relevant interpretive provision, the approach of the UK courts is defensible, the significant risk to the principle of legal certainty which it poses will be highlighted.

Word count: 91,802 words

ACKNOWLEDGEMENTS

One incurs many debts in undertaking a project such as this. First and foremost, I wish to thank my supervisor, Prof Stefan Vogenauer, for his insight, conscientiousness and patience. I am grateful to Magdalen College for providing an ideal environment for study. I am deeply indebted to the Rhodes Trust, without which this thesis would not have been produced. My interest in statutory interpretation was initially sparked by Dr Steven Churches, to whom I am grateful for presenting the subject in such an engaging manner. As is bound to be the case with a comparative thesis, I have received assistance from all corners of the globe in obtaining materials; there are too many people all to name, but I wish to thank especially Ed Bayley, Carmine Conte, Rowan Nicholson, Margaret Priwer and Varin Singh. Certain members of the ‘Class of 2009’ (loosely defined) have been a constant source of support throughout my time in Oxford: Carmine Conte, Dr Jaani Riordan and Dr Kate Robson. My final thanks are reserved for my parents, to whom this thesis is dedicated.

TABLE OF CONTENTS

List of Abbreviations	vii
Table of Cases.....	viii
Table of Statutes	xxvi
Table of International Treaties.....	xxxii
Chapter One — Introduction	1
Chapter Two — Intention and Purpose	
1 Introduction.....	5
2 Intention	6
(a) Objectivity	6
(b) Constitutional Significance	8
(c) The Reasonable Reader Approach	10
(d) (Incorrectly) Perceived Difficulties with the Reasonable Reader Approach ..	13
3 Purpose.....	14
(a) Basic Issues	14
(i) The Concept of Purpose	15
(ii) The Purposive Approach.....	16
(iii) Authority for the Purposive Approach.....	17
(b) Ambiguity and Whether More than One Construction Must Be Open.....	20
(i) Ambiguity	21
(ii) More than One Construction Open	23
(c) Statutory Language as a Constraint on the Purposive Approach	25
(i) Intractability of Language	25
(ii) ‘Straining’ or ‘Stretching’ Language	27
(iii) Unreasonable or Unnatural Interpretations	28
(d) Differing Levels of Abstraction of Purpose	29
4 Distinguishing between Intention and Purpose.....	32
5 Conclusion	35
Chapter Three — Constitutional Background	
1 Introduction.....	37
2 Parliamentary Sovereignty.....	39
(a) Basic Introduction	39
(b) Theoretical Issues	41
(c) United Kingdom	43
(d) Australia: Commonwealth.....	46
(e) Australia: States and Territories	47
(f) New Zealand	50
3 Common Law Constitutionalism	52
(a) United Kingdom	53
(b) New Zealand	55
(c) Australia	56
4 Legal Certainty.....	58
(a) United Kingdom	59

(b) Australia	61
(c) New Zealand.....	63
5 Conclusion	64
Chapter Four — Human Rights at Common Law	
1 The Starting Point	66
2 Principle of Legality	67
(a) Which Rights?	74
(b) Express Provision and Necessary Implication	78
3 Treaty Presumption.....	81
(a) Which Rights?	85
(b) Ambiguity.....	87
4 Conclusion	93
Chapter Five — Legislative Rights-consistent Interpretation in the United Kingdom	
1 Introduction.....	94
2 The Relationship of the Interpretive Provision to the Common Law Interpretive Principles.....	98
3 The Role of Intention.....	103
(a) Revising Previous Interpretations.....	104
(b) The Role of Intention Generally.....	106
(c) Intention and Legislative Language	123
(d) Two Interpretive Techniques: Reading Down and Reading In.....	132
4 Section 3 and ‘the Chaps at Strasbourg’	134
5 Reconciling Rights-consistent Interpretation with Purposive Interpretation.....	144
Chapter Six — Legislative Rights-consistent Interpretation in New Zealand	
1 Introduction.....	150
2 The Relationship of the Interpretive Provision to the Common Law Interpretive Principles.....	152
3 The Role of Intention	162
(a) Revising Previous Interpretations.....	163
(b) The Role of Intention Generally.....	166
(c) Intention and Legislative Language	181
(d) Two Interpretive Techniques: Reading Down and Reading In.....	184
4 New Zealand Going Its Own Way	190
5 Reconciling Rights-consistent Interpretation with Purposive Interpretation.....	196
Chapter Seven — Legislative Rights-consistent Interpretation in Australia	
1 Introduction.....	203
2 The Relationship of the Interpretive Provision to the Common Law Interpretive Principles.....	213
(a) ACT.....	216
(b) Victoria.....	218
3 The Role of Intention	225
(a) Revising Previous Interpretations.....	225
(i) ACT.....	226
(ii) Victoria.....	226
(b) The Role of Intention Generally.....	227
(i) ACT.....	229

(ii) Victoria.....	230
(c) Intention and Legislative Language	235
(i) ACT.....	236
(ii) Victoria.....	237
(d) Two Interpretive Techniques: Reading Down and Reading In.....	240
4 The Modesty of Australia’s Human Rights Legislation	241
(a) ACT.....	242
(b) Victoria.....	248
5 Reconciling Rights-consistent Interpretation with Purposive Interpretation.....	251
(a) ACT.....	253
(b) Victoria.....	255
Chapter Eight — Conclusion.....	258

LIST OF ABBREVIATIONS

ACT — Australian Capital Territory

ACTAAT — Australian Capital Territory Administrative Appeals Tribunal

ACAT — Australian Capital Territory Civil and Administrative Tribunal

ACTHRA — Human Rights Act 2004 (ACT)

Canadian Charter — Canadian Charter of Rights and Freedoms

Charter — Charter of Human Rights and Responsibilities Act 2006 (Vic)

Constitution — Commonwealth of Australia Constitution Act 1900

CROC — Convention on the Rights of the Child

ECHR — European Convention on Human Rights

ICCPR — International Covenant on Civil and Political Rights

NZBORA — New Zealand Bill of Rights Act 1990 (NZ)

UKHRA – Human Rights Act 1998 (UK)

VCAT — Victorian Civil and Administrative Tribunal

TABLE OF CASES

Australia: Australian Capital Territory

ACT Human Rights Commission v Raytheon Australia Pty Ltd [2009] ACTSC 55.....	229, 242
Allatt & ACT Government Health Directorate (Administrative Review) [2012] ACAT 67.....	62, 218, 230
Application for Bail by Islam, Re [2010] ACTSC 147, (2010) 4 ACTLR 235.....	10, 16, 18, 19, 34, 131, 204, 218, 230, 236, 242, 245, 246, 247, 253, 254, 256
Bragon Traders Pty Ltd & ACT Gambling & Racing Commission [2006] ACTAAT 3.....	217, 229
Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority [2006] ACTSC 122, (2006) 206 FLR 328.....	247
Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority (ACT) [2008] ACTCA 9, (2008) 2 ACTLR 44.....	246
Casey v Alcock [2009] ACTCA 1, (2009) 3 ACTLR 1	24, 204, 229, 247
Comr for Housing in the ACT, The v Y [2007] ACTSC 84.....	217
Devenport v Comr for Housing in the ACT [2007] ACTSC 30, (2007) 210 FLR 325.....	247
Gardner v ACT Planning and Land Authority (Administrative Review) [2010] ACAT 64.....	230
IF v ACT Comr for Housing [2005] ACTSC 80	217
JH v Director-General, Community Services Directorate [2012] ACTSC 30, (2012) 260 FLR 21	253
Kingsley's Chicken Pty Ltd v Queensland Investment Corp [2006] ACTCA 9	247
Massey, Re an Application for Bail by (No 2) [2009] ACTSC 70.....	226
Merritt & Comr for Housing [2004] ACTAAT 37	217, 226
Pappas v Noble [2006] ACTSC 39, (2006) 199 FLR 116.....	217, 218
R v AM [2010] ACTSC 149, (2010) 5 ACTLR 170	230
R v Fearnside [2009] ACTCA 3, (2009) 3 ACTLR 25	24, 204, 208, 229, 247
R v YL [2004] ACTSC 115, (2004) 187 FLR 84.....	217

Raytheon Australia Pty Ltd & ACT Human Rights Commission [2008] ACTAAT 19	204, 229, 242
SI bhnf CC v KS bhnf IS [2005] ACTSC 125, (2005) 195 FLR 151.....	212, 213, 250
Thomson v ACT Planning and Land Authority (Administrative Review) [2009] ACAT 38.....	230
Tran v ACT Planning and Land Authority (Administrative Review) [2009] ACAT 46	230
Travini v Starczewski [2009] ACTSC 123, (2009) 169 ACTR 1.....	230
Veness & Medical Board of Australia (Occupational Discipline) [2011] ACAT 55	217, 230
Z & Comr for Housing [2007] ACTAAT 12.....	217

Australia: Commonwealth

Adultshop.Com Ltd v Members of the Classification Review Board [2007] FCA 1871, (2007) 243 ALR 752	31
A-G for the State of New South Wales v Trethowan (1931) 44 CLR 394.....	41
Al-Kateb v Godwin [2004] HCA 37, (2004) 219 CLR 562	70, 80, 84
AMS v AIF [1999] HCA 26, (1999) 199 CLR 160	86
APLA Ltd v Legal Services Comr of New South Wales [2005] HCA 44, (2005) 224 CLR 322.....	16
Australian Capital Television Pty Ltd v The Commonwealth of Australia (1992) 177 CLR 106.....	71
Baker v Campbell (1983) 153 CLR 52	71
Balog v Independent Commission against Corruption (1990) 169 CLR 625.....	71
Barcelo v Electrolytic Zinc Co of Australasia Ltd (1932) 48 CLR 391	84
Behrooz v Secretary, Dept of Immigration and Multicultural and Indigenous Affairs [2004] HCA 36, (2004) 219 CLR 486	75, 89
Bolton, Re, ex p Beane (1987) 162 CLR 514	71
Boral Besser Masonry Ltd v Australian Competition and Consumer Commission [2003] HCA 5, (2003) 215 CLR 374	23

Bowtell v Goldsbrough, Mort & Co Ltd (1905) 3 CLR 444	21
Bropho v State of Western Australia (1990) 171 CLR 1	70, 77, 80
Byrnes v Kendle [2011] HCA 26, (2011) 243 CLR 253	7
Capital Duplicators Pty Ltd v Australian Capital Territory (1992) 177 CLR 248	49
Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross [2012] HCA 56, (2012) 87 ALJR 131	10
Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1	70, 72, 84, 86
Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249	24
Coco v R (1994) 179 CLR 427	70, 71, 78, 80
Coleman v Power [2004] HCA 39, (2004) 220 CLR 1	7, 86
Cooper Brookes (Wollongong) Pty Ltd v The Comr of Taxation of the Commonwealth of Australia (1981) 147 CLR 297	26
Corporate Affairs Commission of New South Wales v Yuill (1991) 172 CLR 319	9, 71
CTM v R [2008] HCA 25, (2008) 236 CLR 440	72
D & R Henderson (MFG) Pty Ltd v Collector of Customs for the State of New South Wales (1974) 48 ALJR 132	86
Dickson v R [2010] HCA 30, (2010) 241 CLR 491	9, 34
Dietrich v R (1992) 177 CLR 292	61, 76, 83, 84, 86
Durham Holdings Pty Ltd v The State of New South Wales [2001] HCA 7, (2001) 205 CLR 399	57, 58, 71
Electrolux Home Products Pty Ltd v The Australian Workers' Union [2004] HCA 40, (2004) 221 CLR 309	71, 72
Evans v New South Wales [2008] FCAFC 130, (2008) 168 FCR 576	69
Federal Comr of Taxation v Walsh (1983) 69 FLR 240 (FCAFC)	28
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33, (2003) 214 CLR 269	72
Hogan v Hinch [2011] HCA 4, (2011) 243 CLR 506	221
International Finance Trust Co Ltd v New South Wales Crime Commission [2009] HCA 49, (2009) 240 CLR 319	61

K-Generation Pty Ltd v Liquor Licensing Court [2009] HCA 4, (2009) 237 CLR 501 ..	70
Kable v The DPP for the State of New South Wales (1996) 189 CLR 51	57
Kartinyeri v The Commonwealth of Australia [1998] HCA 22, (1998) 195 CLR 337.....	83, 89
Koowarta v Bjelke-Petersen (1982) 153 CLR 168	84
Kruger v The Commonwealth of Australia (1997) 190 CLR 1	71, 83, 86
Lacey v A-G for The State of Queensland [2011] HCA 10, (2011) 242 CLR 573	9, 14, 70
Mabo v The State of Queensland (1988) 166 CLR 186	49
MacAlister v R (1990) 169 CLR 324	26
Malika Holdings Pty Ltd v Stretton [2001] HCA 14, (2001) 204 CLR 290	72, 73, 77
Mayor, Aldermen, Councillors and Citizens of The City of Melbourne, The v Barry (1922) 31 CLR 174	71
McGraw-Hinds (Aust) Pty Ltd v Smith (1979) 144 CLR 633	57
Mills v Meeking (1990) 169 CLR 214	9, 22, 25
Minister for Foreign Affairs and Trade v Magno (1992) 37 FCR 298 (FCAFC).....	89
Minister for Immigration and Citizenship v Haneef [2007] FCAFC 203, (2007) 163 FCR 414.....	69
Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri [2003] FCAFC 70, (2003) 126 FCR 54.....	80, 84
Minister for Immigration and Multicultural and Indigenous Affairs, Re, ex p Lam [2003] HCA 6, (2003) 214 CLR 1	84
Minister for Immigration and Multicultural and Indigenous Affairs v VFAD [2002] FCAFC 390, (2002) 125 FCR 249.....	83
Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.....	82, 83, 84, 86, 89
Momcilovic v R [2011] HCA 34, (2011) 245 CLR 13.....	3, 9, 10, 35, 38, 58, 61, 67, 75, 77, 84, 119, 211, 212, 219, 221, 222, 223, 227, 230, 232, 233, 234, 235, 236, 237, 238, 239, 240, 247, 248, 251, 257

NAAV v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 228, (2002) 123 FCR 298.....	9, 23, 34, 61
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.....	71
Newcastle City Council v GIO General Ltd (1997) 191 CLR 85.....	23, 28
News Ltd v South Sydney District Rugby League Football Club Ltd [2003] HCA 45, (2003) 215 CLR 563	16
Northern Territory of Australia v GPAO [1999] HCA 8, (1999) 196 CLR 553	83
Plaintiff M47/2012 v Director-General of Security [2012] HCA 46, (2012) 86 ALJR 1372.....	9
Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32, (2011) 244 CLR 144	84
Plaintiff S157/2002 v The Commonwealth of Australia [2003] HCA 2, (2003) 211 CLR 476.....	70, 86, 218
Polites v The Commonwealth (1945) 70 CLR 60	84
Potter v Minahan (1908) 7 CLR 277	70
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28, (1998) 194 CLR 355.....	235
Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328	71
R v L (1994) 49 FCR 534 (FCAFC).....	23
R v Macfarlane, ex p O’Flanagan (1923) 32 CLR 518.....	71
R v Snow (1915) 20 CLR 315	70
R v Toohey, ex p Northern Land Council (1981) 151 CLR 170	49
Riddle v R (1911) 12 CLR 622.....	59
Saeed v Minister for Immigration and Citizenship [2010] HCA 23, (2010) 241 CLR 252.....	72, 73
Sargood Bros v The Commonwealth (1910) 11 CLR 258	71
Sillery v R (1981) 180 CLR 353.....	48
Singh v The Commonwealth [2004] HCA 43, (2004) 222 CLR 322	7, 8

Skea v Minister for Immigration, Local Government and Ethnic Affairs (1994) 51 FCR 82 (FCA).....	28
Sorby v The Commonwealth of Australia (1983) 152 CLR 281.....	71
Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397	7
State of New South Wales, The v The Commonwealth (1915) 20 CLR 54 (Wheat case)	58
State of South Australia v Totani [2010] HCA 39, (2010) 242 CLR 1	58
State of Western Australia, The v Ward [2002] HCA 28, (2002) 213 CLR 1.....	89
Sue v Hill [1999] HCA 30, (1999) 199 CLR 462.....	47
Telstra Corp Ltd v Australasian Performing Right Association Ltd (1997) 191 CLR 140.....	23
The Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 49, (2002) 213 CLR 543.....	70
The Jumbunna Coal Mine NL v The Victorian Coal Miners' Association (1908) 6 CLR 309.....	84
The Trustees Executors and Agency Co Ltd v The Federal Comr of Taxation (1933) 49 CLR 220.....	48
Trevisan v Comr of Taxation (1991) 29 FCR 157 (FCA)	23, 28
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1	49, 57, 58
Victims Compensation Fund Corp v Brown [2003] HCA 54, (2003) 77 ALJR 1797	31
Waterside Workers' Federation of Australia, The v Gilchrist, Watt and Sanderson Ltd (1924) 34 CLR 482	71
Watson v Lee (1979) 144 CLR 374.....	61
Wentworth v New South Wales Bar Association (1992) 176 CLR 239.....	71
Wilson v Anderson [2002] HCA 29, (2002) 213 CLR 401	7
X7 v Australian Crime Commission [2013] HCA 29, (2013) 87 ALJR 858	71
Yager v R (1977) 139 CLR 28.....	86
Yates, Re, ex p Walsh (1925) 37 CLR 36.....	71
Zachariassen v The Commonwealth (1917) 24 CLR 166	84

Zheng v Cai [2009] HCA 52, (2009) 239 CLR 446	9, 34, 233

Australia: New South Wales

Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372 (NSWCA)	48, 56
Castle Constructions Pty Ltd v North Sydney Council [2007] NSWLEC 459	30
Durham Holdings Pty Ltd v State of New South Wales [1999] NSWCA 324, (1999) 47 NSWLR 340.....	57, 78
Edwards v A-G [2004] NSWCA 272, (2004) 60 NSWLR 667.....	30
Harrison v Melhem [2008] NSWCA 67, (2008) 72 NSWLR 380	73
Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404 (NSWCA).....	28
Nikolovsky v Government Insurance Office of New South Wales (1992) 28 NSWLR 549 (NSWCA)	28
R v Janceski [2005] NSWCCA 281, (2005) 64 NSWLR 10	72
Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc [2000] NSWCA 65, (2000) 48 NSWLR 548.....	21
Save Our Street Inc v Settree [2006] NSWLEC 570, (2006) 149 LGERA 30.....	31
Victims Compensation Fund v Brown [2002] NSWCA 155, (2002) 54 NSWLR 668....	31
Victims Compensation Fund Corp v GM [2004] NSWCA 185, (2004) 60 NSWLR 310.....	31

Australia: Northern Territory

Suich v Northern Territory [2010] NTSC 41, (2010) 241 FLR 200.....	31

Australia: South Australia

Owen v State of South Australia (1996) 66 SASR 251 (SASCFC)	32

Australia: Victoria

A v Children's Court of Victoria [2012] VSC 589.....	222
Aitken v The State of Victoria — Dept of Education & Early Childhood Development (Anti-Discrimination) [2012] VCAT 1547	219, 222, 223, 224, 234, 238, 240

Alinta Asset Management Pty Ltd v Essential Services Commission [2008] VSCA 273, (2008) 22 VR 275	25
Application under the Major Crime (Investigative Powers) Act 2004, Re [2009] VSC 381, (2009) 24 VR 415	220, 231, 237
BAE Systems Australia Ltd (Anti-Discrimination Exemption) [2012] VCAT 349.....	239
Biddle v Allan [2012] VSC 538.....	234
Caripis v Victoria Police (Health and Privacy) [2012] VCAT 1472	240
Conroy v Yooralla Society of Victoria (Residential Tenancies) [2009] VCAT 1873....	219
Cornish College (Anti-Discrimination Exemption) [2012] VCAT 889	239
Darragh v Business Licensing Authority (Occupational and Business Regulation) [2012] VCAT 1360	227, 235
Dawson v Transport Accident Commission (General) [2010] VCAT 644	227
Director of Housing v IF (Residential Tenancies) [2008] VCAT 2413	237
Director of Housing v Sudi [2011] VSCA 266.....	231
Director of Public Transport v XFJ [2010] VSC 319	221, 249
DPP v Ali [2009] VSCA 162, (2009) 23 VR 203	23
DPP v Ali (No 2) [2010] VSC 503	221
Georgina Martina Inc (Anti-Discrimination Exemption) [2012] VCAT 1384.....	239
Guss v Aldy Corp Pty Ltd (Civil Claims) [2008] VCAT 912	226
Kracke and Mental Health Review Board, Re [2009] VCAT 646, (2009) 29 VAR 1	116, 204, 212, 219, 226, 229, 231, 248, 249, 250, 255, 256
Lifestyle Communities Ltd (No 3) (Anti-Discrimination) [2009] VCAT 1869	204, 219, 229, 248, 255
Magee v Delaney [2012] VSC 407	222, 234, 240
Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc [2012] VSCA 91	222, 223, 235
P, In the Review of [2008] VMHRB 1	219
PJB v Melbourne Health (Patrick's case) [2011] VSC 327.....	219, 221, 256

President &c of the Shire of Kowree v President &c of the Shire of Lowan (1897) 4 ALR 5 (VSC)	70
R v Boucher [1995] 1 VR 110 (VCCA)	23
R v Momcilovic [2010] VSCA 50, (2010) 25 VR 436.....	
..... 61, 119, 121, 143, 144, 221, 231, 232, 236, 241, 249, 250, 251, 256	
Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission (Anti-Discrimination) [2011] VCAT 796.....	232
RJE v Secretary to the Dept of Justice [2008] VSCA 265, (2008) 21 VR 256	
..... 226, 231, 237	
Secretary to the Dept of Justice, The v AB [2009] VCC 1132.....	184, 212, 237, 255
Slaveski v Smith [2012] VSCA 25	222, 223, 235, 239, 240, 241
Taha v Broadmeadows Magistrates' Court [2011] VSC 642	223
Valentine v Emergency Services Superannuation Board (General) [2010] VCAT 2130	227
WBM v Chief Comr of Police [2012] VSCA 159.....	221, 228, 235

Europe (European Court of Human Rights)

Burden v UK (2008) 47 EHRR 38.....	141
Sunday Times v UK (1979) 2 EHRR 245	60

New Zealand

Alwen Industries Ltd v Comptroller of Customs (1993) 1 HRNZ 574 (NZHC).....	165
Application by AMM and KJO to Adopt a Child, Re [2010] NZFLR 629 (NZHC)	178
Ashby v Minister of Immigration [1981] 1 NZLR 222 (NZCA).....	82, 84, 86, 90
Auckland Harbour Board v Comptroller of Customs [1992] 3 NZLR 392 (NZCA)	90
Award of Wellington Cooks and Stewards' Union, Re (1906) 26 NZLR 394 (NZSC)...	84
Bailey v Whangarei District Court (1995) 2 HRNZ 275 (NZHC)	184
BDM Grange Ltd v Parker [2006] 1 NZLR 353 (NZHC)	80
Bin Zhang v Police [2009] NZAR 217 (NZHC)	90
Brader v Ministry of Transport [1981] 1 NZLR 73 (NZCA)	55

Brooker v Police [2007] NZSC 30, [2007] 3 NZLR 91	165, 187
Browne v Canwest TV Works Ltd [2008] 1 NZLR 654 (NZHC).....	63
Callahan v Superintendent of Mt Eden Prison [1992] 1 NZLR 541 (NZCA).....	163
Carter v Police [2003] NZAR 315 (NZHC)	41
Chief Executive of Dept of Labour v Yadegary [2008] NZCA 295, [2009] 2 NZLR 495.....	70
Clemance v Hollis [1987] 2 NZLR 471 (NZHC)	64
Collector of Customs v Kilburn Car Sales Ltd [2004] NZAR 500 (NZHC).....	188
Commerce Commission v Fonterra Co-op Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767	19, 22
Comr of Inland Revenue v West-Walker [1954] NZLR 191 (NZCA).....	73
Cooper v A-G [1996] 3 NZLR 480 (NZHC).....	56
Cropp v Judicial Committee [2008] NZSC 46, [2008] 3 NZLR 774	67, 70, 79, 188
Crown Health Financing Agency v P [2008] NZCA 362, [2009] 2 NZLR 149.....	64
Donselaar v Donselaar [1982] 1 NZLR 97 (NZCA)	7
Drew v A-G [2002] 1 NZLR 58 (NZCA).....	188
Fitzgerald v Muldoon [1976] 2 NZLR 615 (NZSC).....	40
Flickinger v Crown Colony of Hong Kong [1991] 1 NZLR 439 (NZCA).....	163, 164, 165, 166, 198, 201
Fraser v State Services Commission [1984] 1 NZLR 116 (NZCA)	55
Frucor Beverages Ltd v Rio Beverages Ltd [2001] 2 NZLR 604 (NZCA).....	26, 35
Genesis Power Ltd v Greenpeace NZ Inc [2008] NZSC 112, [2009] 1 NZLR 730...	19, 22
Governor of Pitcairn and Associated Islands v Sutton [1995] 1 NZLR 426 (NZCA).....	90
Haliburton v Broadcasting Commission [1999] NZAR 233 (NZHC).....	51
Hemmes v Young [2005] 2 NZLR 755 (NZCA).....	84
Herewini v Ministry of Transport [1993] 2 NZLR 747 (NZHC)	156

Hopkinson v Police [2004] 3 NZLR 704 (NZHC)	185, 186
Ithaca (Custodians) Ltd v Perry Corp [2003] 2 NZLR 216 (NZHC)	25
Jury v Brasting [1976] 1 NZLR 231 (NZSC)	26
Knight v Comr of Inland Revenue [1991] 2 NZLR 30 (NZCA)	153
L v M [1979] 2 NZLR 519 (NZCA)	55
Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington) [2000] 3 NZLR 570 (NZCA)	154
M, Re [1992] 1 NZLR 29 (NZHC)	165
Mangawaro Enterprises Ltd v A-G [1994] 2 NZLR 451 (NZHC)	55
Mayfair Ltd v Pears [1987] 1 NZLR 459 (NZCA)	64
Melser v Police [1967] NZLR 437 (NZCA)	165
Ministry of Transport v Noort [1992] 3 NZLR 260 (NZCA)	154, 156, 165, 166, 167, 184
Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (NZCA)	184, 191
Morse v Police [2011] NZSC 45, [2012] 2 NZLR 1	186
Ngati Apa Ki Te Waipounamu Trust v R [2000] 2 NZLR 659 (NZCA)	70, 157
Nicholls v Registrar of the Court of Appeal [1998] 2 NZLR 385 (NZCA)	90, 91
NZ Air Line Pilots' Association Inc v A-G [1997] 3 NZLR 269 (NZCA)	82, 84, 86, 90, 91
NZ Drivers' Association v NZ Road Carriers [1982] 1 NZLR 374 (NZCA)	55
NZ Maori Council v A-G [1987] 1 NZLR 641 (NZCA)	52
O'Connor v R (NZCA, 16 November 1990)	163
Palmer v Superintendent Auckland Maximum Security Prison [1991] 3 NZLR 315 (NZHC)	165
Perkins v Police [1988] 1 NZLR 257 (NZCA)	73
Police v Beggs [1999] 3 NZLR 615 (NZHC)	156, 185
Police v Christie [1962] NZLR 1109 (NZSC)	19

Police v Lawson [2000] 1 NZLR 465 (NZHC)	162
Police v Smith [1994] 2 NZLR 306 (NZCA)	184
Quilter v A-G [1998] 1 NZLR 523 (NZCA)	167, 168, 181, 184, 198, 201
R v B [1995] 2 NZLR 172 (NZCA).....	165
R v Clarke [1985] 2 NZLR 212 (NZCA).....	164
R v D [2003] 1 NZLR 41 (NZCA)	91
R v Goodwin (No 2) [1993] 2 NZLR 390 (NZCA).....	153
R v Hansen [2007] NZSC 7, [2007] 3 NZLR 1.....	3, 70, 74, 119, 121, 152, 154, 158, 159, 160, 175, 176, 177, 178, 179, 180, 181, 182, 183, 186, 191, 198, 199, 201, 211, 234, 238
R v Laugalis (1993) 10 CRNZ 350 (NZCA)	185
R v Michalaros (NZHC, 4 August 2005).....	185
R v Mist [2005] NZSC 77, [2006] 3 NZLR 145.....	70
R v N (No 2) (1999) 5 HRNZ 72 (NZCA)	153
R v Phillips [1991] 3 NZLR 175 (NZCA).....	176, 182, 184, 201, 234
R v Pora [2001] 2 NZLR 37 (NZCA).....	19, 70, 158, 168, 171, 172, 173, 174, 195, 201
R v Poumako [2000] 2 NZLR 695 (NZCA)	168, 169, 170, 171, 172, 174, 192, 194, 195, 199, 201
R v Rongonui [2000] 2 NZLR 385 (NZCA)	20
R v Sturm [2005] 3 NZLR 252 (NZCA)	63
Rajan v Minister of Immigration [1996] 3 NZLR 543 (NZCA).....	84
Riddell v Porteous [1999] 1 NZLR 1 (NZCA)	60, 63
Rothmans of Pall Mall (NZ) Ltd v A-G [1991] 2 NZLR 323 (NZHC).....	50
S, Re [1992] 1 NZLR 363 (NZHC)	165
Schubert v Wanganui DC [2011] NZAR 233 (NZHC)	181
Sellers v Maritime Safety Inspector [1999] 2 NZLR 44 (NZCA)	84, 91, 92
Shaw v Comr of Inland Revenue [1999] 3 NZLR 154 (NZCA)	50, 56

Simpson v A-G [1994] 3 NZLR 667 (NZCA) (Baigent's case).....	156, 165, 184, 185
T v H [1995] 3 NZLR 37 (NZCA).....	25
Tavita v Minister of Immigration [1994] 2 NZLR 257 (NZCA).....	90
Taylor v NZ Poultry Board [1984] 1 NZLR 394 (NZCA)	55
Television NZ Ltd v A-G [1995] 2 NZLR 641 (NZCA).....	189, 190
Transport Ministry v Payn [1977] 2 NZLR 50 (NZCA).....	73
Tyler v A-G [2000] 1 NZLR 211 (NZCA)	20
Wellington District Legal Services Committee v Tangiora [1998] 1 NZLR 129 (NZCA).....	90
Westco Lagan Ltd v A-G [2001] 1 NZLR 40 (NZHC)	50, 51, 56
Worth v Worth [1931] NZLR 1109 (NZCA)	84
Ye v Minister of Immigration [2009] NZSC 76, [2010] 1 NZLR 104.....	84, 91, 92
Zaoui v A-G [2005] 1 NZLR 577 (NZSC)	92, 161
Zaoui v A-G (No 2) [2005] NZSC 38, [2006] 1 NZLR 289.....	84, 91, 92, 155, 161, 188

United Kingdom

A v Secretary of State for the Home Dept [2004] UKHL 56, [2005] 2 AC 68	216
A v Secretary of State for the Home Dept (No 2) [2004] EWCA Civ 1123, [2005] 1 WLR 414.....	53
A-G v BBC [1981] AC 303 (HL)	88
A-G v Observer Ltd [1990] 1 AC 109 (HL)	66
A-G for Canada v A-G for Ontario [1937] AC 326 (PC)	81
A-G for New South Wales v Trethowan [1932] AC 526 (PC).....	41
Ahmed v HM Treasury [2010] UKSC 2, [2010] 2 AC 534.....	68, 70, 101
Alderson v Temple (1768) 4 Burr 2235, 98 ER 165.....	59
Aliakmon, The. See Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd	
Ashworth Hospital Authority v MGN Ltd [2001] 1 WLR 515 (CA)	104

Assange v Sweden [2012] UKSC 22, [2012] 2 AC 471.....	97
Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2004] 1 AC 546.....	139
Attorney General for Northern Ireland’s Reference (R v Z) [2005] UKHL 35, [2005] 2 AC 645	17
AXA General Insurance Ltd v HM Advocate [2011] UKSC 46, [2012] 1 AC 868.....	46
B (a minor) v DPP [2000] 2 AC 428 (HL)	70, 74, 79
B v Auckland District Law Society [2003] UKPC 38, [2003] 2 AC 736.....	79
Bellinger v Bellinger [2003] UKHL 21, [2003] 2 AC 467	147, 148
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 (HL)	7, 8, 9, 59
British Railways Board v Pickin [1974] AC 765 (HL).....	43
Cachia v Faluyi [2001] EWCA Civ 998, [2001] 1 WLR 1966	102
Clarke v General Accident Fire and Life Assurance Corp Plc [1998] 1 WLR 1647 (HL).....	27, 29
Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58, [2012] 2 AC 22	10
Ellerman Lines Ltd v Murray [1931] AC 126 (HL)	82
Entick v Carrington (1765) 19 Howell’s State Trials 1030	66
Fitzpatrick v Sterling Housing Association Ltd [1998] Ch 304 (CA).....	132
Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 27 (HL)	114, 118
Fothergill v Monarch Airlines Ltd [1981] AC 251 (HL).....	59
Garland v British Rail Engineering Ltd [1983] 2 AC 751 (HL).....	85, 88
Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557	3, 7, 10, 28, 97, 99, 101, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 128, 129, 131, 132, 134, 136, 141, 154, 182, 211, 229, 236, 237, 238, 242, 243, 247, 248, 249, 251, 253, 254, 255, 257
Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory) [2007] UKHL 12, [2007] 2 AC 353	60
Golden Victory, The. See Golden Strait Corp v Nippon Yusen Kubishika Kaisha	

Goode v Martin [2001] EWCA Civ 1899, [2002] 1 WLR 1828	102
Howard de Walden Estates Ltd v Aggio [2007] EWCA Civ 499, [2008] Ch 26	80
Huang v Secretary of State for the Home Dept [2007] UKHL 11, [2007] 2 AC 167	139
Ibralebbe v R [1964] AC 900 (PC)	49
Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586 (HL)	22
International Transport Roth GmbH v Secretary of State for the Home Dept [2002] EWCA Civ 158, [2003] QB 728	216
JA Pye (Oxford) Ltd v Graham [2002] UKHL 30, [2003] 1 AC 419	88
Jain v Trent Strategic HA [2009] UKHL 4, [2009] 1 AC 853	96
JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry [1990] 2 AC 418 (HL)	81
Jones v DPP [1962] AC 635 (HL)	237
Jones v Randall (1774) 1 Cowp 37, 98 ER 954	59
Kay v Lambeth LBC [2006] UKHL 10, [2006] 2 AC 465	105
Kirkness v John Hudson & Co Ltd [1955] AC 696 (HL)	21
Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon) [1986] AC 785 (HL)	60, 63
Luke v IRC [1963] AC 557 (HL)	25
M v Secretary of State for Work and Pensions [2006] UKHL 11, [2006] 2 AC 91	131
M and H (minors), Re (Local Authority: Parental Rights) [1990] 1 AC 686 (HL)	88
Madzimbamuto v Lardner-Burke [1969] 1 AC 645 (PC)	40
Malone v Comr of Police of the Metropolis (No 2) [1979] Ch 344 (Ch)	66
Matthews v Ministry of Defence [2002] EWCA Civ 773, [2002] 1 WLR 2621	243
McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277 (HL)	126
McCawley v R [1920] AC 691 (PC)	45
McKerr, Re [2004] UKHL 12, [2004] 1 WLR 807	81
MD Foods Plc (Formerly Associated Dairies Ltd) v Baines [1997] AC 524 (HL)	10

Morris v Beardmore [1981] AC 446 (HL).....	156
Nadarajah v The Secretary of State for the Home Dept [2005] EWCA Civ 1363	63
Okendeji v Government of the Commonwealth of Australia [2005] EWHC 471 (Admin), [2005] Extrad LR 57	111
Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd [2000] Ch 12 (CA)	36
Ormond Investment Co Ltd v Betts [1928] AC 143 (HL).....	21
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595, [2002] QB 48.....	107, 122, 231, 251
Pratt v South Eastern Rly Co [1897] 1 QB 718 (QB).....	21
R (Anderson) v Secretary of State for the Home Dept [2002] UKHL 46, [2003] 1 AC 837.....	105, 112, 113, 124, 143, 145
R (Anufrijeva) v Secretary of State for the Home Dept [2003] UKHL 36, [2004] 1 AC 604.....	70, 75
R (Bancourt) v Secretary of State for Foreign and Commonwealth Affairs [2001] QB 1067 (QB)	49
R (Bancourt) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2007] EWCA Civ 498, [2008] QB 365	49
R (Bancourt) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61, [2009] 1 AC 453.....	49
R (Burkett) v Hammersmith and Fulham LBC (No 1) [2002] UKHL 23, [2002] 1 WLR 1593.....	66
R (European Roma Rights Centre) v Immigration Officer, Prague Airport [2004] UKHL 55, [2005] 2 AC 1	76
R (Gillan) v Comr of Police of the Metropolis [2006] UKHL 12, [2006] 2 AC 307	60, 78
R (Greenfield) v Secretary of State for the Home Dept [2005] UKHL 14, [2005] 1 WLR 673.....	139
R (H) v London North and East Region Mental Health Review Tribunal [2001] EWCA Civ 415, [2002] QB 1.....	126
R (Hooper) v Secretary of State for Work and Pensions [2005] UKHL 29, [2005] 1 WLR 1681.....	54

R (Jackson) v A-G [2005] EWCA Civ 126, [2005] QB 579	40
R (Jackson) v A-G [2005] UKHL 56, [2006] 1 AC 262	39, 44, 45, 46, 54
R (Kelly) v Secretary of State for Justice [2008] EWCA Civ 177, [2009] QB 204.....	36
R (Middleton) v West Somerset Coroner [2004] UKHL 10, [2004] 2 AC 182	105
R (Morgan Grenfell & Co Ltd) v Special Comrs of Income Tax [2002] UKHL 21, [2003] 1 AC 563	70, 79
R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58, [2006] 2 AC 148.....	141
R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2005] UKHL 57, [2006] 1 AC 529.....	139
R (Quintavalle) v Secretary of State for Health [2003] UKHL 13, [2003] 2 AC 687.....	17
R (SB) v Governors of Denbigh High School [2006] UKHL 15, [2007] 1 AC 100	139
R (SSG) v Liverpool City Council [2002] EWHC 4000 (Admin)	115
R (Wilkinson) v IRC [2005] UKHL 30, [2005] 1 WLR 1718.....	10, 119, 120, 121, 123, 131, 177, 184, 221, 223, 231
R (Wooder) v Feggetter [2002] EWCA Civ 554, [2003] QB 219.....	103
R (Wright) v Secretary of State for Health [2009] UKHL 3, [2009] 1 AC 739	147
R v A (No 2) [2001] UKHL 25, [2002] 1 AC 45	98, 101, 102, 107, 108, 109, 110, 111, 112, 113, 115, 119, 124, 126, 134, 142, 182, 242
R v Daniel [2002] EWCA Crim 959, [2003] 1 Cr App R 6	143
R v Lambert [2001] UKHL 37, [2002] 2 AC 545	102, 104, 110, 111, 119, 123, 124, 127, 133, 134, 142, 202, 211, 234, 238
R v Lord Chancellor, ex p Lightfoot [2000] QB 597 (QB)	53, 79, 80
R v Lord Chancellor, ex p Witham [1998] QB 575 (QB)	53
R v Lyons (No 3) [2002] UKHL 447, [2003] 1 AC 976	88
R v Offen [2001] 1 WLR 253 (CA).....	107, 166
R v Offen [2001] 1 WLR 514 (HL).....	107
R v Rezvi [2002] UKHL 1, [2002] UKHL 2, [2003] 1 AC 1099.....	70, 78

R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 2 AC 349 (HL).....	6, 10, 21, 61
R v Secretary of State for the Home Dept, ex p Al-Fayed (No 1) [1998] 1 WLR 763 (CA)	54
R v Secretary of State for the Home Dept, ex p Brind [1991] 1 AC 696 (HL)	82, 83, 88, 89
R v Secretary of State for the Home Dept, ex p McQuillan [1995] 4 All ER 400 (QB) ..	54
R v Secretary of State for the Home Dept, ex p Pierson [1998] AC 539 (HL) ..	68, 78, 157
R v Secretary of State for the Home Dept, ex p Simms [2000] 2 AC 115 (HL)	68, 70, 73, 74, 75, 78, 79, 80, 101, 124, 157, 213
R v Secretary of State for the Home Dept, ex p Stafford [1999] 2 AC 38 (HL)	76
R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1991] 1 AC 603 (HL).....	44
R v Shayler [2002] UKHL 11, [2003] 1 AC 247.....	111, 243
S (minors), Re (Care Order: Implementation of Care Plan) [2002] UKHL 10, [2002] 2 AC 291	99, 112, 113, 124, 127, 128, 146, 147, 189
Salomon v Customs and Excise Comrs [1967] 2 QB 116 (CA).....	85, 88
Salomon v Salomon & Co Ltd [1897] AC 22 (HL).....	6
Secretary of State for the Home Dept v MB [2007] UKHL 46, [2008] 1 AC 440.....	119
Sheldrake v DPP [2004] UKHL 43, [2005] 1 AC 264	119, 138, 176
Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231 (HL).....	7, 34, 60, 232
Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd [1938] Ch 174 (CA)	27, 28
Tangiora v Wellington District Legal Services Committee [2000] 1 NZLR 17 (PC).....	90
Vallejo v Wheeler (1774) 1 Cowp 143, 98 ER 1012	59
Watkins v Secretary of State for the Home Dept [2006] UKHL 17, [2006] 2 AC 395....	55
Wheeler v Leicester City Council [1985] AC 1054 (CA)	66
Wilson v First County Trust Ltd (No 2) [2001] EWCA Civ 633, [2002] QB 74.....	126
Wilson v First County Trust Ltd (No 2) [2003] UKHL 40, [2004] 1 AC 816	102, 105, 116, 126

TABLE OF STATUTES

Australia: Australian Capital Territory

Bail Act 1992 (ACT)	253
Human Rights Act 2004 (ACT).....	
..... 17, 150, 181, 203, 204, 205, 213, 214, 226, 241, 242, 246, 247, 253, 254	
— s 7	224
— s 27A	209
— s 28(1)	151
— s 30	1, 202, 205, 208, 216, 217, 218, 226, 229, 230, 235, 236, 246, 247, 253, 254
— s 30(1)	205
— s 30(2)	205, 245
— s 30(3)	204, 216, 217
— s 32(2)	206
— s 32(3)	206
Human Rights Amendment Act 2008 (ACT)	
— s 5	208
Human Rights Amendment Act 2012 (ACT)	
— s 6	209
Human Rights Bill 2003 (ACT)	
— cl 30(1)	243, 245
— cl 30(2)	243
— cl 30(3)	243
Interpretation Act 1967 (ACT)	
— s 11A	17
Legislation Act 2001 (ACT)	17
— s 7(3)	17
— s 138	18, 23, 24
— s 139	17, 24, 205, 243, 244, 253
— s 139(1)	17, 245
— s 139(2)	17
— s 141(2)(a)	62

Australia: Commonwealth

Acts Interpretation Act 1901 (Cth)	
— s 15AA	238
Australia Act 1986 (Cth)	
— s 1	47
— s 2(2)	48, 58

Australian Capital Territory (Self-Government) Act 1988 (Cth)	
— s 8(1)	49
— s 22(1)	49
— s 23(1A)	49
— s 28(1)	47
— s 35	49
Income Tax Assessment Act 1936 (Cth)	26
Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011 (Cth)	49

Australia: Victoria

Charter of Human Rights and Responsibilities Act 2006 (Vic)	61, 150, 181, 203, 205, 206, 207, 208, 214, 216, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 233, 237, 239, 241, 250, 255, 262
— s 3	256
— s 5	224
— s 7(2)	151
— s 31	207, 224, 225
— s 31(1)	224
— s 31(6)	225
— s 32	207, 220, 222, 227, 240, 241, 248, 249, 250
— s 32(1)	1, 34, 202, 206, 208, 212, 218, 219, 221, 222, 223, 224, 227, 231, 232, 233, 234, 235, 237, 238, 239, 247, 249, 255, 256, 257, 262
— s 32(3)	188
— s 32(3)(a)	239
— s 36	207
— s 36(2)	206, 207
— s 36(5)	207
Interpretation of Legislation Act 1984 (Vic)	
— s 35	23, 24, 256
— s 35(a)	18, 24, 205
Serious Sex Offenders Monitoring Amendment Act 2009 (Vic)	226

Canada

Canadian Charter of Rights and Freedoms	69

New Zealand

Acts Interpretation Act 1924 (NZ)	
— s 5(j)	19, 20, 162, 163, 167, 197, 198

Armed Forces Discipline Act 1971 (NZ)	
— s 117ZB.....	174
— s 117ZC.....	174
— s 117ZD.....	174
Civil Union Act 2004 (NZ).....	168
Constitution Act 1986 (NZ)	
— s 15.....	50
— s 15(1)	50, 52
— s 15(2)	50
Constitution Amendment Act 1973 (NZ)	
— s 2	52
Crimes Act 1961 (NZ)	169
Crimes (Home Invasion) Amendment Act 1999 (NZ)	169
Criminal Justice Act 1985 (NZ).....	171
— s 4(2)	171, 172, 173
— s 80	171, 173
— s 80(a).....	174
Criminal Justice Amendment Act 1993 (NZ)	
— s 56.....	172
Criminal Justice Amendment Act (No 2) 1999 (NZ)	169, 171
— s 2(4)	172
Flags, Emblems, and Names Protection Act 1981 (NZ)	
— s 11(1)(b).....	185, 186
Habeas Corpus Act 2001 (NZ)	
— s 16.....	165
Interpretation Act 1999 (NZ).....	19, 26, 176
— s 4(1)(b).....	198
— s 5	19, 22, 162, 180
— s 5(1)	20, 162, 176, 177, 183, 197, 198, 199, 259
— s 6	176
Judicature Act 1908 (NZ)	
— s 66.....	164
Marriage Act 1955 (NZ)	168
Marriage (Definition of Marriage) Amendment Act 2013 (NZ)	168

Misuse of Drugs Act 1975 (NZ)	
— s 6(6)	175, 176, 178
New Zealand Bill of Rights Act 1990 (NZ).....	
.....	63, 92, 150, 151, 152, 153, 154, 156, 161, 163, 165, 171, 173, 174, 176, 178, 179, 181, 183, 190, 191, 194, 196, 197, 201, 203, 209, 259
— s 4.....	150, 151, 152, 156, 176, 177, 180, 190, 191, 192, 194, 195, 197, 259
— s 5.....	150, 151, 156, 176, 177, 187, 188, 191
— s 6.....	1, 92, 93, 150, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 166, 167, 168, 169, 170, 171, 172, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 191, 192, 196, 197, 198, 199, 200, 201, 202, 259
— s 14.....	185, 187
— s 16.....	185
— s 19.....	168
— s 23(1)(c).....	164
— s 25(c).....	175
— s 25(g)	169
New Zealand Bill of Rights Bill 1989 (NZ)	
— cl 25.....	195
Prostitution Reform Act 2003 (NZ)	
— s 13(2)	174
Sentencing Act 2002 (NZ)	
— s 6.....	174
— s 166.....	174
Summary Offences Act 1981 (NZ)	
— s 4(1)(a).....	187
Supreme Court Act 2003 (NZ)	
— s 3(2)	50

United Kingdom

Adoption and Children Act 2002	
— s 118.....	147
— s 121	147
Children Act 1989.....	146
Commonwealth of Australia Constitution Act 1900	46, 64, 224
— s 51	47
— s 106.....	58
— s 109.....	47
— s 122.....	47, 49
Companies Act 1985.....	31

Crime (Sentences) Act 1997	
— s 29	113
— s 29(1)	112
European Communities Act 1972	44, 46
Gender Recognition Act 2004	148
Housing Act 1988	
— s 39	114
— sch 4	114
Human Rights Act 1998.....	3, 53, 46, 54, 55, 68, 69, 74, 88, 94, 96, 98, 99, 100, 104, 105, 106, 108, 114, 121, 122, 123, 125, 126, 132, 133, 134, 135, 140, 141, 142, 144, 150, 151, 152, 203, 209, 211, 219, 231, 243, 244, 259, 261, 262
— s 3	3, 94, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 107, 108, 110, 111, 112, 113, 114, 115, 117, 118, 119, 120, 121, 122, 123, 125, 126, 127, 128, 129, 130, 131, 133, 134, 135, 136, 138, 140, 141, 142, 143, 144, 145, 146, 148, 149, 150, 179, 182, 201, 202, 207, 208, 213, 214, 221, 223, 242, 248, 251, 257, 259, 260, 262
— s 3(1)	1, 94, 95, 96, 99, 110, 127, 129, 130, 131, 141, 143, 212, 229, 250, 255
— s 3(2)	94, 95, 96
— s 4	94, 95, 96, 136, 140, 141, 148, 207
— s 4(1)	96
— s 4(2)	96
— s 4(6)	96
— s 19	97
Human Rights HL Bill (1997–98) 119	100, 135
— cl 3.....	125, 136
— cl 4.....	136
Income and Corporation Taxes Act 1988	
— s 262	120
— s 262(1)	120
— Pt VII.....	120
Interpretation Act 1978	
— s 6(1)	120
Matrimonial Causes Act 1973	
— s 11(c).....	147, 148
Misuse of Drugs Act 1971	
— s 28	111
— s 28(2)	111
Rent Act 1977	
— sch 1, para 2(1).....	114
— sch 1, para 2(2).....	114
— sch 1, para 3(1).....	114

Terrorism Act 2000.....	119
Youth Justice and Criminal Evidence Act 1999	
— s 41	107, 108
— s 41(2)	109
— s 41(3)(c).....	108, 126

TABLE OF INTERNATIONAL TREATIES

Convention on the Rights of the Child	85
European Convention of Human Rights	
..... 3, 44, 54, 60, 75, 77, 82, 83, 85, 88, 89, 94, 95, 96, 101, 103, 105, 112,	
116, 117, 121, 122, 123, 124, 125, 126, 128, 129, 130, 133, 134, 135, 136, 137, 138,	
139, 140, 141, 142, 144, 149, 152, 201, 209, 210, 212, 213, 223, 257, 259, 261, 262	
— art 6	108, 111
— art 6(1).....	112
— art 8	114
— art 14	114, 120
International Covenant on Civil and Political Rights	75, 85, 152, 155, 209, 210
— art 19(3).....	187
International Covenant on Economic, Social and Cultural Rights	209

CHAPTER ONE

INTRODUCTION

The most significant statutory change to the law of statutory interpretation is the introduction of the special interpretation provisions in human rights acts, which impose an obligation upon courts to interpret *other* legislation so as to be consistent with the rights set out in the human rights act. ... Their application raises some fundamental issues about the nature of the interpretive process ...¹

This thesis considers four such interpretive provisions from the United Kingdom, New Zealand and Australia: s 3(1) of the UKHRA, s 6 of the NZBORA, s 30 of the ACTHRA in the Australian Capital Territory and s 32(1) of the Charter in the Australian State of Victoria. These statutes are all ‘parliamentary bills of rights’² which have been said to exemplify a ‘new Commonwealth model of constitutionalism’.³ Whereas under constitutionally entrenched bills of rights such as that in the United States of America, courts are often empowered to strike down legislation which is held to be inconsistent with human rights, the UK, New Zealand and Australian statutes contain no such power. Instead, the focus is on statutory interpretation as a means to achieve rights-consistency, and the interpretive provisions set out rules which the courts must apply to this end.

The constitutional contexts of the three countries dealt with in this thesis are broadly similar, informed as they are by the doctrine of parliamentary sovereignty and adherence to the rule of law, an important aspect of which is legal certainty. The

¹ James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press 2008) 62.

² Janet L Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 MLR 7.

³ Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’ (2001) 49 Am J Comp L 707.

overall approaches to statutory interpretation, including the roles of the concepts of legislative intention and purpose, are also similar. Furthermore, the countries share certain common law principles which to an extent resemble the rules set out by the interpretive provisions: the principle of legality (the presumption that Parliament does not intend to interfere with fundamental rights) and the treaty presumption (that legislation is to be interpreted in accordance with obligations under international treaties). These common characteristics of the UK, New Zealand and Australian legal systems, in conjunction with the similarity of their interpretive provisions, make these countries ripe for comparative analysis.

There are two broad questions which arise in the course of such an analysis. First, what is the relationship between the common law principles and the rules under the interpretive provisions? Secondly, what effect do the interpretive provisions have on the overall approach to statutory interpretation, particularly in terms of their impact on the roles of intention and purpose? As will be demonstrated in the course of this thesis, the answers to these questions are inextricably linked.

Chapters Two to Four involve consideration of the background against which the relevant human rights legislation has been enacted. The focus in Chapter Two is on the concepts of intention and purpose in statutory interpretation generally. Chapter Three sets out some basic constitutional concepts — including parliamentary sovereignty and legal certainty — which inform the courts' approaches to interpretation. Chapter Four explores the principle of legality and the treaty presumption.

In Chapters Five to Seven, the interpretive provisions themselves are discussed in detail, with each chapter focusing on a different country (the UK in Chapter Five, New Zealand in Chapter Six and Australia in Chapter Seven). These are ordered to reflect the chronological sequence of their leading judicial decisions.⁴ Chapter Eight will conclude the thesis with a summary of how the various interpretive provisions relate to their common law precursors, to the overall approach to interpretation and to one another.

One of the themes of this thesis is that it is possible to identify a common methodology for the application of the various interpretive provisions. This is facilitated by an emphasis on the concept of purpose, which is flexible and capable of being identified and applied at higher levels of abstraction than the concept of intention as commonly applied by the courts. Despite this common methodology, the results of attempts at legislative rights-consistent interpretation in the relevant jurisdictions differ. We shall see that the UK courts have taken a broader interpretive approach than have their New Zealand and Australian counterparts. This will be explained by reference to the respective contexts of the human rights legislation in each jurisdiction, particularly in terms of legislative history. It will be argued that the purpose of the UKHRA to provide remedies in domestic courts for breaches of the ECHR provides the basis for the UK courts' approach. The absence of this factor is the primary point of distinction between the UK on the one hand, and New Zealand and Australia on the other, though other issues will be explored. Finally, while as a matter of the interpretation of the UKHRA, and especially of s 3, the approach of the

⁴ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1; *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.

UK courts is defensible, the significant risk to the principle of legal certainty which it poses will be highlighted.

CHAPTER TWO

INTENTION AND PURPOSE

1 Introduction

In this chapter, I shall explore what the courts mean when they refer to the general interpretive concepts of ‘intention’ and ‘purpose’, including what they mean by the ‘purposive approach’. This is necessary because these concepts are pervasive in the case law and commentary on the interpretive provisions in the human rights legislation under consideration. The nature of the purposive approach is of particular importance, as it was generally considered the prevailing approach to statutory interpretation when the human rights legislation was enacted in the various jurisdictions, so it is integral to answering the question of how human rights legislation has changed the general approach to interpretation. I deal with intention and purpose at this juncture so that, when the concepts are referred to in the context of discussing the human rights legislation in later chapters, the reader will have some understanding of them.

In this context, I adopt the approach of Lord Steyn:

I am not qualified to join in [the] philosophical debate. I am afraid I am going to elide the questions with respect to monkeys on typewriters, and the marks made by waves on a beach. Mundanely, I am going to approach the subject from the point of view of reasoned practicality.¹

¹ Johan Steyn, ‘*Pepper v Hart*; A Re-examination’ (2001) 21 OJLS 59, 64.

This is because it is how the *courts* approach the concepts of intention and purpose that will provide the starting point for the analysis in this thesis.

2 Intention

Coke wrote in the 17th century that '[e]very Statute ought to be expounded according to the intent of them that made it ...'² This basic principle endures today. However, some clarification of what is meant by 'intent' or 'intention' is necessary; as Lord Watson famously noted, "“Intention of the Legislature” is a common but very slippery phrase ..."³

(a) Objectivity

The first, and perhaps most important, point to note about intention is that courts seek to ascertain an objective intention rather than subjective views of legislators or drafters.⁴

Lord Nicholls described this in *R (Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions*:⁵ 'the “intention of Parliament” is an objective concept, not subjective. The phrase is a shorthand reference to the intention

² 4 Co Inst 330.

³ *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) 38.

⁴ See generally Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (forthcoming) 6–10.

⁵ [2001] 2 AC 349 (HL).

which the court reasonably imputes to Parliament in respect of the language used.’⁶ Lord Nicholls quoted Lord Reid’s famous dictum: ‘We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.’⁷ Lord Reid had continued: ‘We are seeking not what Parliament meant but the true meaning of what they said.’⁸

Somers J, in describing the concept of legislative intention in the New Zealand Court of Appeal in 1982, echoed Lord Reid: ‘the inquiry is not as to what the legislature meant to say but as to what it means by what it has in fact said in the framework of the Act as a whole’.⁹

Similarly, in the High Court of Australia, Kitto J stated that ‘It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances.’¹⁰

⁶ *ibid* 396. See also *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [30] (Lord Nicholls). cf Johan Steyn, ‘Interpretation: Legal Texts and their Landscape’ in Basil S Markesinis (ed), *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Hart Publishing 2000) 85–86.

⁷ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) 613.

⁸ *ibid*, see also 645 (Lord Simon). See also *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 (HL) 236 (Lord Simon).

⁹ *Donselaar v Donselaar* [1982] 1 NZLR 97 (NZCA) 114.

¹⁰ *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405, quoted with approval in *Singh v The Commonwealth* [2004] HCA 43, (2004) 222 CLR 322 [19] (Gleeson CJ). See also *Wilson v Anderson* [2002] HCA 29, (2002) 213 CLR 401 [8] (Gleeson CJ); *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1 [245]–[247] (Kirby J); *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253 [97] (Heydon and Crennan JJ); James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press 2008) 120, fn 29 and the authorities cited therein.

However, to say that the relevant intention is objective is not to say that there should be no consideration of an interpretive issue from the legislature's point of view. Indeed, Lord Reid, a few lines after his famous dictum quoted above, stated that '[t]he general rule in construing any document is that one should put oneself "in the shoes" of the maker ...'¹¹ The point being emphasized when judges refer to the objectivity of intention is that, when considering an issue from the legislature's point of view, the views of individual members of the legislature or of drafters should not be mistaken for the intention of the legislature as a whole. Whether the legislature as a whole can have an intention depends on one's view of the nature of the legislature.¹² I shall argue below that a legislature can be taken to have an intention and that a common-sense approach to the nature of the legislature is appropriate for our purposes.

(b) Constitutional Significance

Related to the objectivity of intention, as it reminds interpreters not to focus on subjective views, is the characterization of references to intention as 'expressions of a constitutional role adopted by judges'¹³ or 'the constitutional relationship between courts and the legislature'.¹⁴ As Lord Steyn put it, 'It is sometimes meaningful and

¹¹ *Black-Clawson* (n 7) 613.

¹² See Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) ch 6.

¹³ Rupert Cross, *Statutory Interpretation* (John Bell and George Engle eds, 3rd edn, Butterworths 1995) 31.

¹⁴ *Singh* (n 10) [19] (Gleeson CJ). cf Paul Rishworth, 'Interpreting and Invalidating Enactments under a Bill of Rights: Three Inquiries in Comparative Perspective' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004) 254–55.

appropriate for a judge to refer to the intention of Parliament in recognition of its supreme law-making power.’¹⁵

This characterization has been adopted and approved several times in the High Court of Australia in recent years:

judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. ... the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.¹⁶

While this seems a fair statement, the Court has recently gone a step too far in declaring that

legislative intention ... is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.¹⁷

¹⁵ Steyn (n 1) 64.

¹⁶ *Zheng v Cai* [2009] HCA 52, (2009) 239 CLR 446 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ), approved in *Dickson v R* [2010] HCA 30, (2010) 241 CLR 491 [32] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Lacey v A-G for The State of Queensland* [2011] HCA 10, (2011) 242 CLR 573 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 [38] (French CJ), [146(v)] (Gummow J), [638] (Crennan and Kiefel JJ); *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46, (2012) 86 ALJR 1372 [118] (Gummow J, in dissent). See Anthony Mason, ‘Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power’ (2011) 9 NZJPIL 1, 7. See also *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 228, (2002) 123 FCR 298 [430]–[432] (French J, Wilcox J agreeing).

¹⁷ *Lacey* (n 16) [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 345–46 (McHugh J); *Black-Clawson* (n 7) 613 (Lord Reid); *Mills v Meeking* (1990) 169 CLR 214, 226 (Mason CJ and Toohey J, Brennan J agreeing). See Robert French, ‘What Were They Thinking? Statutory Interpretation and Parliamentary Intention’ (Sir Frank Kitto Lecture, Armidale, 23 September 2011) 11–14 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj23sep11.pdf> accessed 14 August 2013; Robert French, ‘The Judicial Function in an Age of Statutes’ (2011 Goldring Memorial Lecture, Wollongong, 18 November 2011) 16–20 <www.hcourt.gov.au/assets/publications/

This view has been powerfully criticized on the basis that the concept of legislative intention is indispensable to a coherent theory of statutory interpretation.¹⁸

(c) The Reasonable Reader Approach

One notable aspect of the passage from Lord Nicholls' speech in *Spath Holme* above is the use of the word 'reasonably' where he describes intention as 'a shorthand reference to the intention which the court *reasonably* imputes to Parliament in respect of the language used'.¹⁹ This echoed an earlier speech (not cited in *Spath Holme*) in which Lord Nicholls (with the unanimous agreement of the other Law Lords) had adopted a similar formulation.²⁰ A definition similar to that of Lord Nicholls was given by Lord Hoffmann in *R (Wilkinson) v IRC*:²¹ 'One means the interpretation

speeches/current-justices/frenchcj/frenchcj18nov11.pdf> accessed 26 April 2013; RS French, 'Unelected Judges in a Representative Democracy' (Speech to St Thomas More Society, Sydney, 22 June 2012) 13 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22jun12.pdf> accessed 15 August 2013; Robert French, 'The Courts and the Parliament' (Queensland Supreme Court seminar, Brisbane, 4 August 2012) 9–12 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj04aug12.pdf> accessed 28 April 2013. See also *Momcilovic* (n 16) [38] (French CJ), [146(v)] (Gummow J), [315] (Hayne J), [441] (Heydon J, in dissent); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56, (2012) 87 ALJR 131 [25] (French CJ and Hayne J). See further RS French, 'Dolores Umbridge and Policy as Legal Magic' (2008) 82 ALJ 322, 331–32. cf *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22 [79] (Lord Phillips P).

¹⁸ Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (OUP 2010) 232–47; Ekins and Goldsworthy (n 4) 10–19. cf *Re Application for Bail by Islam* [2010] ACTSC 147, (2010) 4 ACTLR 235 [28] (Penfold J).

¹⁹ *Spath Holme* (n 5) 396 (emphasis added). See also *Ghaidan* (n 6) [30] (Lord Nicholls); EW Thomas, 'So-called "Judicial Activism" and the Ascendancy of Judicial Constraints' (2005) 21 NZULR 685, 695.

²⁰ *MD Foods Plc (Formerly Associated Dairies Ltd) v Baines* [1997] AC 524 (HL) 532 (Lord Nicholls, Lord Goff, Lord Mustill, Lord Hoffmann and Lord Clyde agreeing). Lord Nicholls added a further minor variation in a lecture given in 2005: Donald Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 LQR 577, 589. For a discussion of this, see Daniel Greenberg, 'The Nature of Legislative Intention and Its Implications for Legislative Drafting' (2006) 27 Stat LR 15, 21.

²¹ [2005] UKHL 30, [2005] 1 WLR 1718.

which the reasonable reader would give to the statute read against its background ...²² In theoretical terms, this can be classified as ‘moderate intentionalism’,²³ that is, what ‘the speaker’s [in this context, the legislature’s] meaning appears to be, given all the evidence that is readily available to his intended audience ...’²⁴

What precisely does ‘reasonableness’ entail in this context? A recent contribution to the literature on legislative intent provides us with a helpful working definition:

The significance of the public act of lawmaking, of promulgating one’s authoritative intention, is that a well-formed legal system has good reason—consistent with full recognition of legislative authority—to provide that the meaning of the statute turns on what one reasonably infers the enacting legislature intended. I do not mean at all that interpreters may substitute their judgment of what the legislature in fact intended for what they think it would have been better for the legislature to have intended. Rather, the interpreter’s best inference about what was in fact intended is decisive—he or she can do no other—even if this departs from what is in fact the legislative intent.²⁵

It therefore follows that

a reader is reasonable only if he aims to identify, from the publicly available evidence, the actual intentions on which the author — Parliament — acted. A reader who ignored that aim, and instead foisted onto the text whatever meanings best suited him, would be an unreasonable reader ...²⁶

²² *ibid* [18]. cf Reed Dickerson, *The Interpretation and Application of Statutes* (Little, Brown & Co 1975) 70: ‘little objection can be found to the expression “manifest intent” (which by definition is objectively determinable), except that it appears to be a mere synonym for “meaning to the typical reader”’.

²³ Jeffrey Goldsworthy, ‘Moderate versus Strong Intentionalism: Knapp and Michaels Revisited’ (2005) 42 San Diego LR 669, 683.

²⁴ *ibid* 671. cf Paul Rishworth, ‘Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases’ [1991] NZRL Rev 337, 345.

²⁵ Ekins, *The Nature of Legislative Intent* (n 12) 247.

²⁶ Ekins and Goldsworthy (n 4) 8.

Perhaps the primary difficulty with the concept of the reasonable reader is that it requires the reader ‘to consider the nature and circumstances of the speaker’, which ‘has the potential to take us full circle back to the impossibility of identifying who Parliament actually is’.²⁷ But, as one commentator has pointed out, ‘the return is not quite full circle: the typical reader will have an imprecise but generally serviceable image of the nature of the legislature, and it will be sufficient to imagine what the reader would have expected that imaginary legislature to be intending to convey’.²⁸ Another, too, seems to have recognized this ‘generally serviceable image of the nature of the legislature’: ‘Certainly in the layman’s sense the legislators had an intention and the layman’s common-sense approach seems sufficiently close to the real situation to make the word “intention” not as inappropriate as has often been suggested.’²⁹

This approach finds a parallel in everyday life:

an intuitive sense of what counts may suffice, and judges might share enough in common to agree on many discrete practical questions of intent. We can recognize something similar in regard to everyday uses of the word ‘intent.’ Most people do not consider what exactly it takes for someone to ‘intend’ a consequence, and if they turned their minds to perplexing examples they would sometimes disagree. Nevertheless, people, by and large, understand each other when they conclude that a person intended a result.³⁰

I would agree that it is this common-sense approach which courts tend to apply, which for the purposes of this thesis is the most important point in this context.

²⁷ Greenberg (n 20) 21.

²⁸ *ibid.*

²⁹ Michael Zander, *The Law-making Process* (6th edn, CUP 2004) 194. Compare the layman with the ‘ordinary legal interpreter’: Cross (n 13) 52.

³⁰ Kent Greenawalt, *Statutory and Common Law Interpretation* (OUP 2013) 68.

(d) (Incorrectly) Perceived Difficulties with the Reasonable Reader Approach

It has, however, been argued that there are two difficulties with the notion of objective intention involving reasonableness. First, because ‘reasonableness is a very broad concept’, the approach ‘offers no guarantee of producing a single meaning for the words in question’.³¹ This is correct but not of concern. Across all cases, no method of ascertaining intent will ever give the same legal result regardless of the identity of the interpreter; this is in the nature of the exercise. As the present Chief Justice of Australia has said,

It is not at all unusual ... that, in a contest about the meaning of a statute, more than one reasonable outcome is exposed. Constructional choice is frequently a feature of interpretation. Where the choice is identified and made according to rules which reflect the proper function of the court interpreting the statute, it is legitimate even though reasonable minds may differ as to the outcome.³²

Secondly, it has been asserted that the reasonable reader approach involves judges ‘becoming legislators themselves’ and that this in turn raises problems of democratic legitimacy.³³ However, under the reasonable reader approach, the courts are still engaged in a search for what the legislature intended. They are not simply deciding how they think a provision should operate and then stating that *that* is what

³¹ Ian McLeod, ‘Legislative Intent’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 40.

³² French, ‘What Were They Thinking?’ (n 17) 7; French, ‘The Courts and the Parliament’ (n 17) 9.

³³ McLeod (n 31) 40.

the legislature intended.³⁴ So long as they avoid the latter approach, it is hard to see how it can be argued that they are ‘legislating’ (another ‘slippery’ term), and to the extent that interpretation involves a law-making function this is legitimate.³⁵

Having dismissed the perceived difficulties with the reasonable reader approach, it can be concluded that Lord Nicholls is correct that intention is ‘a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used’ and Lord Hoffmann’s concept of the reasonable reader provides assistance in applying this approach. The use of the term ‘intention’ is legitimate, provided that its constitutional significance is borne in mind.

3 Purpose

(a) Basic Issues

Before discussing the main issues arising from the application of the purposive approach, it is first necessary to outline what is meant by ‘purpose’ and also to establish the primary authorities for the application of the purposive approach in the relevant jurisdictions.

³⁴ This is despite the suggestion along these lines in *Lacey*, discussed above: see Ekins and Goldsworthy (n 4).

³⁵ See Chapter Five.

(i) The Concept of Purpose

The concept of purpose assumed significance in 1969 when the Law Commission and the Scottish Law Commission published an influential report on statutory interpretation in which they criticized the courts for taking too literal an approach to statutory interpretation.³⁶ To address this perceived problem, the Commissions concluded that a legislative provision should be enacted (it never was) which would require ‘that a construction which would promote the *general legislative purpose* underlying the provision in question is to be preferred to a construction which would not’.³⁷

The concept of purpose had its origins in the concept of mischief, that is, what a statute is aimed to remedy (indeed, one English High Court judge has recently equated the concepts³⁸). The Commission preferred the term ‘purpose’ because of its greater breadth, as it encompasses the furtherance of positive social purposes (whereas mischief seemed to denote dealing with an ‘evil’) and can be drawn from a greater range of sources (the range of materials from which mischief could be gleaned was somewhat limited).³⁹

Like intention, purpose must be ascertained objectively:

³⁶ Law Commission and Scottish Law Commission, *The Interpretation of Statutes* (Law Com No 21, Scot Law Com No 11, 1969) para 80(c).

³⁷ *ibid* app A, Draft Bill, cl 2(a) (emphasis added).

³⁸ Philip Sales, ‘Judges and Legislature: Values into Law’ (2012) 71 CLJ 287, 294.

³⁹ Law Commission and Scottish Law Commission (n 36) para 81(b)(i), fn 177.

when legislation refers to the purpose of a provision, it is not absurd to regard the legislature as referring to the purpose in the notional mind of those responsible for the provision. In such cases, the test must inevitably be an objective test.⁴⁰

(ii) The Purposive Approach

It is necessary to explain what is meant by the ‘purposive approach’. Under the modern approach to statutory interpretation, purpose should always be considered. Usually, the purpose will coincide with the ordinary meaning of the language being interpreted.⁴¹ In the relatively small number of cases where the purpose does not coincide with the language, interpreters must apply strained constructions (which will be explained below);⁴² when judges refer to the purposive approach, this is usually what they are referring to.⁴³ In an even smaller number of cases, the language may be held to be intractable (which will also be explained below).⁴⁴

After the following sections setting out authority for the purposive approach, I shall address the two more controversial of these three categories: the third, under the heading ‘Intractability of language’, and then the second, under the heading “‘Straining” or “stretching” language’.

⁴⁰ *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45, (2003) 215 CLR 563 [40] (McHugh J). See also *APLA Ltd v Legal Services Comr of New South Wales* [2005] HCA 44, (2005) 224 CLR 322 [178] (Gummow J), [423]–[424] (Hayne J); *Islam* (n 18) [28] (Penfold J).

⁴¹ FAR Bennion, *Bennion on Statutory Interpretation: A Code* (5th edn, LexisNexis 2008) 944, see further 951–55; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th edn, LexisNexis Butterworths Australia 2011) para 2.15; JF Burrows and RI Carter, *Statute Law in New Zealand* (4th edn, LexisNexis NZ 2009) 208. See also Tom Campbell, ‘Incorporation through Interpretation’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 85–86.

⁴² Bennion (n 41) 944, see further 955–59.

⁴³ *ibid* 944.

⁴⁴ *ibid* 954–55.

(iii) Authority for the Purposive Approach

The purposive approach is a principle of English common law. In *R (Quintavalle) v Secretary of State for Health*,⁴⁵ Lord Nicholls stated that

The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.⁴⁶

This was, in effect, unanimously approved by the House of Lords in *Attorney General for Northern Ireland's Reference (R v Z)*.⁴⁷

In Australian jurisdictions, the purposive approach is mandated by legislation. In the ACT, s 139(1) of the Legislation Act 2001 (ACT)⁴⁸ provides: 'In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.' Section 139(2) provides that 'This section applies whether or not the Act's purpose is expressly stated in the Act.' Relevantly, s 7(3) provides that 'A reference to an **Act** includes a reference to a provision of an Act.' As has been judicially noted,

There is thus a question about s 139, which seems to have at least three possible meanings:

(a) it may require a provision of an Act to be interpreted having regard only to the purpose of that provision;

⁴⁵ [2003] UKHL 13, [2003] 2 AC 687.

⁴⁶ *ibid* [8], see also [21] (Lord Steyn).

⁴⁷ [2005] UKHL 35, [2005] 2 AC 645 [17] (Lord Bingham), [36] (Lord Woolf CJ), [49] (Lord Carswell), see also [48] (Lord Rodger), [56] (Lord Brown).

⁴⁸ cf its predecessor, Interpretation Act 1967 (ACT), s 11A. This is not dealt with here, as the ACTHRA post-dates the Legislation Act 2001 (ACT).

- (b) it may require (or permit) regard to be had in interpreting a provision of an Act to the purpose of the Act or the purpose of any other specific component of the Act;
- (c) it may require (or permit) all possible purposes to be taken into account in interpreting any provision or other part of an Act.⁴⁹

Section 138 must also be referred to. It defines ‘working out the meaning of an Act’ as:

- (a) resolving an ambiguous or obscure provision of the Act; or
- (b) confirming or displacing the apparent meaning of the Act; or
- (c) finding the meaning of the Act when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
- (d) finding the meaning of the Act in any other case.

In Victoria, s 35(a) of the Interpretation of Legislation Act 1984 (Vic) provides:⁵⁰

In the interpretation of a provision of an Act or subordinate instrument—
 (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object[.]

Compared with the questions raised in relation to the ACT provision, the identification of purpose under s 35(a) is relatively straightforward:

The specific reference to interpreting a *provision* of an Act by reference to the purpose underlying the Act is a fairly clear indication that individual provisions are to be interpreted by reference to their broader context. This avoids the question ... of whether a provision may be interpreted only by reference to its own purpose or also by reference to a purpose discerned from another legislative unit. Perhaps more importantly, it also eliminates the difficulty of trying to interpret a provision by reference to its own purpose,

⁴⁹ *Islam* (n 18) [34] (Penfold J).

⁵⁰ In strikingly similar language to the recommendation of the Law Commissions: see above text to n 37.

which cannot sensibly be discerned without at least some interpretation of the provision itself.⁵¹

In New Zealand, s 5 of the Interpretation Act 1999 (NZ) provides that ‘The meaning of an enactment must be ascertained from its text and in the light of its purpose.’⁵² This has been described as making the purposive approach ‘a paramount principle’.⁵³ The effect of the section has been judicially described as making text and purpose ‘the key drivers of statutory interpretation’.⁵⁴ Two legislative drafters have posited that ‘Text is enlarged by purpose, and purpose is constrained by text.’⁵⁵

It should be noted that the equivalent interpretive direction under the predecessor of the Interpretation Act 1999 (NZ) was in different, less ‘pithy’,⁵⁶ terms. Section 5(j) of the Acts Interpretation Act 1924 (NZ), once described as ‘[t]he cardinal rule of statutory construction in New Zealand ...’,⁵⁷ provided:

Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing

⁵¹ *Islam* (n 18) [41] (Penfold J).

⁵² On the New Zealand courts’ approach to purposivism, see KJ Keith, *Interpreting Treaties, Statutes and Contracts: Occasional Paper No 19* (New Zealand Centre for Public Law 2009) 42–44.

⁵³ George Tanner, ‘Reflections on the Writing of Statutes’ in Jeremy Finn and Stephen Todd (eds), *Law Liberty, Legislation: Essays in Honour of John Burrows QC* (LexisNexis NZ 2008) 79. See also George Tanner and Ross Carter, ‘The Old Girl Still Looks Good to Me: Purposive Interpretation of New Zealand Legislation’ (4th Australasian Drafting conference, Sydney, 4 August 2005) para 66 <www.pcc.gov.au/pccconf/2005/papers/9-George-Tanner.pdf> accessed 10 September 2013.

⁵⁴ *Commerce Commission v Fonterra Co-op Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 [22] (Tipping J, for the Court). See also *Genesis Power Ltd v Greenpeace NZ Inc* [2008] NZSC 112, [2009] 1 NZLR 730 [51] (Blanchard, Tipping, McGrath and Wilson JJ).

⁵⁵ Tanner and Carter (n 53) para 66.

⁵⁶ Susan Glazebrook, ‘The New Zealand Bill of Rights Act 1990: Its Operation and Effectiveness’ (South Australian State Legal Convention, Adelaide, 22–23 July 2004) para 37, fn 66 <www.courtsofnz.govt.nz/speechpapers/Speech22-07-2004.pdf> accessed 5 February 2012.

⁵⁷ *Police v Christie* [1962] NZLR 1109 (NZSC) 1112 (Henry J). See JF Burrows, ‘The Cardinal Rule of Statutory Interpretation in New Zealand’ (1969) 3 NZULR 253, 253. See also *R v Pora* [2001] 2 NZLR 37 (NZCA) [103] (Keith J, for Gault, Keith and McGrath JJ).

of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit[.]

Despite the stark difference in language between this provision and its successor, the authors of the leading textbook on statutory interpretation in New Zealand have asserted that ‘it is unlikely that these verbal alterations make any difference’.⁵⁸ Indeed, in the Court of Appeal case of *Tyler v A-G*,⁵⁹ Richardson P (for the Court) drew no distinction between the provisions in this regard, while he addressed differences relating to the use of extrinsic materials under the respective sections.⁶⁰ However, in another Court of Appeal case, *R v Rongonui*,⁶¹ Thomas J made the point that

While it might be said that this provision adds little or nothing to its predecessor, the more prolix s 5(j) of the Acts Interpretation Act 1924, there is no doubt that the change in wording was introduced to emphasise to the Courts the importance of the purpose of a statutory provision in arriving at its meaning. Section 5(1) was the most widely discussed provision in the new Act. The Law Commission report, the select committee report and the parliamentary debates all expressly sanctioned reference to a statute’s purpose.⁶²

(b) Ambiguity and Whether More than One Construction Must Be Open

The first two questions arising from the application of the purposive approach relate to the circumstances in which it is permissible to use purpose to assist interpretation.

⁵⁸ Burrows and Carter (n 41) 207.

⁵⁹ [2000] 1 NZLR 211 (NZCA).

⁶⁰ *ibid* [23]–[24].

⁶¹ [2000] 2 NZLR 385 (NZCA).

⁶² *ibid* [161].

The first question is whether ambiguity is required and the second is whether more than one construction must be open.

(i) Ambiguity

When asking whether a provision is ambiguous, what is meant is whether the provision is ‘fairly and equally open to divers meanings’⁶³ or ‘reasonably open on orthodox rules of construction to more than one meaning’.⁶⁴ It ‘is not restricted to lexical or verbal ambiguity and syntactic or grammatical ambiguity. It extends to circumstances in which the intention of the legislature is, for whatever reason, doubtful ...’⁶⁵ Of course, it has been observed that ‘no form of words has ever yet been framed by human ingenuity with regard to which some ingenious counsel could not suggest a difficulty’⁶⁶ and ‘[a]ll words can be made to appear ambiguous if one makes sufficient effort ...’⁶⁷ But, as we shall see, it is not in any event necessary to ‘suggest a difficulty’ or ‘make sufficient effort’ in order for the purposive approach to be applied. Ambiguity can be patent — on the face of a provision — or latent — only

⁶³ *Ormond Investment Co Ltd v Betts* [1928] AC 143 (HL) 156 (Lord Buckmaster), approved in *Kirkness v John Hudson & Co Ltd* [1955] AC 696 (HL) 712 (Viscount Simonds).

⁶⁴ *Spath Holme* (n 5) 401 (Lord Cooke).

⁶⁵ *Repatriation Commission v Vietnam Veterans’ Association of Australia NSW Branch Inc* [2000] NSWCA 65, (2000) 48 NSWLR 548 [116] (Spigelman CJ, Handley JA agreeing). See also *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 456–57 (O’Connor J); Jim Evans, *Statutory Interpretation: Problems of Communication* (OUP 1988) ch 4; Cross (n 13) 83–84; Helen Mountfield and Michael J Beloff, ‘Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales’ [1996] EHRLR 467, 477; JJ Spigelman, ‘Statutory Interpretation: Identifying the Linguistic Register’ (1999) 4 Newc LR 1, 2–3; JJ Spigelman, ‘Access to Justice and Human Rights Treaties’ (2000) 22 Syd LR 141, 149–50; JJ Spigelman, ‘The Poet’s Rich Resource: Issues in Statutory Interpretation’ (2001) 21 Aust Bar Rev 224, 231; JJ Spigelman, ‘Blackstone, Burke, Bentham and the Human Rights Act 2004’ (2005) 26 Aust Bar Rev 1, 5–6; JJ Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 ALJ 769, 771–72; Spigelman, *Statutory Interpretation and Human Rights* (n 10) 37–39.

⁶⁶ *Pratt v South Eastern Rly Co* [1897] 1 QB 718 (QB) 721 (Cave J, Lawrance J agreeing).

⁶⁷ *Vietnam Veterans* (n 65) [201] (Meagher JA, in dissent).

arising from the broader context of the provision falling for interpretation.⁶⁸ When the concept is used as a pre-condition to a particular interpretive technique, it is usually the former type which is at issue.

In *Inco Europe Ltd v First Choice Distribution*⁶⁹ Lord Nicholls (with the unanimous agreement of the other Law Lords) stated that ‘It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language.’⁷⁰

This is also the position under the New Zealand legislation. In the Supreme Court case of *Commerce Commission v Fonterra Co-op Group Ltd*,⁷¹ Tipping J (for the Court) remarked that ‘Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5.’⁷²

The point has been clearly spelled out in Australia. Dawson J, in an influential dissent in the High Court case of *Mills v Meeking*,⁷³ dealing with the Victorian legislation, held that

⁶⁸ This distinction is ancient: Francis Bacon, *The Elements of the Common Lawes of England* (Assignes of J More Esq 1630) Tract I, 90–91; see Horst Lücke, ‘Statutes and the Intention of the Lawmaker as the Ultimate Guide to their Applicability: History and Prospects’ [2010] *Supreme Court History Program Yearbook* 1, 19.

⁶⁹ [2000] 1 WLR 586 (HL).

⁷⁰ *ibid* 592.

⁷¹ *Fonterra* (n 54).

⁷² *ibid* [22]. See also *Genesis Power* (n 54) [51] (Blanchard, Tipping, McGrath and Wilson JJ).

⁷³ *Mills* (n 17).

The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done.⁷⁴

In the ACT, s 138 of the Legislation Act 2001 (ACT) makes it clear that ambiguity is not required.

(ii) More than One Construction Open

It can be concluded therefore that ambiguity is not required as a general rule across the relevant jurisdictions. However, the particular wording of the Victorian legislation gives rise to a closely related point (arguably the other side of the same coin). As French J, as he then was, put it, in reference to the then equivalent Commonwealth legislation, ‘This section operates upon the premise that more than one construction of the provision to be interpreted is open.’⁷⁵ It follows that

When the express words of a legislative provision are reasonably capable of only one construction and neither the purpose of the provision nor any other provision in the legislation throws doubt on that construction, a court cannot ignore it and substitute a different construction because it furthers the objects of the legislation.⁷⁶

⁷⁴ *ibid* 235, approved in *R v Boucher* [1995] 1 VR 110 (VCCA) 123–24 (Phillips CJ, Brooking, Teague, Coldrey and Eames JJ); *Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140, 186 (Kirby J); *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 [383] (Kirby J); *DPP v Ali* [2009] VSCA 162, (2009) 23 VR 203 [44] (Maxwell P, Weinberg JA and Kyrou AJA). See also *Trevisan v Comr of Taxation* (1991) 29 FCR 157 (FCA) 162 (Burchett J); *R v L* (1994) 49 FCR 534 (FCAFC) 538 (Burchett, Miles and Ryan JJ).

⁷⁵ *NAAV* (n 16) [434] (French J, Wilcox J agreeing). See also *Ali* (n 74) [44] (Maxwell P, Weinberg JA and Kyrou AJA).

⁷⁶ *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 109 (McHugh J).

This leads onto the question of when courts can depart from the ordinary meaning of statutory language. First, though, we must briefly consider the possibility of a divergence between Victoria and the ACT in relation to whether more than one construction must be open. The authors of the leading textbook on statutory interpretation in Australia note that

Although it is doubtful whether s 139 produces any different results from [provisions such as s 35 of the Interpretation of Legislation Act 1984 (Vic)], it is of interest because, when read with s 138, it assumes that a meaning that is compatible with purpose is to be preferred to a meaning that is clear on the face of the provision in question.⁷⁷

Certain remarks made by Dawson, Toohey and Gaudron JJ in the High Court case of *Chugg v Pacific Dunlop Ltd*⁷⁸ also point to a potential difference between the Victorian and ACT sections:

The choice directed by s 35(a) of the Interpretation of Legislation Act is not as to the construction which ‘will best achieve’ the object of the Act. Rather, it is a limited choice between ‘a construction that would promote the purpose or object [of the Act]’ and one ‘that would not promote that purpose or object’.⁷⁹

Although this passage might suggest that the ACT legislation has greater effect than the Victorian legislation, it seems unlikely that any Australian court would hold that the purposive approach should not be applied in the same way across jurisdictions. I would reiterate what was said above: ‘it is doubtful whether s 139 produces any different results’.⁸⁰

⁷⁷ Pearce and Geddes (n 41) para 2.16.

⁷⁸ (1990) 170 CLR 249.

⁷⁹ *ibid* 262.

⁸⁰ Pearce and Geddes (n 41) para 2.16. cf *Casey v Alcock* [2009] ACTCA 1, (2009) 3 ACTLR 1 [103] (Besanko J, Refshauge J agreeing); *R v Fearnside* [2009] ACTCA 3, (2009) 3 ACTLR 25 [60] (Besanko J, Gray P and Penfold J agreeing).

(c) Statutory Language as a Constraint on the Purposive Approach

We may now consider the crucial point about the purposive approach, which is the extent to which it authorizes departures from the ordinary meanings of statutory terms. As one Australian judge has said, the purposive approach ‘certainly has not brought in an age when the letter fades away and courts expound the spirit of the laws’.⁸¹ Judges in Australia⁸² and New Zealand⁸³ have also pointed out that it does not authorize them to ‘rewrite’ statutes. In analyzing statutory language as a constraint on the purposive approach, three main issues will be discussed: the intractability of language, the idea of ‘straining’ or ‘stretching’ language, and unreasonable and unnatural interpretations.

(i) *Intractability of Language*

In 1963, Lord Reid identified the following ‘general principle’ as ‘well settled’: ‘It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail.’⁸⁴

⁸¹ John Bryson, ‘Statutory Interpretation’ (1991) 8 Aust Bar Rev 185, 192; John Bryson, ‘Statutory Interpretation: An Australian Judicial Perspective’ (1992) 13 Stat LR 187, 195.

⁸² See, eg, *Mills* (n 17) 235 (Dawson J, in dissent); *Alinta Asset Management Pty Ltd v Essential Services Commission* [2008] VSCA 273, (2008) 22 VR 275 [83] (Dodds-Streeton JA, Ashley JA and Hansen AJA agreeing).

⁸³ See, eg, *T v H* [1995] 3 NZLR 37 (NZCA) 51 (Hardie Boys J, Casey and Gault JJ agreeing); *Ithaca (Custodians) Ltd v Perry Corp* [2003] 2 NZLR 216 (NZHC) [249] (Potter J).

⁸⁴ *Luke v IRC* [1963] AC 557 (HL) 577.

In 1990, the High Court of Australia unanimously approved this statement.⁸⁵ Some years earlier, in a case which ushered the purposive approach into Australian common law⁸⁶ (it preceded the enactment of the relevant legislation), some members of the Court had expressed a similar point in holding that one of two reasons why a judge may consider that a statute ‘admits of no reasonable alternative construction ... is because ... the language is *intractable*’.⁸⁷

Echoing this in New Zealand, in a case which post-dated the enactment of the Interpretation Act 1999 (NZ), Thomas J (for a majority of the Court of Appeal) described the result of a literal interpretation of the relevant legislation as

anomalous, illogical and futile in that it does not meet the concern which Parliament sought to address in the legislation. In such circumstances, and where the main legislative purpose of the statute is clear, the provision should not be reduced to a nullity by a literal adherence to the language, unless the language is ‘*intractable*’.⁸⁸

All of these authorities refer to the idea of there being some point at which statutory language is so clear as to prevent a departure from the ordinary meaning of that language. It should be noted, however, that the number of cases in which

⁸⁵ *MacAlister v R* (1990) 169 CLR 324, 330 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

⁸⁶ *Cooper Brookes (Wollongong) Pty Ltd v The Comr of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297. This case ‘represented an important change in the attitude of the High Court to the interpretation of legislation, particularly income tax legislation. By a majority of four to one it construed [a provision] of the *Income Tax Assessment Act 1936* (Cth), in a way that avoided a drafting oversight and achieved a result which was consistent with what the court perceived to be the parliament’s manifest intentions’: RS Geddes, ‘Purpose and Context in Statutory Interpretation’ (2005) 2 U New Eng LJ 5, 15–16.

⁸⁷ *Cooper Brookes* (n 86) 320 (Mason and Wilson JJ) (emphasis added).

⁸⁸ *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (NZCA) [29] (Thomas J, for Thomas and Blanchard JJ) (emphasis added), citing *Laws of New Zealand, Statutes*, para 182 (edn not indicated). See also *Jury v Brasting* [1976] 1 NZLR 231 (NZSC) 235 (Wilson J). For criticism of the Court’s approach in *Frucor Beverages*, see Richard Ekins and John Ip, ‘Opening Pandora’s Box?’ [2002] NZLJ 117; Ekins, *The Nature of Legislative Intent* (n 12) 252–54. cf John Burrows, ‘Interpretation of Legislation: The Changing Approach to the Interpretation of Statutes’ (2002) 33 VUWLR 561, 577–78.

language is found to be intractable is low. Rather, the question that will more often be crucial is the extent to which courts can ‘strain’ or ‘stretch’ the statutory language.

(ii) ‘Straining’ or ‘Stretching’ Language

The terms ‘straining’ or ‘stretching’ when used in relation to statutory language refer to the fact that the language may be sufficiently malleable to allow an alternative interpretation. The leading authority for the concept of ‘straining’ language is *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd*,⁸⁹ in which Mackinnon LJ stated that ‘When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used, and of which the plain meaning would defeat the obvious intention of the Legislature.’⁹⁰

Lord Clyde (Lord Browne-Wilkinson, Lord Goff, Lord Slynn and Lord Steyn agreeing) in *Clarke v General Accident Fire and Life Assurance Corp Plc*⁹¹ defined a strained construction as ‘beyond the literal meaning of the word[(s)] or beyond what the word[(s)] would mean in ordinary usage ...’⁹² Lord Clyde also said that adopting a strained construction ‘cannot be taken to the length ... of so stretching the language that its former shape is transformed into something which is not only significantly different but has a name of its own’.⁹³

⁸⁹ [1938] Ch 174 (CA).

⁹⁰ *ibid* 201.

⁹¹ [1998] 1 WLR 1647 (HL).

⁹² *ibid* 1655.

⁹³ *ibid*.

The idea of ‘stretching’ as a way of describing what courts can do where language is found not to be intractable, a device also used in Australian cases⁹⁴ and New Zealand commentary,⁹⁵ is particularly striking when contrasted with Lord Millett’s assertion in *Ghaidan v Godin-Mendoza*⁹⁶ that a court ‘can do considerable violence to the language and stretch it almost (but not quite) to breaking point’.⁹⁷ We shall return to this point in Chapter Five.

(iii) *Unreasonable or Unnatural Interpretations*

The question arises: if judges may to some extent ‘strain’ or ‘stretch’ statutory language, but some language will be ‘intractable’, what features of a proposed interpretation should they look for in order to ascertain whether the interpretation is permissible? McHugh J in the High Court of Australia, long an eloquent advocate for, and exponent of, the purposive approach,⁹⁸ provides an answer to this question: ‘when the purpose of a legislative provision is clear, a court may be justified in giving the provision “a strained construction” to achieve that purpose provided that the construction is neither unreasonable nor unnatural’.⁹⁹

⁹⁴ *Federal Comr of Taxation v Walsh* (1983) 69 FLR 240 (FCAFC) 264 (Fitzgerald J), approved in *Trevisan* (n 74) 162 (Burchett J) and *Skea v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 51 FCR 82 (FCA) 85 (Moore J); *Nikolovsky v Government Insurance Office of New South Wales* (1992) 28 NSWLR 549 (NSWCA) 560 (Kirby P, Meagher JA agreeing), see also 561–62 (Handley JA). See also Mason (n 16) 7.

⁹⁵ Burrows and Carter (n 41) 225.

⁹⁶ *Ghaidan* (n 6).

⁹⁷ *ibid* [67].

⁹⁸ See, eg, his seminal dissenting reasons, as a Justice of Appeal in the New South Wales Court of Appeal, in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 (NSWCA) 421–24.

⁹⁹ *Newcastle City Council* (n 76) 113, citing *Sutherland Publishing* (n 89) 201 (Mackinnon LJ).

The criteria of unreasonableness and unnaturalness are helpful in this context, in that they emphasize ‘the necessity of interpreting the actual words of the provision, while allowing that a less obvious interpretation may be adopted, so long as that interpretation is a credible one’.¹⁰⁰ As the authors of the leading Australian textbook on statutory interpretation nonetheless point out, ‘The question of the limits of what is reasonable or natural is of course open-ended.’¹⁰¹

McHugh J’s approach is (indirectly) supported by high authority in the UK. Lord Clyde, in the passage from his speech in *Clarke* quoted above, identified another impermissible application of the purposive approach as ‘applying unnatural meanings to familiar words’.¹⁰² This bolsters the case for using McHugh J’s criteria across the relevant jurisdictions.

(d) Differing Levels of Abstraction of Purpose

The third and final issue to deal with here — and the most important to the overarching argument of this thesis — is that purpose can be identified and used at different levels of abstraction. It has also been noted that ‘the level of generality at which one identifies the statutory purpose can have a radical effect on the construction at which the court arrives’.¹⁰³ However, as has been pointed out, ‘Unfortunately there is no standardised terminology for these various categories.’¹⁰⁴

¹⁰⁰ Pearce and Geddes (n 41) para 2.13.

¹⁰¹ *ibid.*

¹⁰² *Clarke* (n 91) 1655.

¹⁰³ Richard McHugh, ‘Implications of the Proposed *Human Rights Act* for the Rule of Law as Manifested in Australian Courts’ (‘Is the Rule of Law under Challenge in Australia?’ conference, Sydney, 20 November 2009) 7 <www.ruleoflaw.org.au/wp-content/uploads/2012/08/Media-3-12-09-

Sir Rupert Cross illustrated the issue with the following example:

There may be a very general aim behind legislation — eg in the case of the Equal Pay Act 1970, to improve the social position of women. Such an aim merely states a broad political objective of which the Act is a manifestation. More immediately, the objective of the 1970 Act was to remove unjustified discrimination against women in relation to pay and conditions of employment. But the actual provisions of the Act are directed to outlawing certain specific forms of discrimination, such as paying women less than men doing an equivalent kind of work; so the purpose, as exhibited by the words of the statute, has a more limited scope.¹⁰⁵

Occasionally, courts will emphasize the ‘very general aim behind legislation’.

For example, in the New South Wales Court of Appeal, in the context of a case dealing with corporations law, Young CJ in Eq emphasized ‘a particularly broadly stated statutory purpose’.¹⁰⁶

The purpose of the *Corporations Act* and its predecessor was for permitting the economy to be advantaged by ... entrepreneurial ventures with limited liability and to regulate the rights of members inter se, the rights between members and creditors of corporations.

As time went on, it was realised that fraudsters could manipulate the system so as to perpetrate fraud and exceptions were placed against limited liability such as liability for trading while insolvent. Nonetheless the essential purpose of the Act remains and whenever one is construing any particular provision one must be careful not to take one’s gaze off the essential purpose and pay overmuch attention to technical details of wording of individual provisions.¹⁰⁷

Implications-of-the-proposed-Human-Rights-Act-for-the-rule-of-law-as-manifested-in-Australian-courts-Richard-McHugh.pdf> accessed 14 August 2013.

¹⁰⁴ William Twining and David Miers, *How to Do Things with Rules* (5th edn, CUP 2010) 154, fn 7.

¹⁰⁵ Cross (n 13) 33.

¹⁰⁶ *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWLEC 459 [65] (Biscoe J).

¹⁰⁷ *Edwards v A-G* [2004] NSWCA 272, (2004) 60 NSWLR 667 [76]–[77] (Young CJ in Eq, Spigelman CJ and Mason P agreeing).

In this context, it is noteworthy that Sir Rupert wrote that ‘[i]t is inept to speak of “the purpose” of Acts such as the Companies Act 1985 ... It is only possible to seek out the purpose of particular provisions ...’¹⁰⁸ While ‘inept’ may be a harsh term to apply, the fact remains that in most cases it will be the purpose behind a particular provision which will assist an interpreter. To take another example, namely a complex taxation statute, ‘To say that its general purpose is to raise revenue is of no rational assistance in solving a problem of interpretation of one of its provisions.’¹⁰⁹

In a similar vein, the previous Chief Justice of New South Wales warned about the dangers of using purpose at too high a level of abstraction, in the context of a victims’ compensation case:

In the present proceedings, the respondent submitted that the purpose was to compensate victims. Even if I were to accept a legislative purpose stated at that level of generality, that would not entail that any ambiguity must be construed in such a way as to maximise compensation ... In any event, the very specificity of the provisions of the legislation indicate that the legislative purpose is to provide compensation in accordance with the Act and not otherwise.¹¹⁰

¹⁰⁸ Cross (n 13) 57.

¹⁰⁹ Murray Gleeson, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (2009) 20 PLR 26, 32, see also 33, in the context of legislation regulating the conduct of police in questioning people suspected of crime: ‘If there is a legislative purpose to be identified, it must be identified at a level of particularity that points to the resolution of the specific doubt about meaning that has arisen.’ See also Murray Gleeson, ‘Statutory Interpretation’ (Justice Hill Memorial Lecture, Sydney, 11 March 2009) 12 <www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/gleeson11mar09.pdf> accessed 13 August 2013. For a real taxation example, see Ian McKay, ‘Interpreting Statutes — A Judge’s View’ (2000) 9 Otago LR 743, 749.

¹¹⁰ *Victims Compensation Fund v Brown* [2002] NSWCA 155, (2002) 54 NSWLR 668 [10] (Spigelman CJ, in dissent) (citation omitted), approved on appeal in *Victims Compensation Fund Corp v Brown* [2003] HCA 54, (2003) 77 ALJR 1797 [12] (Heydon J, McHugh ACJ, Gummow J, Kirby and Hayne JJ agreeing), also approved in *Victims Compensation Fund Corp v GM* [2004] NSWCA 185, (2004) 60 NSWLR 310 [95] (McColl JA, Mason P and Ipp JA agreeing) (see also [130]); *Save Our Street Inc v Settree* [2006] NSWLEC 570, (2006) 149 LGERA 30 [22] (Biscoe J); *Adultshop.Com Ltd v Members of the Classification Review Board* [2007] FCA 1871, (2007) 243 ALR 752 [128] (Jacobson J); *Suich v Northern Territory* [2010] NTSC 41, (2010) 241 FLR 200 [31] (Kelly J).

This pragmatic approach is supported at a theoretical level. A former President of the Supreme Court of Israel, in theorizing on purposive interpretation, has stated: ‘Sometimes, a clear picture of legislative intent emerges, but it is self-contradictory. To resolve those contradictions, purposive interpretation prefers a specific purpose to a general purpose ...’¹¹¹

However, two points need to be made in response. First, purpose at a high level of abstraction can be crucial at the outset of the task of ascertaining meaning, such as in determining the subject matter of a provision from a consideration of the Act as a whole. Secondly, identifying at a high level of abstraction the purpose/s of legislation impugned under the human rights interpretive provisions may be an appropriate method of ensuring that the operation of those provisions is not unduly narrow.¹¹² This will be considered further in the second half of this thesis.

4 Distinguishing between Intention and Purpose

Having discussed intention and purpose, it remains to consider their interrelationship, which is another crucial point in this thesis. As Cox J noted, in a case in the Full Court of the Supreme Court of South Australia, ‘the difference between those concepts is often difficult to draw or apply in practice’.¹¹³ This is because, linking back to the discussion above about levels of abstraction of purpose, ‘One’s purpose is an aspect

¹¹¹ Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi tr, Princeton UP 2005) 364.

¹¹² See, eg, Jan van Zyl Smit, ‘The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*’ (2007) 70 MLR 294, 298–300.

¹¹³ *Owen v State of South Australia* (1996) 66 SASR 251 (SASCFC) 256.

of one's intention, usually an end at a certain level of abstraction'¹¹⁴ — some would say 'the most important aspect'.¹¹⁵ That is to say,

in general legal usage the word 'intent' coincides with the particular immediate purpose that the statute is intended to directly express and immediately accomplish, whereas the word 'purpose' refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish.¹¹⁶

However, it can be seen that the difficulty of distinguishing between intention and purpose exists because 'In their widest sense the two concepts overlap.'¹¹⁷ This is so despite the fact that some commentators draw a clear distinction between the concepts¹¹⁸ — indeed, the present Chief Justice of Australia has argued, albeit unpersuasively, that 'It is possible to determine the purpose of a constructed thing, be it a tool or a law, without exploring the intention of its maker'¹¹⁹ — while others overstate the similarity of the concepts by equating them.¹²⁰

¹¹⁴ Richard Ekins, 'The Intention of Parliament' [2010] PL 709, 726. See also Ekins and Goldsworthy (n 4) 15. cf Jim South, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (2009) 28 UQLJ 143, 157: 'The purpose is a product of the intention.'

¹¹⁵ Lücke (n 68) 18.

¹¹⁶ Dickerson (n 22) 88.

¹¹⁷ *ibid* 87. See also James Allan, 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About—Doin' the Sankey Hanky Panky' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 113.

¹¹⁸ Bennion (n 41) 483–84.

¹¹⁹ French, 'The Courts and the Parliament' (n 17) 13. The fallacy is demonstrated by the inaptness of his example to the situation of a legislature: 'I may look at the human eye and say its purpose is to enable its possessor to see. That does not answer the question whether it evidences a creator's intention.'

¹²⁰ Zander (n 29) 194. See also Greenberg (n 20) 22.

The overlap of intention and purpose is borne out by English, Australian and New Zealand authority. Viscount Dilhorne seemed to equate purpose and intention in drawing on the famous quote from Coke above:¹²¹

It is now fashionable to talk of a purposive construction of a statute, but it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it ‘according to the intent of them that made it’.¹²²

In Australia, it not uncommon for purpose to be equated with intention. For example, French J in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*,¹²³ a case which has received ringing endorsement from the High Court of Australia,¹²⁴ noted that ‘It is often said, and there is a statutory requirement, that Acts of Parliament be construed purposively, that is to say in a way which will accord with the legislative intention.’¹²⁵ More recently, a judge of the ACT Supreme Court, who happens to be a former Commonwealth First Parliamentary Counsel,¹²⁶ indicated that ‘I do not consider that “the intention of the enacting Parliament” has any sensible meaning that differs from the purpose of the legislation as discerned from its text and the context of its enactment.’¹²⁷ Similarly, Gummow J in the only High Court case on s 32(1) of the Charter stated that ‘the reference to “purpose” in such a provision as s 32(1) is to the legislative “intention” revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory

¹²¹ See text to n 2.

¹²² *Stock* (n 8) 234, citing 4 Co Inst 330.

¹²³ *NAAV* (n 16).

¹²⁴ *Zheng* (n 16) [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ), approved in *Dickson* (n 16) [32] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹²⁵ *NAAV* (n 16) [430] (French J, Wilcox J agreeing). See also French, ‘Dolores Umbridge’ (n 17) 331.

¹²⁶ *Who’s Who in Australia 2012* (48th edn, Crown Content 2012) 1770.

¹²⁷ *Islam* (n 18) [114] (Penfold J).

construction and interpretation’.¹²⁸ Even an Australian textbook on statutory interpretation begins a chapter on the purposive approach thus: ‘The purposive approach requires a court to interpret the legislation before it in accordance with the intention of the legislature.’¹²⁹ It is not uncommon for commentators to adopt this view.¹³⁰

In New Zealand, in the Court of Appeal, Thomas J also seems to have drawn a link between purpose and intention in the course of a discussion of the purposive approach, wherein he drew on earlier authorities in holding that ‘The Court will strive for an interpretation which will make the Act work in the manner that the Court presumes Parliament must have intended.’¹³¹ Likewise, at least one commentator appears to have adopted this approach.¹³²

5 Conclusion

It has been suggested that the concept of intention is redundant, ‘[w]here a purposive interpretation is the primary judicial driver ...’¹³³ However, it is indispensable to a

¹²⁸ *Momcilovic* (n 16) [170] (Gummow J). See Steven Churches, ‘An Activist Court or a Court Scrupulous to Common Law Standards?’ (2011) 19 *AJ Admin L* 13, 14; Will Bateman and James Stellios, ‘Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights’ (2012) 36 *MULR* 1, 15.

¹²⁹ Donald Gifford, *Statutory Interpretation* (Law Book Co 1990) 49, see generally ch 4.

¹³⁰ Goh Yihan, ‘A Comparative Account of Statutory Interpretation in Singapore’ (2008) 29 *Stat LR* 195, 217; McHugh (n 103) 7.

¹³¹ *Frucor Beverages* (n 88) [29]. For an argument that the Court in fact preferred purpose to intention in this case, see Ekins, *The Nature of Legislative Intent* (n 12) 252–54.

¹³² Nathanael Starrenburg, ‘Interpretive Theories in New Zealand Bill of Rights Jurisprudence’ (2004) 10 *Auckland UL Rev* 115, 116, 125.

¹³³ Editorial, ‘Legislative Intention’ (2008) 29 *Stat LR* iii, iv.

coherent theory of statutory interpretation and courts do not err in applying a common-sense approach to its identification.

The role of purpose is nonetheless vital. It is a flexible concept, able to be identified and applied at differing levels of abstraction. This means that intention and purpose overlap where purpose is identified at a low level of abstraction and it also means that a focus on purpose can allow greater scope to depart from the ordinary meaning of statutory language (by identifying purpose at a relatively high level of abstraction). This is particularly apposite in the context of applying the interpretive provisions which are the subject of this thesis, and this issue will be considered further in Chapters Five to Seven.

Laws LJ (Stuart-Smith and Robert Walker LJ agreeing on this point) has said of the purposive approach: ‘Its virtue is that the legislator’s true purpose may be more accurately ascertained. Its vice is that the certainty and accessibility of the law may be reduced or compromised. The common law, which regulates the interpretation of legislation, has to balance these considerations.’¹³⁴ Indeed, certainty and accessibility of the law are key concepts in this thesis, and especially in the following chapter in which some constitutional concepts will be introduced. To this we may now turn.

¹³⁴ *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12 (CA) 34. See also *R (Kelly) v Secretary of State for Justice* [2008] EWCA Civ 177, [2009] QB 204 [24] (Laws LJ, Sir Anthony Clarke MR and Wilson LJ agreeing): ‘there is a price to be paid in the coin of legal certainty ...’

CHAPTER THREE

CONSTITUTIONAL BACKGROUND

1 Introduction

This chapter will introduce some constitutional law concepts which form part of the background against which human rights interpretive provisions must be approached. The aim here is not to give detailed accounts of constitutional law in the relevant jurisdictions, but rather to give succinct summaries of the relevant points and to refer to some of the landmark cases.

Three concepts merit discussion: the doctrine of parliamentary sovereignty, the contrasting phenomenon of common law constitutionalism, and, as mentioned at the end of the previous chapter, legal certainty. The first concept provides the basis for the traditional understanding of legislative intention, as discussed in the previous chapter, and forms the general background to the courts' approach to statutory interpretation, including under human rights interpretive provisions. The second concept challenges parliamentary sovereignty by qualifying it to a degree, and is often relied on by advocates of a broad approach to the interpretive provisions as evidence of the legitimacy of such an approach. The third concept is impacted upon by the application of the interpretive provisions, especially where a broad approach is adopted.

I do not intend to dwell in this thesis on certain other concepts that often arise in this context: the separation of powers, the notion of 'dialogue' in human rights

adjudication and the doctrine of deference. The first is of limited comparative relevance because the nature of the concept differs so markedly between the relevant jurisdictions; on the one hand it (more strictly, the separation of judicial power) finds expression in rigid rules under Australian law,¹ while on the other hand it is more of a guiding principle in the UK² and New Zealand³ (albeit that its relationship with parliamentary sovereignty and the way in which it underlies the legal system in each country means that one cannot go so far as to assert its general irrelevance). The second concept, a metaphor for the interaction of the arms of government under human rights legislation, is problematic⁴ (it has been rejected by a majority of the High Court of Australia⁵) and in any event goes to broader issues of constitutional design which are beyond the scope of this thesis. The third is bound up with the thorny issue of proportionality,⁶ which is also beyond the scope of this thesis, and so will generally be left to one side — albeit that a closely related issue (the courts’

¹ See James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths Australia 2010).

² See Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011).

³ See Philip A Joseph, *Constitutional & Administrative Law in New Zealand* (3rd edn, Brookers 2007) ch 7.

⁴ See Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 23 SCLR (2d) 7, 7–8; Sara Jackson, ‘Designing Human Rights Legislation: “Dialogue”, the Commonwealth Model and the Roles of Parliaments and Courts’ (2007) 13 Auckland UL Rev 89; Aileen Kavanagh, ‘Choosing between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v. Mendoza*’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 135–37; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 128–32; Roger Masterman, ‘Interpretations, Declarations and Dialogue: Rights Protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities’ [2009] PL 112, 115–17; Mark Elliott, ‘Interpretative Bills of Rights and the Mystery of the Unwritten Constitution’ [2011] NZL Rev 591, 613–17; Philip Sales and Richard Ekins, ‘Rights-consistent Interpretation and the Human Rights Act 1998’ (2011) 127 LQR 217, 227–30; Keith Ewing, ‘Doughty Defenders of the Human Rights Act’ in Nicholas Kang-Riou, Jo Milner and Surya Nayak (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge 2012) 122–23.

⁵ *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 [95] (French CJ), [146(iii)] (Gummow J, Hayne J agreeing on this point), [534] (Crennan and Kiefel JJ).

⁶ See Alan DP Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (CUP 2012).

varying of their interpretive approaches according to the subject matter of legislation under consideration) will feature in Chapters Five to Seven.

2 Parliamentary Sovereignty

(a) Basic Introduction

The importance of the doctrine of parliamentary sovereignty to constitutional law in the United Kingdom (or at least England⁷), Australia and New Zealand cannot be underestimated. The most famous exponent of the doctrine, Dicey, described it as ‘(from a legal point of view) the dominant characteristic of our political institutions’⁸ and further asserted that ‘the legislative supremacy of Parliament is the very keystone of the law of the constitution’.⁹ On the basis of Dicey’s account of sovereignty, ‘[i]t has become an unshakeable truism that parliamentary sovereignty is the key to understanding the English constitution ...’¹⁰ This is so despite occasional criticism of the doctrine in the 20th century.¹¹

According to Dicey, ‘Parliament’ is constituted by ‘the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly

⁷ cf *R (Jackson) v A-G* [2005] UKHL 56, [2006] 1 AC 262 [104] (Lord Hope), cf [159] (Lady Hale).

⁸ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan & Co 1915) 37.

⁹ *ibid* 68.

¹⁰ Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009) 2.

¹¹ See, eg, W Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) ch 4; RFV Heuston, *Essays in Constitutional Law* (2nd edn, Stevens & Sons 1964) ch 1; GdeQ Walker, ‘Dicey’s Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion’ (1985) 59 ALJ 276.

described as the “King in Parliament,” ...’¹² Having defined Parliament, he went on to state the basic principle:

Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and, further, ... no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.¹³

This passage has been described by Lord Woolf CJ, Lord Phillips MR and May LJ as ‘Professor Dicey’s classic statement as to what is usually understood by the sovereignty of Parliament, which is a basic constituent of our constitutional arrangements’.¹⁴ One commentator has argued convincingly that ‘The positive and negative criteria are merely different formulations of the same principle.’¹⁵ However, it is difficult to envisage situations in which this characterization will make any difference.

The basic principle must be qualified to some extent. Dicey identified two limitations; one external and one internal:¹⁶ ‘The external limit to the real power of a sovereign consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws.’¹⁷ Further, Dicey argued that an internal limit

¹² Dicey (n 8) 37.

¹³ *ibid* 38. This passage has been quoted with approval in New Zealand case law: *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (NZSC) 622 (Wild CJ).

¹⁴ *R (Jackson) v A-G* [2005] EWCA Civ 126, [2005] QB 579 [18].

¹⁵ Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press 1999) 10.

¹⁶ *cf Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC) 723 (Lord Reid, for Lord Reid, Lord Morris, Lord Wilberforce, Lord Pearson).

¹⁷ Dicey (n 8) 74.

arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs.¹⁸

A further limitation follows from Dicey's approval of the following passage from Todd's influential book on colonial government:

It is equally certain that a Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament, and thereby disable the legislature from entire freedom of action at any future time when it might be needful to invoke the interposition of Parliament to legislate for the public welfare.¹⁹

The general acceptance of this limitation is indicated by Gallen J's statement in the High Court of New Zealand that 'there is now ample authority to the effect that no Parliament can bind it [*sic*] successors, except in a procedural sense'.²⁰ This, however, must be qualified, as some legislation (for example, ceding territory or granting independence) cannot be 'reversed'.²¹

(b) Theoretical Issues

Having set out what is meant by 'parliamentary sovereignty', it is necessary to note some of the theoretical complexities of the doctrine. The first of these is the distinction between *legal* sovereignty and *political* sovereignty. Dicey restricted his

¹⁸ *ibid* 77.

¹⁹ Alpheus Todd, *Parliamentary Government in the British Colonies* (1st edn, Longman, Green & Co 1880) 192, quoted in Dicey (n 8) 65.

²⁰ *Carter v Police* [2003] NZAR 315 (NZHC) 325. cf *A-G for the State of New South Wales v Trethowan* (1931) 44 CLR 394, *affd A-G for New South Wales v Trethowan* [1932] AC 526 (PC).

²¹ AW Bradley and KD Ewing, *Constitutional and Administrative Law* (15th edn, Longman 2011) 61; Joseph, *Constitutional & Administrative Law* (n 3) 508–10.

analysis to the former, stating his aim to be ‘to explain the nature of Parliamentary sovereignty and to show that its existence is a legal fact’²² and acknowledging that

the word ‘sovereignty’ is sometimes employed in a political rather than in a strictly legal sense. That body is ‘politically’ sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested.²³

This accords with one possible classification of Dicey’s conception of sovereignty: ‘his theory can be explained as one of continuing parliamentary legislative sovereignty, provided that we are restricting our analysis to the legal as opposed to the non-legal limits placed on the powers of Parliament’.²⁴ However, arguably ‘a more realistic account’ can be given:

Dicey can be classified as adhering to a theory of continuing parliamentary legislative supremacy. His theory is regarded as a theory of supremacy as it discusses the power of Parliament to enact legislation which cannot be questioned by the courts, within confines set by practical and political realities.²⁵

This has some force, as ‘Dicey asserts that he is providing an analysis of sovereignty, yet his theory places limits on the power of the sovereign.’²⁶

There are other reasons to avoid the use of the term ‘sovereignty’; the authors of the leading constitutional law textbook in the UK prefer ‘legislative supremacy’

²² Dicey (n 8) 37.

²³ *ibid* 70–71.

²⁴ Young (n 10) 17.

²⁵ *ibid*.

²⁶ *ibid* 16–17.

partly because it is less likely to be confused with the notion of national sovereignty; and to avoid supporting the jurisprudential doctrine of John Austin and his successors that in every legal system there must be a sovereign.²⁷

However, in this thesis, the term ‘sovereignty’ will be adopted, as this is most commonly used, especially in case law. Having noted the issues above, this should not lead to any of the sort of confusion which one might fear.

(c) United Kingdom

The classic statement in the case law relating to parliamentary sovereignty in the UK is found in Lord Reid’s speech in *British Railways Board v Pickin*:²⁸

The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution ...

I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.²⁹

Three points must be noted about the way parliamentary sovereignty applies in the UK, which distinguish it from its application in Australia and New Zealand. The first is the UK’s membership of the European Union and the primacy of EU laws, as

²⁷ Bradley and Ewing (n 21) 53 (citation omitted).

²⁸ [1974] AC 765 (HL).

²⁹ *ibid* 782.

confirmed by *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)*,³⁰ in which Lord Bridge referred to the European Communities Act 1972 and stated that under its terms: ‘it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law’.³¹ The second is devolution, the process whereby bodies in Scotland, Wales and Northern Ireland have been empowered to legislate for those parts of the United Kingdom.³² The third is the general indication in the 2006 case of *R (Jackson) v A-G*³³ that the traditional view of parliamentary sovereignty and its role in the UK may be on the wane.

Lord Bingham adhered to the traditional position:

The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament. ... Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.³⁴

However, Lord Steyn rejected this orthodoxy, asserting that ‘We do not in the United Kingdom have an uncontrolled constitution’, and citing not only *Factortame* and devolution but also the ECHR. He continued:

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in

³⁰ [1991] 1 AC 603 (HL).

³¹ *ibid* 659.

³² See, eg, Vernon Bogdanor, *Devolution in the United Kingdom* (OUP 2001) 105, 201–13. See also Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) ch 4.

³³ *Jackson* (HL) (n 7).

³⁴ *ibid* [9]. See also Lord Bingham of Cornhill, ‘The Rule of Law and the Sovereignty of Parliament’ (2008) 19 KLJ 223, 227–33; Tom Bingham, *The Rule of Law* (Allen Lane 2010) 161–68.

the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is constitutional fundamental [sic] which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.³⁵

Lord Hope appeared to express a similar view in more cautious language:

Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.³⁶

He later added that ‘The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.’³⁷

Lady Hale joined those questioning the status of parliamentary sovereignty:

The concept of parliamentary sovereignty which has been fundamental to the constitution of England and Wales since the 17th century ... means that Parliament can do anything. The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny. Parliament has also, for the time being at least, limited its own

³⁵ *Jackson* (HL) (n 7) [102]. See also Lord Steyn, ‘Democracy, the Rule of Law and the Role of Judges’ [2006] EHRLR 243, 248–53. cf Lord Steyn, ‘Democracy through Law’ [2002] EHRLR 723, 728–30.

³⁶ *Jackson* (HL) (n 7) [104].

³⁷ *ibid* [107].

powers by the European Communities Act 1972 and, in a different way, by the Human Rights Act 1998. It is possible that other qualifications may emerge in due course. In general, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional.³⁸

Lord Walker preferred ‘to express no view’³⁹ on these questions, underlining the fact that it was not necessary in the context of the case to decide what precisely the status of parliamentary sovereignty in the UK is. For the time being, it seems to be correct to say that the traditional position persists, but that it is under challenge.⁴⁰ Indeed, Lord Hope DP recently reiterated the remarks that he made in *Jackson* about the rule of law being the ‘ultimate controlling factor’:

I would take that to be, for the purposes of this case, the guiding principle. ... The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind [‘to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual’] is not law which the courts will recognise.⁴¹

(d) Australia: Commonwealth

While the doctrine of parliamentary sovereignty in Australia shares its basic content with that in the UK, as the authors of the leading book on Australian constitutional law have pointed out,

In Australia, the idea of parliamentary sovereignty must be understood in the context of the rigid limits and boundaries imposed by the federal Constitution, and to some extent by the State Constitutions as well. Clearly, whatever

³⁸ *ibid* [159]. See also KD Ewing and Joo-Cheong Tham, ‘The Continuing Futility of the Human Rights Act’ [2008] PL 668, 682.

³⁹ *Jackson* (HL) (n 7) [141].

⁴⁰ cf an Australian perspective on the role of the common law in the constitution of that country: WMC Gummow, ‘The Constitution: Ultimate Foundation of Australian Law?’ (2005) 79 ALJ 167.

⁴¹ *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [51].

degree of sovereignty is possessed by Australian legislatures is subject to the constraints imposed by these instruments.⁴²

The Commonwealth Parliament draws most of its power from s 51 of the Constitution (some other provisions, such as s 122, confer legislative power but s 51 is the most generous): '[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth ...' This means that the Commonwealth Parliament sits at the apex of the legislative law-making bodies relevant to Australia.⁴³ However, the Commonwealth's power to legislate is restricted to the matters enumerated in s 51 (and the other provisions which confer power). The bodies which legislate on other matters are the State Parliaments and Territory legislatures.

(e) Australia: States and Territories

The powers of the sub-national legislatures are not limited except where manner and form procedures apply (for example, often in relation to electoral legislation) and subject to the primacy of Commonwealth laws under s 109 of the Constitution⁴⁴ (and, in the case of the Territories, subject to override by legislation⁴⁵).

⁴² Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (5th edn, Federation Press 2010) 89. See also Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne UP 1992) 152.

⁴³ The Imperial Parliament lost its power to legislate effectively for Australia in 1986: Australia Act 1986 (Cth), s 1. See *Sue v Hill* [1999] HCA 30, (1999) 199 CLR 462 [64] (Gleeson CJ, Gummow and Hayne JJ).

⁴⁴ See also, in the context of the ACT, Australian Capital Territory (Self-Government) Act 1988 (Cth), s 28(1).

⁴⁵ See text to n 56.

The original grants of legislative power to the States were made to these polities when they were colonies. Throughout the 19th century, the Imperial Parliament adopted a form of words when conferring legislative power: for the ‘peace, order (or sometimes ‘welfare’) and good government’ of the colony. This is reflected in s 2(2) of the Australia Act 1986 (Cth), which continued the powers of the State Parliaments:

It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State ...

The use of this phrase gave rise to a question as to whether the colonial, and now State, legislatures were limited in their powers. That is, if legislation were found not to be for the peace, order and good government of the State, a court could declare it invalid. Both a Justice of the High Court⁴⁶ and the then Chief Justice of New South Wales⁴⁷ so held in the 1980s. However, this approach has since been firmly rejected by a unanimous High Court:

within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words ‘for the peace, order and good government’ are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its

⁴⁶ *Sillery v R* (1981) 180 CLR 353, 362 (Murphy J). cf *The Trustees Executors and Agency Co Ltd v The Federal Comr of Taxation* (1933) 49 CLR 220, 234 (Evatt J).

⁴⁷ *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (NSWCA) 382–85 (Street CJ).

legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score.⁴⁸

This accorded with the traditional position as established by Privy Council authorities. For example, in *Ibralebbe v R*,⁴⁹ Viscount Radcliffe (for the Committee) had stated that ‘The words “peace, order and good government” connote, in British institutional language, the widest law-making powers appropriate to a Sovereign.’⁵⁰ The House of Lords confirmed this reading as recently as 2008.⁵¹

The powers of the legislative assemblies of the territories are similarly wide.⁵² Relevantly for the purposes of this thesis, the ACT Legislative Assembly⁵³ ‘has power to make laws for the peace, order and good government of the Territory’,⁵⁴ although the Commonwealth Parliament’s ability to legislate for the territories⁵⁵ means that the federal body can override Territory legislation.⁵⁶

⁴⁸ *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). See also *Mabo v The State of Queensland* (1988) 166 CLR 186, 201–02 (Wilson J).

⁴⁹ [1964] AC 900 (PC).

⁵⁰ *ibid* 923.

⁵¹ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 [50] (Lord Hoffmann), [108] (Lord Rodger), [130] (Lord Carswell), cf [145] (Lord Mance, Lord Bingham agreeing). Their Lordships overruled the Divisional Court and the Court of Appeal on this point: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 (QB) [55] (Laws LJ), [69] (Gibbs J); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA Civ 498, [2008] QB 365 [50] (Sedley LJ).

⁵² *R v Toohey, ex p Northern Land Council* (1981) 151 CLR 170, 279 (Wilson J), quoted with approval in *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 281–82 (Brennan, Deane and Toohey JJ).

⁵³ Established by Australian Capital Territory (Self-Government) Act 1988 (Cth), s 8(1).

⁵⁴ *ibid* s 22(1).

⁵⁵ Constitution, s 122.

⁵⁶ See, eg, Australian Capital Territory (Self-Government) Act 1988 (Cth), s 23(1A). Until recently, the Commonwealth could also achieve this by executive act under s 35 but this provision has now been repealed: Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011 (Cth).

(f) New Zealand

The author of the leading New Zealand constitutional law textbook has described that country as

the acme of legislative supremacy. It has no fundamental laws, no entrenched Bill of Rights, and no federal division of powers. Its freedom of legislation transcends even that of Britain, where devolution and European Union membership obligations have effected a de facto surrender of United Kingdom legislative power. Parliamentary sovereignty is retained in principle only given Britain's supra-national obligations and devolved institutions. New Zealand's unitary and insular status avoids any comparable limitations on legislative power ...⁵⁷

The current expression of the legislative power of the New Zealand Parliament is found in s 15 of the Constitution Act 1986 (NZ):⁵⁸

- (1) The Parliament of New Zealand continues to have full power to make laws.
- (2) No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend to New Zealand as part of its law.

The following passage from Robertson J's reasons in *Rothmans of Pall Mall (NZ) Ltd v A-G*⁵⁹ has met with judicial approval on several occasions:

the constitutional position in New Zealand ... is clear and unambiguous. Parliament is supreme and the function of the Courts is to interpret the law as laid down by Parliament. The Courts do not have a power to consider the validity of properly enacted laws.⁶⁰

⁵⁷ Joseph, *Constitutional & Administrative Law* (n 3) 498 (citation omitted).

⁵⁸ See also Supreme Court Act 2003 (NZ), s 3(2): 'Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.'

⁵⁹ [1991] 2 NZLR 323 (NZHC).

⁶⁰ *ibid* 330, quoted with approval in *Shaw v Comr of Inland Revenue* [1999] 3 NZLR 154 (NZCA) [13] (Richardson P, Henry and Blanchard JJ), in turn quoted in *Westco Lagan Ltd v A-G* [2001] 1 NZLR 40

That this position is unchanged even after the enactment of the New Zealand Bill of Rights Act 1990 (NZ) is clear from McGechan J's reasons in *Westco Lagan Ltd v AG*:⁶¹

in principle, provided Parliament proceeds according to mandatory law governing the procedure for enacting legislation ..., Parliament is sovereign and can pass any legislation it sees fit. ... In doing so, it can step right through existing laws and rights, obliterating remedies which otherwise would exist. The Courts, providing Parliament proceeds according to law in the way described, cannot stop Parliament making such legislative changes. It cannot strike down such legislative changes once made (subject to the possible extreme reservation mentioned). There is no supreme law in New Zealand which inhibits those powers. In particular, Parliament can pass laws which are directly contrary to provisions of the BOR. ... It is not for the unelected Courts to frustrate that legislative ability. If content of legislation offends, the remedies are political and ultimately electoral. The fact those alternatives seem monumentally difficult, indeed unreal, to particular persons, or to those espousing unpopular causes, is no more than a dark side of democracy.⁶²

A similar 'peace, order and good government' question as arises in Australia also arises in New Zealand. The countries have in common some dicta supporting the proposition that 'laws passed by [Parliament] can, in proper cases, still be challenged as being ultra vires'.⁶³ However, they also have in common the ultimate rejection of such an approach. In New Zealand's instance, the rejection was legislative. In response to the case just quoted from, Parliament enacted the New Zealand Constitution Amendment Act 1973 (NZ), under which: 'The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any

(NZHC) [92] (McGechan J). See also *Haliburton v Broadcasting Commission* [1999] NZAR 233 (NZHC) 237–38 (Morris J).

⁶¹ *Westco Lagan* (n 60).

⁶² *ibid* [95]. The 'possible extreme reservation', which McGechan J indicated (at [92]) 'should be left open in perpetuity', refers to the dicta of Lord Cooke discussed below at text to n 81.

⁶³ *R v Fineberg* [1968] NZLR 119 (NZSC) 121–22 (Moller J).

part thereof and laws having effect outside New Zealand.⁶⁴ It can be noted that s 15(1) of the Constitution Act 1986 (NZ), quoted above, uses similar language.

Although it may be contentious as to whether Parliament can give itself power by asserting that it has such power, it has been argued convincingly that

the time has passed to raise questions about the devolution of Parliament's legislative powers. It saw no reason to refer to objects of legislation when it declared: 'The Parliament of New Zealand continues to have full power to make laws.' This abstraction of legislative power would defeat any argument that a statute was vitiated, as being inimical to peace, order, or good government. Parliament's powers are plenary, whatever their exact source and historical evolution.⁶⁵

One final point must be noted in relation to parliamentary sovereignty in New Zealand. The Treaty of Waitangi,⁶⁶ which is a crucial historical document for New Zealand concluded between representatives of the Crown and several Māori chiefs in 1841, does not affect the doctrine of parliamentary sovereignty, despite it imposing solemn obligations on the Crown and Parliament.⁶⁷

3 Common Law Constitutionalism

Having dealt with the prevailing orthodox view of parliamentary sovereignty, we may now move to discuss a doctrine which sits much further from orthodoxy: common law

⁶⁴ New Zealand Constitution Amendment Act 1973 (NZ), s 2.

⁶⁵ Joseph, *Constitutional & Administrative Law* (n 3) 518, citing Constitution Act 1986 (NZ), s 15(1).

⁶⁶ See Joseph, *Constitutional & Administrative Law* (n 3) ch 3; Matthew SR Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria UP 2008).

⁶⁷ *NZ Maori Council v A-G* [1987] 1 NZLR 641 (NZCA). See Joseph, *Constitutional & Administrative Law* (n 3) 532–33. cf Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (OUP 1991) 63–64.

constitutionalism (sometimes less charitably, if appropriately, called ‘common law radicalism’⁶⁸). This doctrine doubts that Parliament cannot legislate to override certain fundamental or ‘constitutional’ common law rights, or at least can do so only expressly and not by necessary implication.

(a) United Kingdom

In the UK, before the advent of the UKHRA, at least three prominent judges supported this doctrine. In *R v Lord Chancellor, ex p Witham*,⁶⁹ Laws J labelled ‘the citizen’s right of access to the courts’ as a ‘constitutional right’, meaning that it could not be abrogated ‘unless it is specifically so permitted by Parliament’, before explaining

what in my view the law requires by such a permission. A statute may give the permission expressly; in that case it would provide in terms that in defined circumstances the citizen may not enter the court door. ... for my part I find great difficulty in conceiving a form of words capable of making it plain beyond doubt to the statute’s reader that the provision in question prevents him from going to court (for that is what would be required), save in a case where that is expressly stated. The class of cases where it could be done by necessary implication is, I venture to think, a class with no members.⁷⁰

Sedley J also approved of a distinction between types of rights:

⁶⁸ Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials* (7th edn, CUP 2012) 86–95.

⁶⁹ [1998] QB 575 (QB).

⁷⁰ *ibid* 585–86. See Lord Justice Laws, ‘The Impact of the Human Rights Act 1998 on the Interpretation of Enactments in the UK’ in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004) 243–45. See also *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597 (QB); John Laws, ‘Is the High Court the Guardian of Fundamental Constitutional Rights?’ [1993] PL 59; John Laws, ‘Law and Democracy’ [1995] PL 72, 81–94. cf *A v Secretary of State for the Home Dept (No 2)* [2004] EWCA Civ 1123, [2005] 1 WLR 414 [233] (Laws LJ). See generally JAG Griffith, ‘The Brave New World of Sir John Laws’ (2000) 63 MLR 158.

the legal standards by which the decisions of public bodies are supervised can and should differentiate between those rights which are recognised as fundamental and those which, though known to the law, do not enjoy such a pre-eminent status.⁷¹

Lord Woolf also lent support to this approach⁷² and it has found favour in academia to a certain extent.⁷³

However, as it emerged the approach was subjected to powerful criticism⁷⁴ and cannot be said to have displaced the orthodox view of parliamentary sovereignty. Despite the dicta in *Jackson* quoted above,⁷⁵ the current position is that ‘There are not, under English domestic law, any fundamental constitutional rights that are immune from legislative change.’⁷⁶ In any event, as Lord Rodger (Lord Bingham, Lord Hope and Lord Carswell agreeing) has noted:

Most of the references to ‘constitutional rights’ are to be found in cases dealing with situations before the Human Rights Act 1998 brought Convention rights into our law. In using the language of ‘constitutional rights’, the judges were, more or less explicitly, looking for a means of incorporation *avant la*

⁷¹ *R v Secretary of State for the Home Dept, ex p McQuillan* [1995] 4 All ER 400 (QB) 421. See also Stephen Sedley, ‘Human Rights: A Twenty-first Century Agenda’ [1995] PL 386.

⁷² Lord Harry Woolf, ‘Droit Public — English Style’ [1995] PL 57, 67–69. See also *R v Secretary of State for the Home Dept, ex p Al-Fayed (No 1)* [1998] 1 WLR 763 (CA) 774–77 (Lord Woolf MR).

⁷³ See, eg, TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993). See also TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003); Paul Craig, ‘Constitutional Foundations, the Rule of Law and Supremacy’ [2003] PL 92.

⁷⁴ Lord Irvine of Lairg, ‘Judges and Decision Makers: The Theory and Practice of Wednesbury Review’ [1996] PL 59, 75–78; Christopher Forsyth, ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review’ (1996) 55 CLJ 122, 139. For a summary and analysis of this debate, see Fiona Donson, ‘Civil Liberties and Judicial Review: Can the Common Law Really Protect Rights?’ in Peter Leyland and Terry Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press 1997) 358–70. For a collection of more recent criticisms, see Andrew Geddis and Bridget Fenton, “‘Which Is to Be Master?’ — Rights-friendly Statutory Interpretation in New Zealand and the United Kingdom’ (2008) 25 *Ariz J Intl & Comp L* 733, 774–75, fn 319.

⁷⁵ *Jackson* (HL) (n 7) [102] (Lord Steyn), [107] (Lord Hope), [159] (Lady Hale).

⁷⁶ *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 [92] (Lord Scott).

lettre, of having the common law supply the benefits of incorporation without incorporation. Now that the Human Rights Act 1998 is in place, such heroic efforts are unnecessary ...⁷⁷

(b) New Zealand

In New Zealand, the future Lord Cooke advocated common law constitutionalism in the 1980s.⁷⁸ The culmination of a series of dicta⁷⁹ came in 1984 in the case of *Taylor v NZ Poultry Board*:⁸⁰ ‘Some common law rights presumably lie so deep that even Parliament could not override them.’⁸¹

While Lord Cooke continued to express support for this proposition into this century,⁸² the approach has yet to find general acceptance in New Zealand,⁸³ even as

⁷⁷ *Watkins v Secretary of State for the Home Dept* [2006] UKHL 17, [2006] 2 AC 395 [64]. See Brice Dickson, ‘Judicial Activism in the House of Lords 1995–2007’ in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (OUP 2007) 382–83. cf Lord Steyn, ‘Democracy through Law’ (n 35) 731–32.

⁷⁸ See Michael Kirby, ‘Lord Cooke and Fundamental Rights’ in Paul Rishworth (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths (NZ) 1997); Paul Rishworth, ‘Lord Cooke and the Bill of Rights’ in Paul Rishworth (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths (NZ) 1997) 297–300. For the political context of the time and the link between this and Lord Cooke’s view, see Paul Rishworth, ‘The Inevitability of Judicial Review under “Interpretive” Bills of Rights: Canada’s Legacy to New Zealand and Commonwealth Constitutionalism’ (2004) 23 SCLR (2d) 254.

⁷⁹ *L v M* [1979] 2 NZLR 519 (NZCA) 527 (Cooke J, in dissent); *Brader v Ministry of Transport* [1981] 1 NZLR 73 (NZCA) 78 (Cooke J, McMullin and Vautier JJ agreeing); *NZ Drivers’ Association v NZ Road Carriers* [1982] 1 NZLR 374 (NZCA) 390 (Cooke, McMullin and Ongley JJ); *Fraser v State Services Commission* [1984] 1 NZLR 116 (NZCA) 121 (Cooke J). See John L Caldwell, ‘Judicial Sovereignty — A New View’ [1984] NZLJ 357.

⁸⁰ [1984] 1 NZLR 394 (NZCA).

⁸¹ *ibid* 398. See also Robin Cooke, ‘Fundamentals’ [1988] NZLJ 158, 162–63. cf *Mangawaro Enterprises Ltd v A-G* [1994] 2 NZLR 451 (NZHC) 457–58 (Gallen J).

⁸² Lord Cooke of Thorndon, ‘The Basic Themes’ (2004) 2 NZJPIL 113, 114; Robin Cooke, ‘The Road Ahead for the Common Law’ (2004) 53 ICLQ 273, 276–78; Robin Cooke, ‘The Road Ahead for the Common Law’ in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009) 691–93.

⁸³ James Allan, ‘Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990’ (2000) 9 Otago LR 613, 618; James Allan, ‘The Effect of a Statutory Bill of Rights Where Parliament Is Sovereign: The Lesson from New Zealand’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 380–81; Matthew SR Palmer, ‘New Zealand Constitutional Culture’ (2007) 22 NZULR 565, 583; Grant Huscroft and Paul Rishworth, “‘You Say

influential figures have begun to question the traditional view of the importance of parliamentary sovereignty.⁸⁴ Judges have tended to sidestep the question, as did Baragwanath J in the 1996 case of *Cooper v A-G*:⁸⁵

I am ... relieved from venturing into what happily remains in New Zealand an extra-judicial debate, which the good sense of parliamentarians and Judges has kept theoretical, as to whether in any circumstances the judiciary could or should seek to impose limits on the exercise of Parliament's legislative authority to remove more fundamental kinds of substantive rights.

Our small society has to date found it unnecessary to equip itself with techniques of judicial challenge to Parliament and its work. ... in New Zealand both Parliament and the judiciary recognise that constitutional peace and good order are better maintained by adherence to conventions rather than judicial decision.⁸⁶

It cannot therefore be said that common law constitutionalism is the prevailing orthodoxy in New Zealand, though it is perhaps less heterodox than in the UK.

(c) Australia

In Australia, Lord Cooke's approach was considered but rejected by the New South Wales Court of Appeal,⁸⁷ although the High Court in 1988 identified it as a 'question

You Want a Revolution": Bills of Rights in the Age of Human Rights' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009) 137.

⁸⁴ Sian Elias, 'Sovereignty in the 21st Century: Another Spin on the Merry-go-round' (2003) 14 PLR 148; Philip A Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 KCLJ 321.

⁸⁵ [1996] 3 NZLR 480 (NZHC).

⁸⁶ *ibid* 484–85, quoted with approval in *Shaw* (n 60) [14] (Richardson P, Henry and Blanchard JJ). See also *Westco Lagan* (n 60) [91] (McGechan J).

⁸⁷ *Building Construction Employees* (n 47) 386–87 (Street CJ), 404–05 (Kirby P), cf 409 (Mahoney JA).

which we need not explore'.⁸⁸ In 1996, Dawson J in the High Court (Brennan J agreeing on this point) answered the question thus:

no non-territorial restraints upon parliamentary supremacy arise from the nature of a power to make laws for peace, order (or welfare), and good government or from the notion that there are fundamental rights which must prevail against the will of the legislature. The doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.⁸⁹

In 2001, a majority of the Court cast doubt over the approach:

The question that the applicant posed for the Court of Appeal thus was whether or not the right to receive 'just' or 'properly adequate' compensation is such a 'deeply rooted right' as to operate as a restraint upon the legislative power of the New South Wales Parliament. What the Court of Appeal said is true of the application to this Court, namely:

'The [applicant] was unable to point to any judicial pronouncements, let alone a decided case, which indicated, at any time, that any such principle existed in the common law of England, or of the colonies of Australasia, or of Australia. It advocated the development of the common law, by the recognition of such a principle for the first time in this case.'⁹⁰

The majority continued, referring to the section of the Constitution which saved the State Constitutions:

⁸⁸ *Union Steamship* (n 48) 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). cf *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 668 (Murphy J, in dissent), as to which see George Winterton, 'Extra-constitutional Notions in Australian Constitutional Law' (1986) 16 FL Rev 223, 228–35; George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press 1996) 128–31.

⁸⁹ *Kable v The DPP for the State of New South Wales* (1996) 189 CLR 51, 76. cf the view of another High Court Justice: John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 PLR 158, 170.

⁹⁰ *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7, (2001) 205 CLR 399 [12] (Gaudron, McHugh, Gummow and Hayne JJ), citing *Durham Holdings Pty Ltd v State of New South Wales* [1999] NSWCA 324, (1999) 47 NSWLR 340 [105] (Spigelman CJ, Handley and Giles JJA agreeing).

what would be involved if the applicant's submission were accepted would not be the development of the common law of Australia. Rather, it would involve modification of the arrangements which comprise the Constitutions of the States within the meaning of s 106 of the *Constitution*, and by which the State legislatures are erected and maintained, and exercise their powers.

The applicant must seek to introduce into the constitutional text, in particular s 2(2) of the *Australia Act*, a limitation not found there. Undoubtedly, having regard to the federal system and the text and structure of '[t]he Constitution of each State of the Commonwealth' (the phrase used in s 106 of the *Constitution*), there are limits to the exercise of the legislative powers conferred upon the Parliament which are not spelled out in the constitutional text. However, the limitation for which the applicant contends is not, as a matter of logical or practical necessity, implicit in the federal structure within which State Parliaments legislate. Further, whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in *Union Steamship*, the requirement of compensation which answers the description 'just' or 'properly adequate' falls outside that field of discourse. The Court of Appeal correctly refused to disturb what, since the *Wheat Case*, has been taken to be the settled position respecting State legislative power.⁹¹

Thus the doctrine of common law constitutionalism has not found a place in Australian law, though the question is not entirely resolved.⁹²

4 Legal Certainty

'*Misera est servitus, ubi jus est vagum aut incertum.*'⁹³ ('[O]bedience to law becomes a hardship when that law is unsettled or doubtful'.⁹⁴) This maxim referred to by Coke indicates the longevity of the principle of legal certainty. Lord Mansfield CJ once said 'As to the certainty of the law ..., it would be very hard upon the profession, if the

⁹¹ *Durham Holdings* (HCA) (n 90) [13]–[14] (Gaudron, McHugh, Gummow and Hayne JJ) (citations omitted), cf [74] (Kirby J), [79] (Callinan J).

⁹² *State of South Australia v Totani* [2010] HCA 39, (2010) 242 CLR 1 [31], fn 114 (French CJ). cf *Momcilovic* (HCA) (n 5) [562] (Crennan and Kiefel JJ). See further Robert French, 'The Courts and the Parliament' (Queensland Supreme Court seminar, Brisbane, 4 August 2012) 3–8 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj04aug12.pdf> accessed 28 April 2013.

⁹³ 4 Co Inst 246.

⁹⁴ Herbert Broom, *A Selection of Legal Maxims, Classified and Illustrated* (Herbert F Manisty and Herbert Chitty eds, 7th edn, Sweet & Maxwell 1900) 120.

law was so certain, that every body knew it: the misfortune is that it is so uncertain, that it costs much money to know what it is, even in the last resort.⁹⁵ However, legal certainty is an important value which informs the tasks of the profession and especially of the courts. Legal philosophers have acknowledged it (sometimes referring to it as clarity) as an aspect of the rule of law.⁹⁶

(a) United Kingdom

Lord Diplock stated in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*⁹⁷ that ‘The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.’⁹⁸ He further articulated this principle some years later:

the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.⁹⁹

⁹⁵ *Jones v Randall* (1774) 1 Cowp 37, 40; 98 ER 954, 956. See also *Vallejo v Wheeler* (1774) 1 Cowp 143, 153; 98 ER 1012, 1017 (Lord Mansfield CJ). cf *Alderson v Temple* (1768) 4 Burr 2235, 2239; 98 ER 165, 167 (Lord Mansfield CJ). cf also *Riddle v R* (1911) 12 CLR 622, 629 (Griffith CJ): ‘as I was once reminded in England by a distinguished lawyer, the law is always certain although no one may know what it is ...’

⁹⁶ Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1969) 63–65; Robert S Summers, ‘The Principles of the Rule of Law’ (1999) 74 Notre Dame L Rev 1691, 1691, 1693–94; Jeremy Waldron, ‘The Concept and the Rule of Law’ (2008) 43 Ga L Rev 1, 6–7; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 214; John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 270.

⁹⁷ [1975] AC 591 (HL).

⁹⁸ *ibid* 638 (Lord Diplock, in dissent but not as to this point).

⁹⁹ *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL) 279.

Lord Simon stated that ‘English law ... seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law ...’¹⁰⁰

More recently, Lord Bingham has stated extra-judicially that

the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.¹⁰¹

The principle also exists under the ECHR. The European Court of Human Rights has held that

a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.¹⁰²

There can be no doubt as to the importance of the principle in the UK. It has been described by Lord Brandon and Lord Nicholls respectively as ‘of the utmost importance’¹⁰³ and as ‘one of the fundamental elements of the rule of law’.¹⁰⁴

¹⁰⁰ *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 (HL) 236.

¹⁰¹ Tom Bingham, ‘The Rule of Law’ (2007) 66 CLJ 67, 69–70. See also *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 [1], [23] (Lord Bingham, in dissent, Lord Walker agreeing), cf [38] (Lord Scott), [63] (Lord Carswell), [84] (Lord Brown); Bingham, *The Rule of Law* (n 34) 37–39.

¹⁰² *Sunday Times v UK* (1979) 2 EHRR 245 [49]. cf *R (Gillan) v Comr of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307 [34] (Lord Bingham, Lord Walker agreeing). See generally John McGarry, ‘Effecting Legal Certainty under the Human Rights Act’ [2011] JR 66.

¹⁰³ *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL) 817 (Lord Brandon, Lord Keith, Lord Brightman, Lord Griffiths and Lord Ackner agreeing), quoted with approval in *Riddell v Porteous* [1999] 1 NZLR 1 (NZCA) 11 (Blanchard J, for Thomas, Keith and Blanchard JJ).

(b) Australia

In Australia, in the recent case of *International Finance Trust Co Ltd v New South Wales Crime Commission*,¹⁰⁵ the Chief Justice of the High Court stated that

those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished.¹⁰⁶

This reflected an earlier dictum dating from when French CJ was a member of the Federal Court;¹⁰⁷ both dicta were endorsed by a unanimous Victorian Court of Appeal in considering the Victorian human rights interpretive provision,¹⁰⁸ and on appeal one member of the High Court referred to certainty as ‘[o]ne value associated with the rule of law from which the Charter departs ...’¹⁰⁹

The principle has been referred to elsewhere in the High Court¹¹⁰ and, mirroring the jurisprudential commentators cited at the beginning of this section, it

¹⁰⁴ *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349 (HL) 397. See also Lord Steyn, ‘Democracy through Law’ (n 35) 728.

¹⁰⁵ [2009] HCA 49, (2009) 240 CLR 319.

¹⁰⁶ *ibid* [42] (citation omitted).

¹⁰⁷ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 228, (2002) 123 FCR 298 [430] (French J, Wilcox J agreeing).

¹⁰⁸ *R v Momcilovic* [2010] VSCA 50, (2010) 25 VR 436 [98] (Maxwell P, Ashley and Neave JJA).

¹⁰⁹ *Momcilovic* (HCA) (n 5) [382] (Heydon J, in dissent), see also [456].

¹¹⁰ *Watson v Lee* (1979) 144 CLR 374, 381 (Barwick CJ); *Dietrich v R* (1992) 177 CLR 292, 320–21 (Brennan J).

has been described by a former Justice extra-judicially as one of four ‘great principles of the rule of law’. In his view, this fourth principle encapsulates three elements:

the law should be general in its application, equal in its operation and certain in its meaning. Each one of these qualities is in a sense perfectionist; no one of them can always be complied with absolutely in our complex present day society. However each does represent a goal to be aimed at by our legislators. ... As to certainty of meaning, its importance is that it should leave no room for arbitrary application, provide no room for the exercise of unfettered discretionary powers.¹¹¹

The previous Chief Justice of Australia has also noted the importance of legal certainty to the rule of law, after warning that

Nobody supposes that there is any area of the law in which certainty is to be pursued at all costs. Yet its value is generally acknowledged, and in some areas is given special emphasis. Legal unpredictability itself may be a form of injustice. The rule of law implies that citizens may know, with reasonable assurance, their rights and obligations, and that the outcome of litigation will depend as little as reasonably possible upon the chance factor of the identity of the judge assigned to hear the case.¹¹²

Section 141(2)(a) of the Legislation Act 2001 (ACT) refers to ‘the desirability of being able to rely on the ordinary meaning of the Act, having regard to the purpose of the Act and the provisions of the Act read in the context of the Act as a whole’. This was noted, and held to be a requirement of the general law, in a recent decision of the ACAT.¹¹³

¹¹¹ Ninian Stephen, ‘The Rule of Law’ (2003) 22 Dialogue 8, 10.

¹¹² Murray Gleeson, ‘The Value of Clarity’ in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009) 108.

¹¹³ *Allatt & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67 [76] (Prof P Spender, Presidential Member, and Mr P Sutherland, Senior Member).

(c) New Zealand

The author of the leading New Zealand constitutional law textbook has argued that in that country

Certainty of the law is a basic principle of the legal system in two senses: the law should be prospective and general in application (rather than retrospective and ad hominem), and it should confer no wider powers on public authorities than is necessary to achieve the desired social goal ...¹¹⁴

However, he argues that the principle is less apt in the context of public law:¹¹⁵

the demand for legal certainty is a deception in public law adjudication. ... The principle 'like cases ought to be decided alike' has lesser application in public law than in most other areas of the law. There is inevitably, in any model of public law adjudication, a degree of judicial discretion and choice that excludes any a priori certainty in judicial outcomes. The divining rod for the courts is the range of constitutional values and rule of law principles that underpin the common law reasoning and method.¹¹⁶

While there is a grain of truth in this, it is an overstatement of the position.

Certainty still has a role to play in the public law context,¹¹⁷ as its citation in cases dealing with criminal law,¹¹⁸ the NZBORA,¹¹⁹ mental health legislation,¹²⁰ as well as tort,¹²¹ demonstrates.

¹¹⁴ Joseph, *Constitutional & Administrative Law* (n 3) 540 (citation omitted).

¹¹⁵ cf *The Aliakmon* (n 103) 817 (Lord Brandon, Lord Keith, Lord Brightman, Lord Griffiths and Lord Ackner agreeing), quoted with approval in *Riddell* (n 103) 11 (Blanchard J, for Thomas, Keith and Blanchard JJ).

¹¹⁶ Joseph, *Constitutional & Administrative Law* (n 3) 540–41.

¹¹⁷ *Nadarajah v The Secretary of State for the Home Dept* [2005] EWCA Civ 1363 [68] (Laws LJ, Thomas LJ and Nelson J agreeing). See Lord Mance, 'Should the Law Be Certain?' (The Oxford Shrieval Lecture, Oxford, 11 October 2011) para 4 <www.supremecourt.gov.uk/docs/speech_111011.pdf> accessed 17 September 2013.

¹¹⁸ *R v Sturm* [2005] 3 NZLR 252 (NZCA) [97] (Anderson P, for Anderson P, Hammond and William Young JJ).

¹¹⁹ *Browne v Canwest TV Works Ltd* [2008] 1 NZLR 654 (NZHC) [28] (Wild J).

One New Zealand judge has warned that

... the impact of a decision on the community's ability to order its affairs should be taken into consideration in the context of the particular case and not applied in a blanket sense as a general goal of adjudication. Certainty, in other words, must be given a particular relevance to the case in hand.¹²²

5 Conclusion

In this chapter, I have sought to outline parliamentary sovereignty, common law constitutionalism and legal certainty; all important concepts, familiarity with which is necessary before considering human rights interpretive provisions in depth.

Parliamentary sovereignty provides the general background to the courts' task in statutory interpretation. The doctrine is linked to the courts' use of the concept of legislative intention. It has central importance in the legal systems of all of the jurisdictions under consideration in this thesis, although its central place is being questioned by some in the UK, and in Australia the doctrine operates subject to the arrangements under the written Constitution.

Common law constitutionalism poses a challenge to parliamentary sovereignty. Some judges and commentators in the UK and New Zealand have

¹²⁰ *Crown Health Financing Agency v P* [2008] NZCA 362, [2009] 2 NZLR 149 [186] (Hammond J, O'Regan and Robertson JJ agreeing on the relevant issue).

¹²¹ *Mayfair Ltd v Pears* [1987] 1 NZLR 459 (NZCA) 462 (Cooke P), quoted with approval in *Clemance v Hollis* [1987] 2 NZLR 471 (NZHC) 477 (Gallen J).

¹²² EW Thomas, 'Fairness and Certainty in Adjudication: Formalism v Substantialism' (1999) 9 Otago LR 459, 467. See also EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP 2005) 136.

asserted that Parliament cannot legislate to override certain fundamental or ‘constitutional’ common law rights, or at least can do so only expressly and not by necessary implication. However, this approach has lost much of its relevance with the advent of human rights legislation and it cannot be said to have gained widespread support or replaced parliamentary sovereignty as the orthodox doctrine to explain the constitutions of the relevant jurisdictions.

Finally, legal certainty, an aspect of the rule of law, was considered. This principle plays an important role in all of the jurisdictions. This is noteworthy because an approach to human rights interpretive provisions involving the identification and application of the purpose of impugned legislation at a high level of abstraction increases the scope for courts to adopt meanings which do not correspond to ordinary meanings of legislative language, which obviously leads to less certainty in interpretation.

CHAPTER FOUR

HUMAN RIGHTS AT COMMON LAW

1 The Starting Point

The traditional position of rights in English law is encapsulated in the following passage from Dicey:

the Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights ... than upon any declaration of the Rights of Man or of Englishmen.¹

Rather than relying on declarations of rights, English law has rested on the principle of residual rights, that is, ‘everybody is free to do anything, subject only to the provisions of the law’.² This approach is longstanding.³ However, certain common law interpretive principles protecting human rights have gained in importance in recent decades. Two of these principles are of especial interest in the context of this thesis. I deal with them separately, although they have occasionally been (unhelpfully⁴) conflated.⁵

¹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan & Co 1915) 194–95.

² *A-G v Observer Ltd* [1990] 1 AC 109 (HL) 283 (Lord Goff), see also 178 (Sir John Donaldson MR, in the Court below). See further *Malone v Comr of Police of the Metropolis (No 2)* [1979] Ch 344 (Ch) 357 (Sir Robert Megarry V-C). See also *Wheeler v Leicester City Council* [1985] AC 1054 (CA) 1065 (Browne-Wilkinson LJ, in dissent).

³ See, eg, *Entick v Carrington* (1765) 19 Howell’s State Trials 1030, 1066.

⁴ Wendy Lacey, ‘The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-doors, Platitudes and Window-dressing’ in Hilary Charlesworth and others (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press 2005) 85.

⁵ See, eg, *R (Burkett) v Hammersmith and Fulham LBC (No 1)* [2002] UKHL 23, [2002] 1 WLR 1593 [60] (Lord Hope); Jack Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell 2008) para 1–49.

The first of these is the so-called ‘principle of legality’,⁶ which has the effect that legislation can only abrogate certain common law rights expressly or by necessary implication. This is related to the idea of common law constitutionalism, but is rather weaker. The second principle that will be dealt with in detail in this chapter is the presumption that Parliament intends to legislate in accordance with the Crown’s obligations under international treaties (‘the treaty presumption’). There has been increased judicial attention to these principles in the last two decades or so, including at a cross-jurisdictional level,⁷ and it seems that in applying them ‘Courts have been more forthright than had been the case in the past.’⁸

2 Principle of Legality

We commence with consideration of the principle of legality. Again, Dicey provides a useful point of departure: ‘Parliamentary sovereignty has favoured the rule of law, and ... the supremacy of the law of the land both calls forth the exertion of

⁶ This name for the principle has been widely adopted despite criticism of it: *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 [26] (Blanchard J, for the Court); *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 [444], fn 779 (Heydon J); FAR Bennion, *Bennion on Statutory Interpretation: A Code* (5th edn, LexisNexis 2008) 823; JF Burrows and RI Carter, *Statute Law in New Zealand* (4th edn, LexisNexis NZ 2009) 320; Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998’ (2009) 125 LQR 598, 600; Philip Sales, ‘Three Challenges to the Rule of Law in the Modern English Legal System’ in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011) 190. cf Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications 2008) 103–04. Perhaps its appeal lies at least in part in the fact that it may be considered ‘snappy’: Michael Taggart, ‘Administrative Law’ [2003] NZL Rev 99, 110.

⁷ See Michael Kirby, ‘The Growing *Rapprochement* between International Law and National Law’ in Antony Anghie and Garry Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International 1998); Lord Lester of Herne Hill, ‘The Challenge of Bangalore: Making Human Rights a Practical Reality’ [1999] EHRLR 273.

⁸ Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis Butterworths NZ 2005) 39. See also Nick O’Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd edn, Federation Press 2004) 46; Lacey, *Implementing Human Rights Norms* (n 6) 84.

Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.’⁹

This passage was relied on by Lord Steyn in one of the seminal modern cases¹⁰ on the principle of legality, *R v Secretary of State for the Home Dept, ex p Pierson*.¹¹ In that case, Lord Browne-Wilkinson held that

A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.¹²

The most famous explanation of the principle of legality is that given by Lord Hoffmann in *R v Secretary of State for the Home Dept, ex p Simms*:¹³

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.¹⁴

⁹ Dicey (n 1) 409.

¹⁰ For a review of earlier authorities to similar effect, see Lord Browne-Wilkinson, ‘The Infiltration of a Bill of Rights’ [1992] PL 397, 404–08.

¹¹ [1998] AC 539 (HL) 587.

¹² *ibid* 575. This passage was recently cited with approval in *Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534 [46] (Lord Hope DP, Lord Walker and Lady Hale JJSC agreeing), [240] (Lord Mance JSC).

¹³ [2000] 2 AC 115 (HL). For an enlightening discussion of the political and legal background to the decision and the influence thereof on the Committee’s reasoning, see Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) 20–21.

¹⁴ *R v Secretary of State for the Home Dept, ex p Simms* [2000] 2 AC 115 (HL) 131.

The promoter of the UKHRA during its passage through the House of Lords said in a lecture two years thereafter (when most of the Act came into force) that it ‘does introduce a *limited* form of constitutional review which is able fully to coexist with the theory of parliamentary sovereignty’.¹⁵

An Australian judge around the same time noted the point about political cost in the context of the Canadian Charter: ‘The price to be paid by a legislature which interferes with protected rights and freedoms is that it must do so openly and expressly, thereby exposing its actions and motivation to close critical scrutiny.’¹⁶ The ‘constitutional dimension’¹⁷ or ‘constitutional role’¹⁸ of the principle has also been acknowledged in Australia. As the Chief Justice of Australia has put it, ‘the interpretive rule can be regarded as “constitutional” in character even if the rights and freedoms which it protects are not’.¹⁹ In the UK, the rights themselves are more likely to be viewed as constitutional.²⁰

¹⁵ Lord Irvine of Lairg, ‘Sovereignty in Comparative Perspective: Constitutionalism in Britain and America’ (2001) 76 NYUL Rev 1, 19 (citation omitted).

¹⁶ Ronald Sackville, ‘A Bill of Rights: Form and Substance’ (2000) 19 Aust Bar Rev 101, 106 (citation omitted).

¹⁷ *Evans v New South Wales* [2008] FCAFC 130, (2008) 168 FCR 576 [70] (French, Branson and Stone JJ).

¹⁸ *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203, (2007) 163 FCR 414 [113] (Black CJ, French and Weinberg JJ).

¹⁹ Robert French, ‘The Constitution and the Protection of Human Rights’ (Edith Cowan University Vice-Chancellor’s Oration, Perth, 20 November 2009) 27 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20nov09.pdf> accessed 24 April 2013; Robert French, ‘Protecting Human Rights without a Bill of Rights’ (2010) 43 J Marshall L Rev 769, 788; Robert French, ‘Liberty and Law in Australia’ (Address given to Washington University in St Louis School of Law, St Louis, 14 January 2011) 50 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj14jan11.pdf> accessed 2 June 2013; Robert French, ‘What Were They Thinking? Statutory Interpretation and Parliamentary Intention’ (Sir Frank Kitto Lecture, Armidale, 23 September 2011) 20 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj23sep11.pdf> accessed 14 August 2013; Robert French, ‘The Courts and the Parliament’ (Queensland Supreme Court seminar, Brisbane, 4 August 2012) 14 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj04aug12.pdf> accessed 28 April 2013, citing *Evans* (n 17) [70] (French,

The passage from *Simms* above has been cited with approval many times in the last decade or so, in England,²¹ Australia²² and New Zealand.²³ In the latter two countries, the principle is established by authorities old and new.

In Australia, the seminal case²⁴ is *Potter v Minahan*,²⁵ in which O'Connor J quoted with approval²⁶ the following passage from a leading book on statutes:

Branson and Stone JJ). See also Robert French, 'The Judicial Function in an Age of Statutes' (2011 Goldring Memorial Lecture, Wollongong, 18 November 2011) 22 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18nov11.pdf> accessed 26 April 2013. cf James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press 2008) 55–56.

²⁰ See Chapter Three.

²¹ See, eg, *B (a minor) v DPP* [2000] 2 AC 428 (HL) 470 (Lord Steyn, Lord Mackay and Lord Hutton agreeing); *R v Rezvi* [2002] UKHL 1, [2002] UKHL 2, [2003] 1 AC 1099 [19] (Lord Steyn, Lord Slynn, Lord Browne-Wilkinson, Lord Hope and Lord Hutton agreeing); *R (Morgan Grenfell & Co Ltd) v Special Comrs of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 [8] (Lord Hoffmann, Lord Nicholls, Lord Hope and Lord Scott agreeing), [44] (Lord Hobhouse, Lord Hope agreeing); *R (Anufrijeva) v Secretary of State for the Home Dept* [2003] UKHL 36, [2004] 1 AC 604 [27] (Lord Steyn, Lord Hoffmann and Lord Scott agreeing); *Ahmed* (n 12) [45], [61] (Lord Hope DP, Lord Walker and Lady Hale JJSC agreeing), [111] (Lord Phillips P), [193] (Lord Brown JSC, in dissent), [240] (Lord Mance JSC).

²² *The Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49, (2002) 213 CLR 543 [106] (Kirby J); *Plaintiff S157/2002 v The Commonwealth of Australia* [2003] HCA 2, (2003) 211 CLR 476 [30] (Gleeson CJ); *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562 [19] (Gleeson CJ, in dissent), *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4, (2009) 237 CLR 501 [47] (French CJ). See Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 PLR 26, 33.

²³ *Ngati Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659 (NZCA) [82] (Elias CJ, in dissent); *R v Pora* [2001] 2 NZLR 37 (NZCA) [53] (Elias CJ, for Elias CJ and Tipping J), [157] (Thomas J); *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (Elias CJ, in dissent, though not as to this point); *Cropp* (n 6) [27] (Blanchard J, for the Court); *Chief Executive of Dept of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495 [35] (Baragwanath J). The phrase 'principle of legality' has also been adopted without citation of authority: *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 [8], [27] (Keith J, for Elias CJ and Keith J).

²⁴ See *Al-Kateb* (n 22) [19] (Gleeson CJ, in dissent). See also Steven Rares, 'Legality, Rights and Statutory Interpretation' (2013 AGS Administrative Law conference, Canberra, 20 June 2013) para 19 <www.fedcourt.gov.au/_data/assets/word_doc/0020/23078/Rares-J-20130620.doc> accessed 18 September 2013.

²⁵ (1908) 7 CLR 277. cf the even earlier example from colonial Victoria of *President &c of the Shire of Kowree v President &c of the Shire of Lowan* (1897) 4 ALR 5 (VSC) 7–8 (Madden CJ).

²⁶ *Potter* (n 25) 304. See *Lacey v A-G for The State of Queensland* [2011] HCA 10, (2011) 242 CLR 573 [17] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *R v Snow* (1915) 20 CLR 315, 322–23 (Giffith CJ); *Bropho v State of Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 12 (Mason CJ); *Coco v R* (1994) 179 CLR

It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.²⁷

While the principle has often been restated,²⁸ in recent times, the leading authority has been the High Court of Australia case, *Coco v R*.²⁹

The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal

427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Electrolux Home Products Pty Ltd v The Australian Workers' Union* [2004] HCA 40, (2004) 221 CLR 309 [21] (Gleeson CJ); *X7 v Australian Crime Commission* [2013] HCA 29, (2013) 87 ALJR 858 [86] (Hayne and Bell JJ, Kiefel J agreeing). cf *Sargood Bros v The Commonwealth* (1910) 11 CLR 258, 279 (O'Connor J); *The Mayor, Aldermen, Councillors and Citizens of The City of Melbourne v Barry* (1922) 31 CLR 174, 206 (Higgins J); *R v Macfarlane, ex p O'Flanagan* (1923) 32 CLR 518, 568–69 (Higgins J); *The Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482, 522 (Isaacs and Rich JJ); *Re Yates, ex p Walsh* (1925) 37 CLR 36, 93 (Isaacs J).

²⁷ Peter Benson Maxwell, *On the Interpretation of Statutes* (J Anwyl Theobald ed, 4th edn, Sweet & Maxwell 1905) 122 (citation omitted).

²⁸ See, eg, *Sorby v The Commonwealth of Australia* (1983) 152 CLR 281, 289 (Gibbs CJ), 309 (Mason, Wilson and Dawson JJ), 316 (Brennan J); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341 (Mason ACJ, Wilson and Dawson JJ); *Baker v Campbell* (1983) 153 CLR 52, 96–97 (Wilson J), 104 (Brennan J), 116 (Deane J), 123 (Dawson J); *Re Bolton, ex p Beane* (1987) 162 CLR 514, 523 (Brennan J); *Balog v Independent Commission against Corruption* (1990) 169 CLR 625, 635–36 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 322 (Brennan J), 331 (Dawson J, Toohey J agreeing), 338 (Gaudron J), 348 (McHugh J); *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 252 (Deane, Dawson, Toohey and Gaudron JJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 43 (Brennan J); *Australian Capital Television Pty Ltd v The Commonwealth of Australia* (1992) 177 CLR 106, 183 (Dawson J); *Kruger v The Commonwealth of Australia* (1997) 190 CLR 1, 105 (Gaudron J); *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7, (2001) 205 CLR 399 [30] (Kirby J); *X7* (n 26) [158] (Kiefel J).

²⁹ *Coco* (n 26).

with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.³⁰

In the 2010 case of *Saeed v Minister for Immigration and Citizenship*,³¹ a majority of five High Court Justices quoted this passage with approval³² and applied it.³³ The other Justice sitting in the case had earlier approved the principle.³⁴

However, despite the wealth of authority for the principle of legality in Australia, doubt has been expressed over the strength of the presumption, in light of the increased level of legislative activity in modern times. As McHugh J put it:

nearly every session of Parliament produces laws which infringe the existing rights of individuals. Given the frequency with which legislatures now amend or abolish rights or depart from the general system of law, it is difficult to accept that it is ‘in the last degree improbable’ that a legislature would intend to alter rights or depart from the general system of law unless it did so ‘with irresistible clearness’.³⁵

However, this note of caution is sounded more because of the confusion in Australia between two similar doctrines: the ‘presumption against alteration of common law doctrines’ and the ‘presumption against invasion of common law

³⁰ *ibid* 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), citing *Chu Kheng Lim* (n 26) 12 (Mason CJ), cf 446 (Deane and Dawson JJ).

³¹ [2010] HCA 23, (2010) 241 CLR 252.

³² *ibid* [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

³³ *ibid* [59].

³⁴ *CTM v R* [2008] HCA 25, (2008) 236 CLR 440 [201] (Heydon J).

³⁵ *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14, (2001) 204 CLR 290 [28], cf [121] (Kirby J). See also *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33, (2003) 214 CLR 269 [36] (McHugh J); *Electrolux Home Products* (n 26) [19] (Gleeson CJ), [118] (McHugh J); Paul Finn, ‘Statutes and the Common Law: The Continuing Story’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press 2005) 56–57. cf *R v Janceski* [2005] NSWCCA 281, (2005) 64 NSWLR 10 [61]–[62] (Spigelman CJ).

rights’.³⁶ The distinction has some consequence in the context of McHugh J’s comments, as he had stated just before the passage quoted above that ‘infringement of rights and departures from the general system of law are in a different category from fundamental principles’³⁷ and had reinforced that ‘Clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend these and other fundamental principles.’³⁸ I would submit that the distinction is otherwise unimportant where fundamental rights are concerned:³⁹ as the authors of the leading Australian textbook on statutory interpretation note, they are ‘closely related’⁴⁰ and ‘most cases do not distinguish them.’⁴¹ In any event, cases such as *Saeed* indicate that the principle still has an important role to play.

Similarly to Australia, it is possible to find several New Zealand authorities for the principle of legality pre-dating the use of that term by its courts,⁴² and the citations of *Simms* above show that the principle is well established in New Zealand law.

³⁶ Spigelman, *Statutory Interpretation and Human Rights* (n 19) 39–40; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th edn, LexisNexis Butterworths Australia 2011) paras 5.27–5.36. Under English law, the distinction appears to be clearer: see Bennion (n 6) 814–16, 822–23, 829; Daniel Greenberg (ed), *Craies on Legislation: A Practitioners’ Guide to the Nature, Process, Effect and Interpretation of Legislation* (10th edn, Sweet & Maxwell 2012) paras 14.1.7–14.1.8, 19.1.9–19.1.11.

³⁷ *Malika Holdings* (n 35) [28].

³⁸ *ibid*. See Spigelman, *Statutory Interpretation and Human Rights* (n 19) 41–42; Pearce and Geddes (n 36) para 5.7. See also *Harrison v Melhem* [2008] NSWCA 67, (2008) 72 NSWLR 380 [6]–[7] (Spigelman CJ).

³⁹ *cf*, dealing with other contexts: Spigelman, *Statutory Interpretation and Human Rights* (n 19) 39–45.

⁴⁰ Pearce and Geddes (n 36) para 5.27.

⁴¹ *ibid* para 5.35. See also JJ Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 ALJ 769, 774, fn 34.

⁴² *Comr of Inland Revenue v West-Walker* [1954] NZLR 191 (NZCA) 212 (Gresson J); *Transport Ministry v Payn* [1977] 2 NZLR 50 (NZCA) 62 (Woodhouse J); *Perkins v Police* [1988] 1 NZLR 257 (NZCA) 261 (Bisson J, for the Court); *R v T* [1999] 2 NZLR 602 (NZCA) 615 (Blanchard J, for the Court).

One general point which it is convenient to note in relation to England,⁴³ Australia⁴⁴ and New Zealand⁴⁵ is that, unlike the treaty presumption, there is no requirement for ambiguity to be found in order for the principle of legality to be applied. This leaves us to consider two key points in relation to the principle: first, which rights are protected by it; and, secondly, what sort of statutory language is required in order to rebut the presumption.

(a) Which Rights?

Traditionally, the common law concentrated on personal liberty ('the common law's great prize'⁴⁶) and property rights but in the decades before the enactment of the UKHRA courts were 'increasingly ... prepared to recognise, both expressly and impliedly, the existence of certain other fundamental rights, such as freedom of expression and the right to respect for private life'.⁴⁷ Indeed, one recent list includes rights to life, '[c]ommon humanity/human dignity/freedom from destitution', non-torture, liberty, due process, privacy, religion, freedom of expression, assembly/association, property, among others.⁴⁸ Similar rights are protected in

⁴³ *Simms* (n 13) 130 (Lord Steyn); *B (a minor)* (n 21) 470 (Lord Steyn, Lord Mackay and Lord Hutton agreeing).

⁴⁴ Spigelman, 'Principle of Legality' (n 41) 779; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 MULR 449, 459. cf Spigelman, *Statutory Interpretation and Human Rights* (n 19) 37–38; Jeremy Gans and others, *Criminal Process and Human Rights* (Federation Press 2011) 34–35; Alexander Reilly and others, *Australian Public Law* (OUP 2011) 276.

⁴⁵ *Hansen* (n 23) [13] (Elias CJ, in dissent, though not as to this point).

⁴⁶ Steven Churches, 'An Activist Court or a Court Scrupulous to Common Law Standards?' (2011) 19 AJ Admin L 13, 13.

⁴⁷ Rabinder Singh, *The Future of Human Rights in the United Kingdom* (Hart Publishing 1997) 9.

⁴⁸ Michael Fordham, *Judicial Review Handbook* (5th edn, Hart Publishing 2008) paras 7.5.8–7.5.18.

Australia⁴⁹ and New Zealand.⁵⁰ It is noteworthy that there are far more authorities supporting the protection of rights to liberty and property than to some others, such as privacy and religion.⁵¹

Some rights, such as rules of natural justice and legal professional privilege, are protected by the common law, even though they are not protected by international instruments. As Lord Steyn (Lord Hoffmann and Lord Scott agreeing) noted in *R (Anufrijeva) v Secretary of State for the Home Dept*⁵² in relation to the ECHR, having referred to *Simms*: ‘the Convention is not an exhaustive statement of fundamental rights under our system of law. Lord Hoffmann’s dictum applies to fundamental rights beyond the four corners of the Convention’.⁵³

However, this works both ways. Not all of the rights enumerated in treaties would necessarily be found to form part of the common law of any of the relevant countries,⁵⁴ though, since the enactment of the human rights legislation with which

⁴⁹ *Momcilovic* (n 6) [444] (Heydon J), cf [522] (Crennan and Kiefel JJ); Spigelman, *Statutory Interpretation and Human Rights* (n 19) 26–29; Jennifer Corrin, ‘Australia: Country Report on Human Rights’ (2009) 40 VUWLR 37, 41–42; Pearce and Geddes (n 36) paras 5.6–5.7, 5.36; Reilly and others (n 44) 275.

⁵⁰ Butler and Butler, *The New Zealand Bill of Rights Act* (n 8) paras 3.3.1–3.3.28; Burrows and Carter (n 6) 320–26.

⁵¹ On how courts identify which rights are protected, see Meagher, ‘The Common Law Principle of Legality’ (n 44) 456–59.

⁵² *Anufrijeva* (n 21).

⁵³ *ibid* [27]. He had made a similar remark even before *Simms*: Lord Steyn, ‘Incorporation and Devolution — A Few Reflections on the Changing Scene’ [1998] EHRLR 153, 155.

⁵⁴ John Doyle and Belinda Wells, ‘How Far Can the Common Law Go Towards Protecting Human Rights?’ in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law/Human Rights and Equal Opportunity Commission 1994) 111; John Doyle and Belinda Wells, ‘How Far Can the Common Law Go Towards Protecting Human Rights?’ in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (OUP 1999) 27–28. cf the heterodox assertion that the ICCPR reflects ‘rights long recognised and protected by the common law’: *Behrooz v Secretary, Dept of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36, (2004) 219 CLR 486 [128] (Kirby J, in dissent). See Lacey, *Implementing Human Rights Norms* (n 6)

this thesis is concerned, this exercise has generally not been necessary. There are examples of courts being asked to apply the principle of legality and refusing to do so on the basis that no relevant right can be identified as being protected by the common law.⁵⁵ The one caveat to this is revealed by a passage found (identically) in two 2009 lectures given by the Chief Justice of Australia:

One area which awaits further exploration is the interface between human rights norms in Conventions to which Australia is a party or in customary international law and the presumption against statutory displacement of fundamental rights and freedoms of the common law. If the former can inform the latter through developmental processes ... then the content of the so-called principle of legality may be deepened.⁵⁶

105–06, cf 106–08; Gans and others (n 44) 33–34. cf Philip A Joseph and Thomas Joseph, ‘Human Rights in the New Zealand Courts’ (2011) 18 AJ Admin L 80, 80.

⁵⁵ *R v Secretary of State for the Home Dept, ex p Stafford* [1999] 2 AC 38 (HL) 49 (Lord Steyn, Lord Goff, Lord Browne-Wilkinson, Lord Slynn and Lord Clyde agreeing); *R (European Roma Rights Centre) v Immigration Officer, Prague Airport* [2004] UKHL 55, [2005] 2 AC 1 [29] (Lord Bingham, Lord Hope, Lady Hale and Lord Carswell agreeing). cf *Dietrich v R* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J).

⁵⁶ Robert French, ‘International Law and Australian Domestic Law’ (Speech to Supreme Court of New South Wales Annual conference, Pokolbin, 21 August 2009) 33 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21aug09.pdf> accessed 16 August 2013; RS French, ‘Oil and Water? International Law and Domestic Law in Australia (The Brennan Lecture, Gold Coast, 26 June 2009) para 37 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26June09.pdf> accessed 16 August 2013. See also JJ Doyle, ‘Common Law Rights and Democratic Rights’ in PD Finn (ed), *Essays on Law and Government: Volume 1: Principles and Values* (Law Book Co 1995) 159; David Dyzenhaus, Murray Hunt and Michael Taggart, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation’ (2001) 1 OJCLJ 5, 33; Hilary Charlesworth and others, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 Syd LR 423, 461; O’Neill, Rice and Douglas (n 8) 207; Bruce Harris, ‘Judicial Activism and New Zealand’s Appellate Courts’ in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (OUP 2007) 283–84; Spigelman, *Statutory Interpretation and Human Rights* (n 19) 29; French, ‘The Courts and the Parliament’ (n 19) 16; Bryan Horrigan, ‘Commonalities, Intersections, and Challenges for the Scrutiny and Interpretation of Legislation in Trans-Tasman Jurisdictions and Beyond’ (2012) 27 Aust Parl Rev 4, 19; Bryan Horrigan, ‘Reforming Rights-based Scrutiny and Interpretation of Legislation’ (2012) 37 Alt LJ 228, 230. cf Jeffrey Goldsworthy, ‘Parliamentary Sovereignty and Statutory Interpretation’ in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004) 206–07; Lacey, *Implementing Human Rights Norms* (n 6) 105; Robert McClelland, ‘Promotion and Protection of Human Rights’ (Castan Centre Human Rights conference 2009, Melbourne, 17 July 2009) 9 <www.law.monash.edu.au/castancentre/events/2009/conf-09-mcclelland-paper.pdf> accessed 10 September 2013; Gans and others (n 44) 34; Reilly and others (n 44) 251. See generally Meagher, ‘The Common Law Principle of Legality’ (n 44) 464–68.

A similar possibility has been identified in relation to the ECHR in the UK context.⁵⁷

The resulting potential for a convergence of the principle of legality and the treaty presumption will be addressed later in this chapter and again in the second half of the thesis.

A further point to note is that the rights protected, and the extent of the protection, may change over time. As McHugh J has put it, ‘What is fundamental in one age or place may not be regarded as fundamental in another age or place.’⁵⁸ One example of this is the dilution of private property rights due to an increased emphasis on control of land use in the public interest.⁵⁹

That being said, property rights, along with the right to liberty, are at the core of the principle of legality, as are a number of rights relating to criminal procedure. Beyond this core lie rights to privacy, religion, freedom of expression and freedom of assembly/association, which courts are less likely to find to be protected, but which may nonetheless be relied on occasionally. International treaties will often protect a broader range of rights, or at least will more authoritatively protect rights outside the ‘core’, though certain rights are uniquely protected by the principle of legality.

⁵⁷ Tom Campbell, ‘Incorporation through Interpretation’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 83–84. cf Michael Fordham and Thomas de la Mare, ‘Anxious Scrutiny, the Principle of Legality and the Human Rights Act’ [2000] JR 40, 47; Paul Rishworth, ‘The Rule of International Law?’ in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 273; cf Brice Dickson, ‘Judicial Activism in the House of Lords 1995–2007’ in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (OUP 2007) 382–83.

⁵⁸ *Malika Holdings* (n 35) [28]. See also *Bropho* (n 26) 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Momcilovic* (n 6) [43] (French CJ); Anthony Mason, ‘Courts, Constitutions and Fundamental Rights’ in Richard Rawlings (ed), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895–1995* (Clarendon Press 1997) 281–82; Finn (n 35) 56–57; Spigelman, *Statutory Interpretation and Human Rights* (n 19) 88–89. cf Doyle (n 56) 149, 156.

⁵⁹ Burrows and Carter (n 6) 328.

(b) Express Provision and Necessary Implication

Having discussed which rights are protected by the principle of legality, we may now consider what sort of statutory language is required in order to rebut the presumption. The present Chief Justice of Australia has said of the principle of legality, ‘In a sense, this is the common law imposing on the Parliament what might broadly be called a manner and form requirement for clear language before courts will construe a statute as displacing fundamental rights and freedoms.’⁶⁰ As Lord Steyn said in *Pierson*, the presumption ‘can be displaced by a clear and specific provision to the contrary’.⁶¹ He later emphasized extra-judicially that ‘The words “clear and specific” are not weasel words: they define the strength of the presumption.’⁶²

Two points need to be made here.⁶³ First, language may be ‘express’⁶⁴ or ‘explicit’,⁶⁵ and thereby rebut the presumption.⁶⁶ It will be rebutted by ‘provisions of a detailed, specific and unambiguous character’.⁶⁷

⁶⁰ French, ‘The Courts and the Parliament’ (n 19) 15.

⁶¹ *Pierson* (n 11) 587.

⁶² Steyn, ‘Incorporation and Devolution’ (n 53) 155.

⁶³ See generally Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 103–06.

⁶⁴ *Simms* (n 13) 131 (Lord Hoffmann); *Coco* (n 26) 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

⁶⁵ *Rezvi* (n 21) [19] (Lord Steyn, Lord Slynn, Lord Browne-Wilkinson, Lord Hope and Lord Hutton agreeing).

⁶⁶ See *Durham Holdings Pty Ltd v State of New South Wales* [1999] NSWCA 324, (1999) 47 NSWLR 340 [44]–[45] (Spigelman CJ, Handley and Giles JJA agreeing).

⁶⁷ *R (Gillan) v Comr of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307 [15] (Lord Bingham, Lord Scott, Lord Walker and Lord Brown agreeing).

Secondly, Lord Hoffmann in *Simms* also referred to the possibility of the presumption being rebutted by necessary implication.⁶⁸ The concept of a necessary implication was described ‘authoritatively’⁶⁹ by Lord Hobhouse (Lord Hope agreeing) in *R (Morgan Grenfell & Co Ltd) v Special Comrs of Income Tax*,⁷⁰ who drew a distinction between a necessary implication and a reasonable implication before continuing:

A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.⁷¹

This passage has been quoted with approval by the Supreme Court of New Zealand.⁷²

In Australia, in the leading High Court case on the principle of legality, the majority reasons addressed the concept of necessary implication in these terms:

Sometimes it is said that a presumption about legislative intention can be displaced only by necessary implication but that statement does little more than emphasize that the test is a very stringent one. As we remarked earlier, in some circumstances the presumption may be displaced by an implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, it would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with

⁶⁸ *Simms* (n 13) 131. See also *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597 (CA) 627–28 (Simon Brown LJ, Rattee LJ agreeing). cf *B (a minor)* (n 21) 470 (Lord Steyn, Lord Mackay and Lord Hutton agreeing).

⁶⁹ *B v Auckland District Law Society* [2003] UKPC 38, [2003] 2 AC 736 [58] (Lord Millett, for the Committee).

⁷⁰ *Morgan Grenfell* (n 21).

⁷¹ *ibid* [45].

⁷² *Cropp* (n 6) [26] (Blanchard J, for the Court).

fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope.⁷³

As noted above, *Simms* has met with approval in New Zealand. Furthermore, the Chief Justice of New Zealand has said extra-judicially that

Where human rights are engaged, they can be expected to prevail unless the statute under which the authority is exercised *clearly* requires a result inconsistent with the human right or unless it is limited by another human right. That conforms with what I suggest is a widely-held intuitive view that where fundamental rights are engaged, the margin appropriately ceded to the legislature will be correspondingly reduced unless it speaks *unmistakeably*.⁷⁴

The common thread in these authorities is the stringency involved in finding that an implication is necessary, and there appears to be no difference between the jurisdictions on this particular point. Before leaving the principle of legality, we should note the guiding principle articulated by Arden LJ in *Howard de Walden Estates Ltd v Aggio*:⁷⁵ ‘the more intrusive the statute is on the rights of the citizen, the clearer the wording of the statute has to be to authorise that intrusion.’⁷⁶ This demonstrates the elasticity of the presumption in its application.

⁷³ *Coco* (n 26) 438 (Mason CJ, Brennan, Gaudron and McHugh JJ), citing *Bropho* (n 26) 16–17 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also Anthony Mason, ‘Courts, Constitutions and Fundamental Rights’ (n 58) 281; Anthony Mason, ‘Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power’ (2011) 9 NZJPIL 1, 8–9.

⁷⁴ Sian Elias, ‘Fighting Talk and Rights Talk’ [2005] LSJ 70, 71–72 (emphasis added).

⁷⁵ [2007] EWCA Civ 499, [2008] Ch 26.

⁷⁶ *ibid* [64]. See also *Lightfoot* (n 68) 627 (Simon Brown LJ, Rattee LJ agreeing); John Burrows, ‘The Changing Approach to the Interpretation of Statutes’ (2002) 33 VUWLR 561, 575. cf *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70, (2003) 126 FCR 54 [92] (Black CJ, Sundberg and Weinberg JJ) (overruled in *Al-Kateb* (n 22)); *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 (NZHC) [97]–[98] (Baragwanath J, for Baragwanath and Courtney JJ); Dyzenhaus, Hunt and Taggart (n 56) 19.

3 Treaty Presumption

As a preliminary, it is necessary to note that, in the present context, consideration of the broad presumption that Parliament intends to legislate in accordance with international law is narrowed so that only obligations under treaties are being dealt with.⁷⁷ This is because

the most relevant [source of law] for international human rights purposes is treaty law. Customary international law has yet to develop an extensive settled jurisprudence of human rights obligations ... Nor has the concept of ‘general principles of international law’ made great strides in expanding the reach of international human rights law absent a treaty.⁷⁸

The position of treaties in the English legal system is that they are not ‘self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.’⁷⁹ This approach has been influential in Commonwealth countries,⁸⁰ leading to its colourful description as ‘the imperial “keep

⁷⁷ The link between the broader international law presumption and the narrower treaty presumption has been questioned: Andrew Clapham, ‘The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights’ in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (OUP 1999) 96–101.

⁷⁸ Andrew S Butler and Petra Butler, ‘The Judicial Use of International Human Rights Law in New Zealand’ (1999) 29 VUWLR 173, 174 (citations omitted). See also Katharine G Young, ‘The World, through the Judge’s Eye’ (2009) 28 Aust YBIL 27, 32; David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (3rd edn, LexisNexis Butterworths Australia 2010) para 14.3.

⁷⁹ *JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418 (HL) 500 (Lord Oliver, Lord Keith, Lord Brandon and Lord Griffiths agreeing), see also 476–77 (Lord Templeman, Lord Keith, Lord Brandon and Lord Griffiths agreeing). cf Lord Templeman, ‘Treaty-making and the British Parliament’ (1991) 67 Chi-Kent L Rev 459, 467–71. Lord Steyn’s questioning of this case, particularly with regard to its applicability to human rights treaties, is supported by neither authority nor principle: *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 [49]–[50] (Lord Steyn); Lord Steyn, ‘Democracy through Law’ [2002] EHRLR 723, 728–29; cf Dickson (n 57) 390; Philip Sales and Joanne Clement, ‘International Law in Domestic Courts: The Developing Framework’ (2008) 124 LQR 388, 398–400.

⁸⁰ *A-G for Canada v A-G for Ontario* [1937] AC 326 (PC) 347–48 (Lord Atkin, for the Committee).

the international law barbarians at the gate” approach’.⁸¹ Even where doubt has been expressed by some commentators as to whether the approach really forms part of the law,⁸² the weight of authority supports it. This is as much the case under Australian⁸³ and New Zealand⁸⁴ law as under English.

Thus it can be seen that obligations under international treaties, where not incorporated by legislation, play a limited role within the legal systems under consideration. However, they are still relevant. To return to Dicey:

judges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament will presume that Parliament did not intend to violate ... the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines ... of international morality.⁸⁵

In *R v Secretary of State for the Home Dept, ex p Brind*,⁸⁶ Lord Bridge (Lord Roskill agreeing) held that

it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will

⁸¹ Gerard van Bohemen, ‘Sir Ken’s Contribution to the Making of International Law — Observations from a Practitioner’ in Claudia Geiringer and Dean R Knight (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008) 147.

⁸² See Paul Hunt and Margaret Bedggood, ‘The International Law Dimension of Human Rights in New Zealand’ in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker’s 1995) 56–57; Charlesworth and others (n 56) 447–48.

⁸³ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–87 (Mason CJ and Deane J, Gaudron J agreeing on this point).

⁸⁴ *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (NZCA) 224 (Cooke J, Somers J agreeing), 229 (Richardson J). See also *NZ Air Line Pilots’ Association Inc v A-G* [1997] 3 NZLR 269 (NZCA) 280–81 (Keith J, for the Court).

⁸⁵ Dicey (n 1) 60 (citations omitted).

⁸⁶ [1991] 1 AC 696 (HL). An example of an older case which stands for the same proposition, indicating its longevity in English law, is *Ellerman Lines Ltd v Murray* [1931] AC 126 (HL).

presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.⁸⁷

This passage has been cited with approval in the High Court of Australia.⁸⁸

In the leading Australian case of *Teoh*,⁸⁹ which one judge said extra-judicially, relatively soon after its handing down, ‘restates and reaffirms the previous pronouncements of the High Court on that topic’,⁹⁰ the leading reasons said this:

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia’s obligations under international law.

... If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.⁹¹

Doubt as to whether this approach would continue with a differently-composed High Court of Australia⁹² has proved to be unfounded, as the many citations of the case attest.⁹³ It should be noted however that the case also stands as authority for a doctrine

⁸⁷ *Brind* (n 86) 747–48, see also 760 (Lord Ackner, Lord Lowry agreeing).

⁸⁸ *Dietrich* (n 55) 348–49 (Dawson J).

⁸⁹ *Teoh* (n 83).

⁹⁰ John W Perry, ‘At the Intersection — Australian and International Law’ (1997) 71 ALJ 841, 850.

⁹¹ *Teoh* (n 83) 287 (Mason CJ and Deane J, Gaudron J agreeing on this point) (citations omitted), cf 315 (McHugh J, in dissent). cf Anthony Mason, ‘The Relationship between International Law and National Law, and Its Application in National Courts’ (1992) 18 CLB 750, 752.

⁹² Kristen Walker, ‘Treaties and the Internationalisation of Australian Law’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press 1996) 211.

⁹³ *Kruger* (n 28) 71 (Dawson J), 87–88 (Toohey J); *Kartinyeri v The Commonwealth of Australia* [1998] HCA 22, (1998) 195 CLR 337 [97] (Gummow and Hayne JJ); *Northern Territory of Australia v GPAO* [1999] HCA 8, (1999) 196 CLR 553 [203] (Kirby J). See also *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* [2002] FCAFC 390, (2002) 125 FCR 249 [114] (Black

of ‘legitimate expectation’ in administrative law, which has been called into question by later case law.⁹⁴ This, however, leaves unaffected the status of *Teoh* as authority for the other propositions stated above,⁹⁵ which were not novel.⁹⁶

The principle is equally well established in New Zealand. The most recent oft-cited statement of the rule is found in the ‘seminal’⁹⁷ case of *NZ Air Line Pilots’ Association Inc v A-G*,⁹⁸ in which Keith J (for the Court) stated that: ‘so far as its wording allows legislation should be read in a way which is consistent with New Zealand’s international obligations ...’⁹⁹ This approach has been approved by the new Supreme Court.¹⁰⁰ Again, it is not novel.¹⁰¹

CJ, Sundberg and Weinberg JJ); *Al Masri* (n 76) [138] (Black CJ, Sundberg and Weinberg JJ) (overruled in *Al-Kateb* (n 22)).

⁹⁴ *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex p Lam* [2003] HCA 6, (2003) 214 CLR 1. See Lacey, *Implementing Human Rights Norms* (n 6) 120–24.

⁹⁵ Lacey, *Implementing Human Rights Norms* (n 6) 83.

⁹⁶ *The Jumbunna Coal Mine NL v The Victorian Coal Miners’ Association* (1908) 6 CLR 309, 363 (O’Connor J); *Zachariassen v The Commonwealth* (1917) 24 CLR 166, 181 (Barton, Isaacs and Rich JJ). See also *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 423–24 (Dixon J); *Polites v The Commonwealth* (1945) 70 CLR 60, 68–69 (Latham CJ), 74 (Rich J), 75–76 (Starke J), 77 (Dixon J), 79 (McTiernan J), 81 (Williams J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 204 (Gibbs CJ); *Dietrich* (n 55) 306 (Mason CJ and McHugh J), 348–49 (Dawson J), 360 (Toohey J); *Chu Kheng Lim* (n 26) 38 (Brennan, Deane and Dawson JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, (2011) 244 CLR 144 [247] (Kiefel J); *Momcilovic* (n 6) [18] (French CJ).

⁹⁷ Treasa Dunworth, ‘Law Made Elsewhere: The Legacy of Sir Ken Keith’ in Claudia Geiringer and Dean R Knight (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008) 126.

⁹⁸ *NZ Air Line Pilots* (n 84).

⁹⁹ *ibid* 289, citing *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (NZCA) 551 (Henry and Keith JJ, for the Court).

¹⁰⁰ *Zaoui v A-G (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 [90] (Keith J, for the Court); *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 [24] (Tipping J, for Blanchard, Tipping, McGrath and Anderson JJ, Elias CJ agreeing on this point).

¹⁰¹ *Re Award of Wellington Cooks and Stewards’ Union* (1906) 26 NZLR 394 (NZSC) 428 (Cooper and Chapman JJ), cited in *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (NZCA) 57 (Keith J, for Richardson P, Keith and Blanchard JJ); *Hemmes v Young* [2005] 2 NZLR 755 (NZCA) [97] (Hammond J). See also *Worth v Worth* [1931] NZLR 1109 (NZCA) 1121–22 (Myers CJ, Blair J agreeing); *Ashby* (n 84) 229 (Richardson J); Justice Richardson, ‘Judges as Lawmakers in the 1990s’ (1986) 12 Mon LR 35, 46.

(a) Which Rights?

The number of international treaties which are relevant in the human rights sphere has made the reach of this presumption, in terms of which rights it protects, quite broad. Aside from the ECHR,¹⁰² which obviously only has relevance in the English context (and not in Australia or New Zealand), the ICCPR¹⁰³ and the CROC¹⁰⁴ are of particular importance. Of course, we have already noted that the rights under these and other treaties do not all coincide with rights at common law.¹⁰⁵

One issue which must be noted in this context is the question as to whether the treaty presumption only applies where the legislation in question was designed to implement the relevant treaty. Under English law, this was once the position,¹⁰⁶ but the courts moved away from this as the importance of international law in the domestic sphere increased.¹⁰⁷

¹⁰² Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, OUP 2009) paras 2.39–2.52.

¹⁰³ *ibid* paras 2.56–2.61. But see, on why the ICCPR ‘attracts much less attention’ than the ECHR, Rosalyn Higgins, ‘The Relationship between International and Regional Human Rights Norms and Domestic Law’ (1992) 18 CLB 1268, 1269–71.

¹⁰⁴ Clayton and Tomlinson (n 102) paras 2.62–2.75.

¹⁰⁵ See text to n 54.

¹⁰⁶ *Salomon v Customs and Excise Comrs* [1967] 2 QB 116 (CA) 143–44 (Diplock LJ, Russell LJ agreeing).

¹⁰⁷ *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 (HL) 771 (Lord Diplock, Lord Edmund-Davies, Lord Fraser, Lord Russell and Lord Scarman agreeing). See Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing 1997) 21.

The law has developed similarly in Australia, with a change occurring in this regard from the 1970s¹⁰⁸ to the 1990s.¹⁰⁹ Although in the last decade, Gleeson CJ in at least one case seemed to adopt the older position,¹¹⁰ the weight of authority clearly indicates that legislation need not be designed to implement a treaty in order for the treaty to be taken into account in interpretation.¹¹¹

In *NZ Air Line Pilots*, Keith J (for the Court) stated that the relevant presumption ‘may apply whether or not the legislation was enacted with the purpose of implementing the relevant text’.¹¹² Keith J has re-asserted this¹¹³ and provided authority¹¹⁴ extra-judicially.¹¹⁵ It is unclear whether a similar evolution of the law as occurred in England and Australia took place in New Zealand. In 1995, two commentators stated that ‘where a statute aims to implement a treaty, the treaty can be used to interpret the statute’¹¹⁶ but there is no indication in the seminal case of *Ashby v Minister of Immigration*¹¹⁷ that the use of a treaty in statutory interpretation was

¹⁰⁸ *D & R Henderson (MFG) Pty Ltd v Collector of Customs for the State of New South Wales* (1974) 48 ALJR 132, 135 (Mason J); *Yager v R* (1977) 139 CLR 28, 43–44 (Mason J).

¹⁰⁹ *Dietrich* (n 55) 306 (Mason CJ and McHugh J); *Chu Kheng Lim* (n 26) 38 (Brennan, Deane and Dawson JJ); *Teoh* (n 83) 287 (Mason CJ and Deane J, Gaudron J agreeing on this point). See Walker (n 92) 209–11; Anthony Mason, ‘International Law as a Source of Domestic Law’ in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne UP 1997) 221, 229–30, fn 66; Lacey, *Implementing Human Rights Norms* (n 6) 96, fn 71.

¹¹⁰ *Plaintiff S157* (n 22) [30]. But see Lacey, *Implementing Human Rights Norms* (n 6) 96–99. cf *AMS v AIF* [1999] HCA 26, (1999) 199 CLR 160 [50] (Gleeson CJ, McHugh and Gummow JJ).

¹¹¹ See generally Gans and others (n 44) 26. cf, at 27, the related issue as to whether the treaty must pre-date the legislation to be interpreted, on which see *Kruger* (n 28) 71 (Dawson J); *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1 [19] (Gleeson CJ, cf [245] (Kirby J)).

¹¹² *NZ Air Line Pilots* (n 84) 289.

¹¹³ Kenneth Keith, ‘Roles of the Courts in New Zealand in Giving Effect to International Human Rights — With Some History’ (1999) 29 VUWLR 27, 39.

¹¹⁴ Kenneth Keith, ‘The Impact of International Law on New Zealand Law’ (1998) 6 Waikato L Rev 1, 27–28.

¹¹⁵ See also New Zealand Law Commission, *A New Zealand Guide to International Law and Its Sources* (NZLC R 34, 1996) para 71.

¹¹⁶ Hunt and Bedggood (n 82) 53.

¹¹⁷ *Ashby* (n 84).

limited in this way. In any event, the current position is clearly as stated in *NZ Air Line Pilots*.

(b) Ambiguity

The crucial aspect of the presumption, at least in England and Australia (the reason for the omission of New Zealand here will shortly become obvious), and one which removes some of its force, is the requirement that ambiguity be found in a statutory provision in order for the presumption to come into play. First it is necessary to explain what is meant by ‘ambiguity’ in this context:¹¹⁸

This notion of ‘ambiguity’ as a triggering condition requires explanation. Patently, a presumption of interpretation can only have a determinative effect on the outcome of litigation if there is some doubt to be resolved as to the meaning of the statutory language. If the words of a statute are clear beyond all doubt then there is no room for an interpretive presumption to operate (the presumption is rebutted). The notion of ambiguity as a triggering condition, however, generally implies something more. It implies that reference cannot be had to the international obligation until a *prior* ambiguity has been identified *on the face of the statute*. Thus, external factors (such as the existence and scope of the international obligation itself) cannot be used to inform the court’s assessment of whether the statutory language is capable of bearing more than one interpretation.¹¹⁹

It can be noted that references to ambiguity as a precondition to the application of the treaty presumption appear in the leading authorities in England and Australia. However, New Zealand has seen a change in this regard in the last three decades — from ambiguity being a precondition to it being abandoned as such.

¹¹⁸ See more generally Chapter Two.

¹¹⁹ Claudia Geiringer, ‘*Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law*’ (2004) 21 NZULR 66, 75, citing Hunt (n 107) 37–41. See also Joseph and Joseph (n 54) 86.

Before discussing this development in New Zealand, we shall pause to consider the approaches taken towards ambiguity under English and Australian law.

In England, *Brind* made clear that ambiguity is required, resolving some doubt that had arisen due to different formulations of this rule being adopted by Lord Diplock in two previous cases.¹²⁰ In *Brind*, Lord Ackner (Lord Lowry agreeing) said of the later of the two cases:

I did not take the view that Lord Diplock was intending to detract from or modify what he had said in [the earlier] case.

It is well settled that the Convention may be deployed for the purpose of the resolution of an ambiguity in English primary or subordinate legislation.¹²¹

The ambiguity requirement has also been confirmed in the context of obligations under the ECHR both before¹²² and after¹²³ the enactment of the UKHRA (it should be noted that the relevant passages in the cases in the latter category were referring to the pre-UKHRA position; since the entry into force of the UKHRA in 2000, it has not been necessary to rely on the treaty presumption to bring the ECHR into play). This is significant:

It might be thought that in the hands of ingenious lawyers, well-practised at finding ambiguities and alternative interpretations, this rule would enable

¹²⁰ *Salomon* (n 106) 143–44 (Diplock LJ, Russell LJ agreeing); *Garland* (n 107) 771 (Lord Diplock, Lord Edmund-Davies, Lord Fraser, Lord Russell and Lord Scarman agreeing). See *Hunt* (n 107) 17–21.

¹²¹ *Brind* (n 86) 760.

¹²² *Re M and H (minors) (Local Authority: Parental Rights)* [1990] 1 AC 686 (HL) 721 (Lord Brandon, Lord Elwyn-Jones, Lord Griffiths, Lord Goff and Lord Jauncey agreeing). cf *A-G v BBC* [1981] AC 303 (HL) 352 (Lord Fraser).

¹²³ *R v Lyons (No 3)* [2002] UKHL 447, [2003] 1 AC 976 [13] (Lord Bingham, Lord Millett agreeing); *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419 [65] (Lord Browne-Wilkinson, Lord Bingham, Lord Mackay, Lord Hope and Lord Hutton agreeing).

frequent reference to be made to the Convention and other human rights treaties which the United Kingdom has ratified. In fact, there are very few cases in which the Convention has made an impact in this way. In most cases, like *Brind* itself, the courts appear to have been unable to find an ambiguity in the words of the legislation.¹²⁴

Turning to Australia, in *Teoh*, the leading reasons asserted that ‘there are strong reasons for rejecting a narrow conception of ambiguity’.¹²⁵ Some commentators have seen this as underlining the strength of the presumption¹²⁶ and it has been opined that ‘[i]t is ... unlikely that the ambiguity requirement is a very great limitation ...’¹²⁷ However, it has also been noted that ‘there is a distinct difference between no requirement of ambiguity, and a requirement of ambiguity broadly or loosely framed’¹²⁸ and one High Court Justice has warned in this context that ‘Where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it.’¹²⁹ It is therefore possible that Australian courts will treat ambiguity as less of a restriction than English courts, albeit

¹²⁴ Piers Gardner and Chanaka Wickremasinghe, ‘England and Wales and the European Convention’ in Brice Dickson (ed), *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland* (Sweet & Maxwell 1997) 97–98 (citation omitted). For criticism of the courts in this respect, see Nicolas Bratza, ‘The Treatment and Interpretation of the European Convention on Human Rights by the English Courts’ in British Institute of International and Comparative Law/British Institute of Human Rights, *Aspects of Incorporation of the European Convention of Human Rights into Domestic Law* (British Institute of International and Comparative Law/British Institute of Human Rights 1993) 69.

¹²⁵ *Teoh* (n 83) 287 (Mason CJ and Deane J, Gaudron J agreeing on this point). One High Court Justice has jettisoned the ambiguity requirement altogether but this approach has not been adopted by his brethren: see, eg, *Behrooz* (n 54) [127] (Kirby J, in dissent). cf *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 (FCAFC) 303–05 (Gummow J). See Lacey, *Implementing Human Rights Norms* (n 6) 95–96; Reilly and others (n 44) 249–50.

¹²⁶ Gavan Griffith and Carolyn Evans, ‘*Teoh* and Visions of International Law’ (2000) 21 Aust YBIL 75, 80, fn 33.

¹²⁷ Stephen Donaghue, ‘Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia’ (1995) 17 Adel L Rev 213, 246.

¹²⁸ Lacey, ‘Unincorporated International Conventions’ (n 4) 106.

¹²⁹ *The State of Western Australia v Ward* [2002] HCA 28, (2002) 213 CLR 1 [956] (Callinan J). See also *Kartinyeri* (n 93) [101] (Gummow and Hayne JJ); IDF Callinan, ‘International Law and Australian Sovereignty’ (2005) 49(7) Quadrant 9, 17.

they have not gone as far as New Zealand courts, to the position of which we may now turn.

In the New Zealand Court of Appeal case of *NZ Air Line Pilots*, Keith J (for the Court) did not mention ambiguity as a precondition. Despite it being referred to in the earlier case of *Ashby* and another case in 1991,¹³⁰ by 1993 the position was said to be ‘undergoing evolution’,¹³¹ and from 1994 the cases tended to omit reference to ambiguity.¹³² Keith J asserted extra-judicially in 1998 that ‘ambiguity does not appear as a necessary prerequisite in the run of judgments’.¹³³ As one commentator noted, ‘There is no explicit judicial pronouncement that ambiguity is no longer a prerequisite to considering international law when interpreting a statute. Nonetheless, the cases bear this out.’¹³⁴ This raises the issue of whether the abandonment of the ambiguity requirement signals a shift from dualism to monism,¹³⁵ but these questions of theory

¹³⁰ *Auckland Harbour Board v Comptroller of Customs* [1992] 3 NZLR 392 (NZCA) 396 (Cooke P, Hardie Boys J agreeing).

¹³¹ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (NZCA) 266 (Cooke P, for Cooke P, Richardson and Hardie Boys JJ).

¹³² *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (NZCA) 430 (Cooke P, Casey and Gault JJ agreeing); *NZ Air Line Pilots* (n 84) 289 (Keith J, for the Court); *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (NZCA) 137 (Keith J, for Richardson P, Gault, Keith and Blanchard JJ), affd *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC); *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (NZCA) 398–99 (Eichelbaum CJ), 439 (Tipping J).

¹³³ Keith, ‘The Impact of International Law’ (n 114) 23. See also, with references to cases, Claudia Geiringer, ‘*Tavita and All That*’ (n 119) 75–76.

¹³⁴ Treasa Dunworth, ‘Public International Law’ [2000] NZL Rev 217, 224. See also John McGrath, ‘International Law’s Recent Influence on Domestic Court Decisions in New Zealand’ in Claudia Geiringer and Dean R Knight (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008) 140; Joseph and Joseph (n 54) 87. cf *Bin Zhang v Police* [2009] NZAR 217 (NZHC) [31] (Clifford J).

¹³⁵ Dunworth, ‘Public International Law’ (2000) (n 134) 225–26; Harris (n 56) 313; W John Hopkins, ‘New Zealand’ in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 446–47. cf Sian Elias, ‘The Impact of International Conventions on Domestic Law’ (Speech to Inaugural Meeting — International Association of Refugee Law Judges Australia/New Zealand Chapter, Auckland, 10 March 2000) para 11 <www.refugee.org.nz/IARLJ3-00Elias.html> accessed 13 August 2011.

as to the relationship between international and domestic law are beyond the scope of this thesis.

The lack of an ambiguity requirement has been criticized¹³⁶ and the cases show a certain amount of caution. In *Nicholls v Registrar of the Court of Appeal*,¹³⁷ Tipping J held that '[c]ourts should adopt the interpretation which best fulfils New Zealand's international obligations' '[w]here domestic legislation is genuinely open to more than one interpretation'.¹³⁸ And in *R v D*,¹³⁹ Glazebrook J (for the Court) remarked that '[i]t is true that this Court has said on a number of occasions that statutes should be interpreted in a manner consistent with international obligations, but that can only be done if the words of the statute allow it ...'¹⁴⁰

Despite these remarks, the Court of Appeal and Supreme Court have applied the treaty presumption so robustly in some cases,¹⁴¹ that one commentator has concluded that 'if the underlying international obligation is sufficiently compelling, nothing less than [*sic*] express statutory language may suffice to overcome it'.¹⁴² It has

¹³⁶ Burrows (n 76) 579. cf Jim Evans, 'Questioning the Dogmas of Realism' [2001] NZL Rev 145, 157–59; Jim Evans, 'Questioning the Dogmas of Realism' in Rick Bigwood (ed), *Legal Method in New Zealand: Essays and Commentaries* (Butterworths (NZ) 2001) 293–95.

¹³⁷ *Nicholls* (n 132).

¹³⁸ *ibid* 439.

¹³⁹ [2003] 1 NZLR 41 (NZCA).

¹⁴⁰ *ibid* [25], citing *NZ Air Line Pilots* (n 84) 289 (Keith J, for the Court).

¹⁴¹ *Sellers* (n 101); *Zaoui (No 2)* (n 100); *Ye* (n 100).

¹⁴² Claudia Geiringer, 'International Law through the Lens of Zaoui: Where Is New Zealand At?' (2006) 17 PLR 300, 317. See also Claudia Geiringer, 'Zaoui Revisited' [2005] NZLJ 285, 288; Claudia Geiringer, 'Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case' in Rick Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ 2006) 182; Claudia Geiringer, '*Ding v Minister of Immigration; Ye v Minister of Immigration*' (2008) New Zealand Centre for Public Law Working Paper VUW-NZCPL-001, 22–24 <www.victoria.ac.nz/law/centres/nzcpl/publications/working-papers/publications/VUW-NZCPL-001.pdf> accessed 10 September 2013.

been said that in one of these cases ‘the Court ... stretched the presumption of consistency to its extreme’.¹⁴³

However, these notes of caution do not detract from the fact that the ambiguity requirement has been abandoned in New Zealand and this marks out that jurisdiction as different from England and Australia in this respect.¹⁴⁴ As a current New Zealand Supreme Court judge has noted, ‘Sir Kenneth gave new force to the presumption ... at a time when in England and elsewhere it seemed to be moribund.’¹⁴⁵ One of the effects of this phenomenon is that it leaves the only substantial difference between the principle of legality and the treaty presumption as the range of rights covered. In terms of the importance of statutory language, the principles would now appear to be identical.¹⁴⁶ The Supreme Court has invoked them in tandem, even without reference to the NZBORA.¹⁴⁷ Their combination has been described as creating a ‘potent double helix’.¹⁴⁸ This has important ramifications for the relationship of these principles to s 6 of the NZBORA, to which we shall turn in Chapter Six. For now, it remains simply to draw some basic conclusions from the above survey.

¹⁴³ Treasa Dunworth, ‘Public International Law’ [2006] NZL Rev 367, 376, on *Zaoui*. See also David Erdos, ‘Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand’ (2009) 34 L & Soc Inquiry 95, 111. On *Sellers*, see Paul Myburgh, ‘Shipping Law’ [1999] NZL Rev 387, 398; Evans, ‘Questioning the Dogmas of Realism’ (NZL Rev) (n 136) 157–59; Evans, ‘Questioning the Dogmas of Realism’ (Bigwood) (n 136) 293–95; Harris (n 56) 312–13; Sales and Clement (n 79) 393, 402; Bohemen (n 81) 148; Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 265–68; cf J Scott Davidson, ‘Freedom of Navigation on the High Seas: *Sellers v Maritime Safety Inspector*’ (1999) 14 IJMCL 435, 438–39; McGrath (n 134) 143. On *Ye*, see Hanna Wilberg, ‘Administrative Law’ [2010] NZL Rev 177, 201, cf 201–02.

¹⁴⁴ Meagher, ‘The Common Law Principle of Legality’ (n 44) 466–68; Dan Meagher, ‘The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)’ [2012] NZL Rev 465, 475–83.

¹⁴⁵ McGrath (n 134) 143.

¹⁴⁶ cf Geiringer, ‘International Law through the Lens of *Zaoui*’ (n 142) 318.

¹⁴⁷ *Zaoui v A-G* [2005] 1 NZLR 577 (NZSC) [44] (Elias CJ, Gault, Keith, Blanchard and Eichelbaum JJ).

¹⁴⁸ Michael Taggart, ‘Rugby, the Anti-apartheid Movement, and Administrative Law’ in Rick Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ 2006) 82.

4 Conclusion

The main points which can be gleaned from this chapter are as follows. First, there are some differences in terms of which rights are protected by the respective principles, so in some cases the decision as to the principle on which to rely will depend on the right sought to be protected.

Secondly, in England and Australia, the principle of legality has much more potential for application than the treaty presumption, because of the ambiguity requirement that exists in relation to the latter in those countries. But the former principle depends much on the malleability of statutory language, and where such language is found to be explicit the presumption will have no application.

Thirdly, in New Zealand, the abandonment of the ambiguity requirement means that the two principles are converging on the issue as to the role of statutory language. This opens up the possibility of flow-on effects on the application of s 6 of the NZBORA, which will be explored further in Chapter Six.

CHAPTER FIVE
LEGISLATIVE RIGHTS-CONSISTENT
INTERPRETATION IN THE UNITED KINGDOM

1 Introduction

The literature on legislative rights-consistent interpretation under UK law is vast.¹ The period between the enactment of the UKHRA and its coming into force saw an explosion of writing on the subject, which led Lord Hope to remark that ‘So much has been said and written about human rights during the past two years that it is hard to find anything to say in a short lecture that has not been said before, several times.’² Given the comparative nature of this thesis, it is therefore necessary to be careful of becoming embroiled in all of the disputes which have arisen on different points about the UKHRA. Our focus is firmly on s 3, and to some extent s 4.

The interpretive provision of the UKHRA, s 3, is as follows:

Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

¹ Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011) 154, fn 43.

² Lord Hope of Craighead, ‘Human Rights — Where Are We Now?’ [2000] EHRLR 439, 439. See also Ian Leigh, ‘The UK’s Human Rights Act 1998: An Early Assessment’ in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 323; James Allan, ‘Down Under Exceptionalism’ (2010) 29 UQLJ 143, 144, fn 7.

- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

By way of introduction, a few comments illustrate the range of views and some of the difficulties presented by this provision. One commentator described it as ‘a deeply mysterious provision posing various problems of interpretation’,³ while another retorted: ‘An alternative view is that it is plain English.’⁴ Also vividly described as a “‘bend me, shape me” clause’,⁵ it is reasonable to argue that ‘The express words of section 3(1) are so vague that they do not provide a clear outline of the limits of possibility.’⁶ Thus, in a sense, ‘in practice, Parliament has given the judiciary carte blanche to determine when it is impossible to interpret statutes in a manner compatible with Convention rights’.⁷

At least one commentator has placed emphasis on s 3(2) in the task of determining what s 3(1) mandates,⁸ though this has drawn criticism⁹ and it is difficult

³ Geoffrey Marshall, ‘Interpreting Interpretation in the Human Rights Bill’ [1998] PL 167, 167. See also Francis Bennion, ‘What Interpretation Is “Possible” under Section 3(1) of the Human Rights Act 1998?’ [2000] PL 77, 88; FAR Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (OUP 2001) 160.

⁴ Dominic McGoldrick, ‘The United Kingdom’s Human Rights Act 1998 in Theory and Practice’ (2001) 50 ICLQ 901, 914.

⁵ David Bonner and Cosmo Graham, ‘The Human Rights Act 1998: The Story So Far’ (2002) 8 EPL 177, 184; David Bonner, Helen Fenwick and Sonia Harris-Short, ‘Judicial Approaches to the Human Rights Act’ (2003) 52 ICLQ 549, 555.

⁶ Alison L Young, ‘Judicial Sovereignty and the Human Rights Act 1998’ (2002) 61 CLJ 53, 65.

⁷ *ibid.*

⁸ CA Gearty, ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) 118 LQR 248; Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2004) 53–54.

⁹ Gavin Phillipson, ‘(Mis)-reading Section 3 of the Human Rights Act’ (2003) 119 LQR 183, 183–85; TRS Allan, ‘Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective’ (2006) 59 CLP 27, 46–47.

to see how it really assists in practice; s 3(1) obviously has limits but s 3(2) does little to specify them.

As Lady Hale has remarked, ‘the interpretative duty in section 3 is designed to march hand in hand with the power to make a declaration of incompatibility in section 4’.¹⁰ The latter provision is as follows:

Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

...

(6) A declaration under this section (‘a declaration of incompatibility’)—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

The close relationship between ss 3 and 4 has been illustrated by the assertion that ‘the examples of arguable overuse of section 3 are often a reaction to the relative weakness of section 4. If section 4 were stronger, there would be much less need to use section 3.’¹¹ We need not dwell on s 4 here; its role will emerge in later consideration of case law. However, it is relevant to note that

Whilst it is true that the scheme of the HRA gives precedence to s.3 in that a declaration of incompatibility can only be made where a compatible interpretation is not ‘possible’, this does not mean that there is any *a priori* assumption about which section will be used more frequently in practice. That

¹⁰ *Jain v Trent Strategic HA* [2009] UKHL 4, [2009] 1 AC 853 [46]. On the possibility of similar declarations at common law, see David Jenkins, ‘Common Law Declarations of Unconstitutionality’ (2009) 7 ICON 183.

¹¹ Robert Wintemute, ‘The Human Rights Act’s First Five Years: Too Strong, Too Weak, or Just Right?’ (2006) 17 KCLJ 209, 215. See also Rosalind Dixon, ‘A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?’ (2009) 37 FL Rev 335, 343.

will depend on the nature of the cases that arise and whether the offending provision can be reinterpreted without undoing the very *purpose* of the statute in question.¹²

Three further points must be mentioned for completeness. The first is that, subject to one brief exception, I shall not deal with what is commonly known as the ‘Marleasing principle’ — an interpretive rule which UK courts apply in relation to legislation where its subject matter is touched by European Union law — which, though admittedly related to the rule under s 3 of the UKHRA,¹³ has limited relevance for comparative purposes on account of its absence in the Antipodes.¹⁴ The second point is that I do not intend to place any emphasis on a distinction between ‘interpretation’ and ‘legislation’ in terms of the judicial role under s 3. The terms tend to obscure the nature of judicial law-making and therefore provide little assistance in identifying the correct approach to s 3.¹⁵ The third point is that I shall leave to one side s 19 of the UKHRA, which provides for statements of compatibility to be made by Ministers promoting legislation. This is because such statements ‘are no more than

¹² Francesca Klug and Keir Starmer, ‘Standing Back from the Human Rights Act: How Effective Is It Five Years On?’ [2005] PL 716, 722 (emphasis added), citing Aileen Kavanagh, ‘Statutory Interpretation and Human Rights after Anderson: A More Contextual Approach’ [2004] PL 537.

¹³ See, eg, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [45], [48] (Lord Steyn), [118] (Lord Rodger). cf *Assange v Sweden* [2012] UKSC 22, [2012] 2 AC 471 [203] (Lord Mance JSC, Lady Hale JSC agreeing). See generally Abigail Schaeffer, ‘Linking *Marleasing* and s. 3(1) of the Human Rights Act 1998’ [2005] JR 72.

¹⁴ It is also arguable in any event that ‘courts have been able to extract little guidance from the Marleasing case law in section 3 cases’: Jan van Zyl Smit, ‘Statute Law’ in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 84.

¹⁵ Richard Clayton, ‘The Limits of What’s “Possible”: Statutory Construction under the Human Rights Act’ [2002] EHRLR 559; Aileen Kavanagh, ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’ (2004) 24 OJLS 259; TRS Allan (n 9) 37–38; David Feldman, ‘Human Rights’ in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876–2009* (OUP 2009) 557; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 29–37. On judicial law-making generally, see, eg, Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale UP 1921); Lord Reid, ‘The Judge as Law Maker’ (1972) 12 JSPTL 22; Michael McHugh, ‘The Law-making Function of the Judicial Process — Part I’ (1988) 62 ALJ 15; Michael McHugh, ‘The Law-making Function of the Judicial Process — Part II’ (1988) 62 ALJ 116; Justice Richardson, ‘Judges as Lawmakers in the 1990s’ (1986) 12 Mon LR 35.

expressions of opinion by the minister. They are not binding on the court, nor do they have any persuasive authority.’¹⁶

2 The Relationship of the Interpretive Provision to the Common Law Interpretive Principles

It will be remembered that in the previous chapter on common law principles an important issue was the role of ambiguity as a precondition to the application of the relevant interpretive rules. It is therefore necessary to deal with the same point as it relates to s 3. Despite differing views on the continuing relevance of ambiguity in this sense around the time of the UKHRA’s enactment — some arguing for or asserting its abandonment,¹⁷ some arguing for its retention¹⁸ — leading authorities indicate that a finding of ambiguity is no longer required. Lord Steyn has stated that the interpretive obligation under s 3 ‘applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings’.¹⁹ Likewise, Lord Hope, in

¹⁶ *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 [69] (Lord Hope). See also Philip Sales and Richard Ekins, ‘Rights-consistent Interpretation and the Human Rights Act 1998’ (2011) 127 LQR 217, 229, fn 52.

¹⁷ Lord Irvine of Lairg, ‘The Development of Human Rights in Britain under an Incorporated Convention on Human Rights’ [1998] PL 221, 228; Ian Leigh and Laurence Lustgarten, ‘Making Rights Real: The Courts, Remedies, and the Human Rights Act’ (1999) 58 CLJ 509, 511; ATH Smith, ‘The Human Rights Act 1998: Part 1: The Human Rights Act and the Criminal Lawyer: The Constitutional Context’ [1999] Crim LR 251, 258. cf J Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 LQR 247, 262–63.

¹⁸ Geoffrey Marshall, ‘Patriating Rights — With Reservations: The Human Rights Bill 1998’ in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998) 80–81; William Wade, ‘The United Kingdom’s Bill of Rights’ in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998) 66; Geoffrey Marshall, ‘Two Kinds of Compatibility: More about Section 3 of the Human Rights Act 1998’ [1999] PL 377, 378, 380; Tom Campbell, ‘Incorporation through Interpretation’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 87. cf Murray Hunt, ‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession’ (1999) 26 JL & Soc 86, 97–98, on Wade; Leigh and Lustgarten (n 17) 536, describing ‘Geoffrey Marshall’s ingenious search for ambiguities’.

¹⁹ *R v A* (n 16) [44].

the same case, asserted that ‘There is no need to identify an ambiguity or absurdity.’²⁰ In a later case, Lord Nicholls (Lord Mackay, Lord Browne-Wilkinson, Lord Mustill and Lord Hutton agreeing) confirmed that the use of s 3(1) is not ‘dependent on the existence of ambiguity’.²¹ Lord Nicholls reiterated this in the leading decision²² on s 3:

It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may none the less require the legislation to be given a different meaning.²³

In the same case, Lord Steyn also maintained his earlier position²⁴ and even the dissentient, Lord Millett, agreed with the majority on this point.²⁵ There is therefore no room for doubt that ambiguity is not a precondition to the application of s 3. This has been described as marking ‘a sea change in the judiciary’s interpretative role’.²⁶

Having dealt with this particular point of comparison between s 3 and the common law principles, we may turn to a more general consideration of their relationship. Again, opinion was divided shortly before and after the enactment of the UKHRA as to whether it went further than the common law principles. However,

²⁰ *ibid* [108].

²¹ *Re S (minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291 [37].

²² See Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in the First Decade* (Hart Publishing 2008) 103; Kavanagh, *Constitutional Review* (n 15) 28; Philip Sales, ‘Three Challenges to the Rule of Law in the Modern English Legal System’ in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011) 198, fn 31.

²³ *Ghaidan* (n 13) [29].

²⁴ *ibid* [44].

²⁵ *ibid* [67].

²⁶ Douglas W Vick, ‘The Human Rights Act and the British Constitution’ (2002) 37 *Tex Intl LJ* 329, 366.

several judges²⁷ and other commentators²⁸ suggested that s 3 would require a departure from traditional principles of interpretation. The promoter of the Bill²⁹ in the House of Lords, Lord Irvine LC, seemed to support this position in an oft-cited article,³⁰ stating that s 3 ‘goes far beyond the present rule’.³¹ Although, in another context, he set out, having referred to the courts ‘applying a strong presumption that Parliament does not intend to interfere with the citizen’s right of access to the courts’ as an example of ‘the common law’s commitment to fundamental rights’, that

the contribution of the Human Rights Bill will be to strengthen and enlarge an already existing edifice of rights protection in English law, the foundations of that are to be found in the common law itself. In this way the Human Rights Bill is wholly in tune with the current nature of public law in the UK, given that both the Bill’s objective of promoting rights and its interpretive methodology are *already*, and increasingly, embraced by the courts.³²

²⁷ Lord Steyn, ‘Incorporation and Devolution — A Few Reflections on the Changing Scene’ [1998] EHRLR 153, 155; Lord Cooke of Thorndon, ‘The British Embracement of Human Rights’ [1999] EHRLR 243, 252–53; Lord Hope of Craighead, ‘The Human Rights Act 1998: The Task of the Judges’ (1999) 20 Stat LR 185, 190. cf JJ Spigelman, ‘Rule of Law — Human Rights Protection’ (1999) 18 Aust Bar Rev 29, 30.

²⁸ Ben Emmerson, ‘This Year’s Model — The Options for Incorporation’ [1997] EHRLR 313, 315; Lord Lester, ‘First Steps Towards a Constitutional Bill of Rights’ [1997] EHRLR 124, 127; Anthony Hooper, ‘The Impact of the Human Rights Act on Judicial Decision-making’ [1998] EHRLR 676, 683; William Wade, ‘Human Rights and the Judiciary’ [1998] EHRLR 520, 529; Michael J Beloff, ‘What Does It All Mean?’ in Lammy Betten (ed), *The Human Rights Act 1998: What It Means: The Incorporation of the European Convention on Human Rights into the Legal Order of the United Kingdom* (Martinus Nijhoff Publishers 1999) 29; Jason Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (John Wiley & Sons 1999) paras 2.41, 2.45, 2.67, 2.73; Hunt (n 18) 96–97; Helen Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act* (Longman 2000) 43; Martin Porter, ‘Marking the First Anniversary of the Human Rights Act’ (2001) 151 NLJ 1204, 1205.

²⁹ Human Rights HL Bill (1997–98) 119.

³⁰ In the course of a parliamentary debate on the Bill that became the UKHRA, Lord Lester quoted several passages to the House: HL Deb 19 January 1998, vol 584, cols 1291–92.

³¹ Irvine, ‘The Development of Human Rights’ (n 17) 228. cf Marshall, ‘Two Kinds of Compatibility’ (n 18) 378.

³² Alexander Andrew Mackay Irvine, ‘Constitutional Change in the United Kingdom: British Solutions to Universal Problems’ (1998) 23 J Sup Ct Hist 26, 33 (emphasis added). See also Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage Books 2009) 135.

In *R v Secretary of State for the Home Dept, ex p Simms*,³³ Lord Hoffmann held that ‘the principle of legality will be expressly enacted as a rule of construction in section 3’.³⁴ This has proved to be an understatement. In a 2010 case, Lord Phillips P referred to Lord Hoffman’s dictum before indicating his belief that ‘the House of Lords has extended the reach of section 3 of the HRA beyond that of the principle of legality’.³⁵ Even more recently, one leading commentator stated that ‘s. 3 propelled human rights protection forward from the weaker conventional principle of legality’.³⁶

When the question arose in the House of Lords, Lord Steyn reiterated an earlier extra-judicial statement:³⁷

Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it ... Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so.³⁸

³³ [2000] 2 AC 115 (HL). See Chapter Four.

³⁴ *ibid* 132. See also *Ghaidan* (n 13) [104] (Lord Rodger); Campbell, ‘Incorporation through Interpretation’ (n 18) 82–83. cf Michael Fordham and Thomas de la Mare, ‘Anxious Scrutiny, the Principle of Legality and the Human Rights Act’ [2000] JR 40, 48; Vick (n 26) 355, taking a similar approach to the treaty presumption.

³⁵ *Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534 [112]. cf Lord Phillips, ‘The Art of the Possible: Statutory Interpretation and Human Rights’ (First Lord Alexander of Weedon Lecture, London, 22 April 2010) 45 <www.brickcourt.co.uk/uploads/lecture---the-art-of-the-possible-by-lord-phillips.pdf> accessed 13 August 2013. On this decision and the legislative response thereto, see Alison L Young, ‘The Rule of Law in the United Kingdom: Formal or Substantive?’ (2012) 6 *Vienna J on Intl Const L* 259, 266–67.

³⁶ Michael Fordham, ‘Common Law Rights’ [2011] JR 14, 17. He proceeded to suggest (at 20) that the courts’ experience with s 3 may lead to a strengthening of the principle of legality. An alternative, heterodox, view is that the principle of legality was always much stronger than most commentators concede: see TRS Allan (n 9).

³⁷ Steyn, ‘Incorporation and Devolution’ (n 27) 155.

³⁸ *R v A* (n 16) [44]. See Peter Mirfield, ‘Human Wrongs?’ (2002) 118 *LQR* 20, 25.

Lord Hope did the same:³⁹ ‘The rule of construction which section 3 lays down is quite unlike any previous rule of statutory interpretation.’⁴⁰

Most commentators have accepted this characterization,⁴¹ and later judicial⁴² and extra-judicial⁴³ statements support it. On the other hand, there is an alternative view, shared by at least one prominent judge,⁴⁴ which emphasizes the continuity between the common law principles and s 3.⁴⁵ This divergence of views has been summarized by one leading constitutional theorist as follows:

³⁹ Hope ‘The Task of the Judges’ (n 27) 190.

⁴⁰ *R v A* (n 16) [108]. See also *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545 [78] (Lord Hope).

⁴¹ Keir Starmer and Francesca Klug, ‘Incorporation through the “Front Door”: The First Year of the Human Rights Act’ [2001] PL 654, 664; Bonner and Graham (n 5) 184; Julie Debeljak, ‘Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights’ (2002) 26 MULR 285, 309; Julie Debeljak, ‘The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection’ (2003) 9 AJHR 183, 206; Gearty, ‘Reconciling Parliamentary Democracy’ (n 8) 250; Claire O’Brien and Francesca Klug, ‘The First Two Years of the Human Rights Act’ [2002] PL 649, 650; Bonner, Fenwick and Harris-Short (n 5) 556; Stephen Gardbaum, ‘Reassessing the New Commonwealth Model of Constitutionalism’ (2010) 8 ICON 167, 195; Stephen Gardbaum, ‘How Successful and Distinctive Is the Human Rights Act? An Expatriate Comparatist’s Assessment’ (2011) 74 MLR 195, 201, 207; Sales and Ekins (n 16) 222; Paul Brady, ‘Convention Compatible Statutory Interpretation: A Comparison of British and Irish Approaches’ (2012) 33 Stat LR 24, 31; Anthony Bradley, ‘The Human Rights Act 1998 and the Development of Administrative Law in the United Kingdom’ in Katja S Ziegler and Peter M Huber (eds), *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (Hart Publishing 2013) 132.

⁴² *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 [61] (Lord Nicholls). See also *Cachia v Faluyi* [2001] EWCA Civ 998, [2001] 1 WLR 1966 [20]–[21] (Brooke LJ, Lord Phillips MR and Henry LJ agreeing); *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828 [41]–[42] (Brooke LJ, Latham and Kay LJ agreeing).

⁴³ Stephen Sedley, ‘The Rocks or the Open Sea: Where Is the Human Rights Act Heading?’ (2005) 32 JL & Soc 3, 17.

⁴⁴ Lady Justice Arden, ‘The Interpretation of UK Domestic Legislation in the Light of European Convention on Human Rights Jurisprudence’ (2004) 25 Stat LR 165, 168; Mary Arden, ‘The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament’ (2008) 67 CLJ 487, 495; Mary Arden, ‘The Impact of Judicial Interpretation on Legislative Drafting’ [2008] The Loophole 4, 10.

⁴⁵ Richard Ekins, ‘A Critique of Radical Approaches to Rights Consistent Statutory Interpretation’ [2003] EHRLR 641, 642; Tom R Hickman, ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’ [2005] PL 306, 310; Tom Hickman, ‘The Courts and Politics after the Human Rights Act: A Comment’ [2008] PL 84, 98–99; Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) 61; Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 ICON 86, 103; Sales and Ekins (n 16) 232. cf Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012) 287.

If it had not been for the emphatic governmental assertions in the debates on the Bill and in the White Paper that preceded it that a departure from the existing principles of interpretation was being ushered in where compliance with Convention rights was in issue, few would have thought that to be the case. Examination of the statute itself might have suggested that s.3 contained merely an emphatic legislative endorsement of the existing presumption about compliance with human rights provisions where the language implied the possibility of alternative readings. ...

Nevertheless there has been from the beginning a well-orchestrated view that s.3 necessitates a new departure in interpretative method that permits even clear and unambiguous words to be read or re-read in a way that upholds a rights claim. Even more startling has been the suggestion that since the passing of the 1998 Act the intention of Parliament in enacting legislation is no longer of the first importance, or even relevant (and, since s.3 applies to legislation whenever enacted, must presumably now be taken not to have been relevant in the past for purposes of current consideration).⁴⁶

It is this question as to the role of intention to which we may now turn.

3 The Role of Intention

The effect of s 3 on the relevance of intention is one of the issues that has greatly occupied courts and commentators. It has been suggested that ‘the Act gives encouragement to liberal methods of interpretation which have the potential to undermine the traditional ethics of adjudication that require a basic commitment to respecting the intention of the legislature as expressed in the enacted text’.⁴⁷ Even the judge who said that s 3 is not ‘anything like as revolutionary as strict constructionists have suggested’ and described parliamentary intent as ‘a deferential but fictional account of the meaning of the text’⁴⁸ later reasserted its importance, explaining his

⁴⁶ Geoffrey Marshall, ‘The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained?’ [2003] PL 236, 236–37.

⁴⁷ Tom Campbell, ‘Democratising Human Rights’ in Burton M Leiser and Tom D Campbell (eds), *Human Rights in Philosophy and Practice* (Ashgate 2001) 192.

⁴⁸ *R (Wooder) v Feggetter* [2002] EWCA Civ 554, [2003] QB 219 [48] (Sedley LJ).

earlier comment as ‘a sideswipe at those who think that a Parliamentary intent can anyway be read off the face of any but the clearest legislation’.⁴⁹ It has been said that the UKHRA ‘is likely to render the problems for the court in divining and attributing significance to Parliamentary intention even more intractable now than they were before’.⁵⁰ Is this true?

(a) Revising Previous Interpretations

One illustrative aspect of the role of intention arises where courts are asked to depart from pre-UKHRA authorities in applying s 3. It is arguable that revising previous interpretations involves departing from the intent of the original enacting legislature, as identified in the earlier cases.

Early indications were that previous interpretations of statutory provisions would require reconsideration where s 3 came into play.⁵¹ This was confirmed by the Court of Appeal⁵² and, later, in the House of Lords. For example, Lord Hope has stated that ‘it is clear that the courts are not bound by previous authority as to what the statute means’.⁵³ Lord Hobhouse starkly summarized the change:

⁴⁹ Sedley, ‘The Rocks or the Open Sea’ (n 43) 11.

⁵⁰ Mirfield (n 38) 24.

⁵¹ Hope ‘The Task of the Judges’ (n 27) 190; Hunt (n 18) 98; Leigh and Lustgarten (n 17) 511; ATH Smith, ‘The Human Rights Act and the Criminal Lawyer’ (n 17) 258; ATH Smith, ‘The Human Rights Act 1998: The Constitutional Context’ in *The Centre for Public Law at the University of Cambridge, The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999) 8; Bennion, ‘What Interpretation Is “Possible”’ (n 3) 91; Fenwick, *Civil Rights* (n 28) 43; Beatson, ‘The Role of Statute’ (n 17) 263–64; Bennion, *Understanding Common Law Legislation* (n 3) 164.

⁵² *Ashworth Hospital Authority v MGN Ltd* [2001] 1 WLR 515 (CA) [79] (Lord Phillips MR, May and Laws LJ agreeing).

⁵³ *Lambert* (n 40) [81].

Before the 1998 Act came into force, legislation had to be construed applying the ordinary canons of construction: the legislation would therefore have the legal effect x. After the 1998 Act came into force, the same legislation may, because of the requirement that ‘so far as it is possible’ the legislation ‘must be read and given effect in a way which is compatible with the Convention rights’, have legal effect y.⁵⁴

There is no shortage of examples of this “‘year zero” approach to *stare decisis*’⁵⁵ from the years following the UKHRA’s coming into force.⁵⁶

One judge, writing extra-judicially, noted this impact and then went on to highlight a further complication:

Where the position is that the courts have construed legislation on a previous occasion in accordance with the Convention but Convention jurisprudence has since then itself moved on in accordance with the evolutive approach adopted by the Strasbourg court, it is an open question whether the doctrine of precedent applies so that only a higher court may depart from a previously Convention compliant interpretation.⁵⁷

⁵⁴ *Wilson* (HL) (n 42) [128]. See also *R (Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2003] 1 AC 837 [53] (Lord Steyn, Lord Bingham, Lord Nicholls, Lord Hutton, Lord Scott and Lord Rodger agreeing); *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182 [34] (Lord Bingham, for the Committee).

⁵⁵ David Mead, ‘Swallowing the Camel, Straining at the Gnat: The Implications of *Mendoza v Ghaidan*’ [2003] EHRLR 501, 509.

⁵⁶ See O’Brien and Klug, ‘The First Two Years’ (n 41) 650–51; Jack Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell 2008) para 5–77.

⁵⁷ Arden, ‘The Interpretation of UK Domestic Legislation’ (n 44) 178, see further 169. See also Leigh and Lustgarten (n 17) 511; Fenwick, *Civil Rights* (n 28) 46; Richard Ekins, ‘Rights, Interpretation and the Rule of Law’ in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011) 174–75. cf *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465 [40]–[45] (Lord Bingham, Lord Nicholls, Lord Hope, Lord Scott, Lord Walker, Lady Hale and Lord Brown agreeing).

(b) The Role of Intention Generally

Early in the life of the UKHRA, one prominent English judge asserted that s 3 ‘will abolish the old lynch-pin of the search for Parliamentary intention’.⁵⁸ A chorus of commentators expressed similar views,⁵⁹ while others were more circumspect.⁶⁰ Lord Hope took a middle position:

the judges need be under no inhibitions, on the grounds of parliamentary sovereignty, about departing from what might be thought to have been the intention of Parliament in their search for a possible meaning of the words used. ...

So much for the theory. In practice however the judges may find it difficult to differ from the intention of the legislature which is to be found in the ordinary meaning of the words used.⁶¹

The first cases in the Court of Appeal produced apparently conflicting dicta, emanating from the then Lord Chief Justice, in support of the continuity of the role of intention⁶² and in favour of a change in approach.⁶³

⁵⁸ Lord Justice Laws, ‘An Overview’ in The Centre for Public Law at the University of Cambridge, *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999) xiv. See also Lord Justice Laws, ‘The Impact of the Human Rights Act 1998 on the Interpretation of Enactments in the UK’ in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004) 248.

⁵⁹ ATH Smith, ‘The Human Rights Act and the Criminal Lawyer’ (n 17) 258; ATH Smith, ‘The Constitutional Context’ (n 51) 8; David Feldman, ‘The Human Rights Act 1998 and Constitutional Principles’ (1999) 19 LS 165, 185–86; Leigh and Lustgarten (n 17) 538; Bennion, ‘What Interpretation Is “Possible”’ (n 3) 91; Richard A Edwards, ‘Reading Down Legislation under the Human Rights Act’ (2000) 20 LS 353, 356; Robert Wintemute, ‘Lesbian and Gay Inequality 2000: The Potential of the Human Rights Act 1998 and the Need for an Equality Act 2002’ [2000] EHRLR 603, 611; Bennion, *Understanding Common Law Legislation* (n 3) 164; Campbell, ‘Incorporation through Interpretation’ (n 18) 98.

⁶⁰ Lord Lester of Herne Hill, ‘The Art of the Possible — Interpreting Statutes under the Human Rights Act’ [1998] EHRLR 665, 670, cf 674; Lord Lester of Herne Hill, ‘The Art of the Possible: Interpreting Statutes under the Human Rights Act’ in The Centre for Public Law at the University of Cambridge, *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999) 28, cf 30; Lord Lester of Herne Hill, ‘Interpreting Statutes under the Human Rights Act’ (1999) 20 Stat LR 218, 224, cf 227; Lord Lester of Herne Hill, ‘Developing Constitutional Principles of Public Law’ [2001] PL 684, 691; Anthony Lester, ‘The Magnetism of the Human Rights Act 1998’ (2002) 33 VUWLR 53, 64. See also Marshall, ‘The Lynchpin of Parliamentary Intention’ (n 46) 239.

⁶¹ Hope, ‘The Task of the Judges’ (n 27) 187.

Then came the important decision of the House of Lords in *R v A (No 2)*.⁶⁴ Various descriptions of the decision have been given: ‘the highpoint of judicial creativity’,⁶⁵ ‘the most extreme use of the interpretative power’,⁶⁶ ‘the high point of the bold approach to section 3’,⁶⁷ ‘the boldest exposition of the courts’ powers under s.3 of the HRA’,⁶⁸ ‘judicial overkill’,⁶⁹ ‘the high water mark of the application of the interpretative obligation’,⁷⁰ ‘[t]he leading example’ of having ‘gone beyond legitimate “repair” and ... engaged in wholesale “redrafting” of Acts’,⁷¹ ‘probably the single most controversial decision under the HRA’,⁷² and ‘the 2002 high point of interpretive power’,⁷³ the case concerned the admissibility of evidence of a complainant’s sexual history in the context of a charge of a sexual offence. Section 41 of the Youth Justice and Criminal Evidence Act 1999 provided that such evidence was inadmissible, subject to certain

⁶² *R v Offen* [2001] 1 WLR 253 (CA) [99] (Lord Woolf CJ, for the Court), see also [100], leave to appeal refused in *R v Offen* [2001] 1 WLR 514 (HL). cf Conor A Gearty, ‘The Human Rights Act and the Criminal Law: An Overview of the Early Case-law’ in Alan Boyle and others (eds), *Human Rights and Scots Law* (Hart Publishing 2002) 305.

⁶³ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48 [75] (Lord Woolf CJ, for the Court), see also [77]. cf Arden, ‘The Interpretation of UK Domestic Legislation’ (n 44) 179.

⁶⁴ *R v A* (n 16).

⁶⁵ Mead, ‘Swallowing the Camel’ (n 55) 509.

⁶⁶ Lord Irvine of Lairg, ‘The Impact of the Human Rights Act: Parliament, the Courts and the Executive’ [2003] PL 308, 320.

⁶⁷ Dinah Rose and Claire Weir, ‘Interpretation and Incompatibility: Striking the Balance’ in Jeffrey Jowell and Jonathan Cooper (eds), *Delivering Rights: How the Human Rights Act Is Working* (Hart Publishing 2003) 46.

⁶⁸ Keir Starmer, ‘Two Years of the Human Rights Act’ [2003] EHRLR 14, 16.

⁶⁹ Danny Nicol, ‘Statutory Interpretation and Human Rights after Anderson’ [2004] PL 274, 276.

⁷⁰ Arden, ‘The Interpretation of UK Domestic Legislation’ (n 44) 175. See also Brice Dickson, ‘Safe in Their Hands? Britain’s Law Lords and Human Rights’ (2006) 26 LS 329, 337.

⁷¹ Wintemute, ‘The Human Rights Act’s First Five Years’ (n 11) 214.

⁷² Gavin Phillipson, ‘Deference, Discretion, and Democracy in the Human Rights Act Era’ (2007) 60 CLP 40, 53.

⁷³ Gardbaum, ‘Reassessing the New Commonwealth Model’ (n 41) 195; Gardbaum, ‘How Successful and Distinctive’ (n 41) 207.

exceptions where leave would be granted. One of the exceptions was contained in s 41(3)(c):

it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar— (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.

The defendant submitted that s 41 breached art 6 of the ECHR, which guarantees the right to a fair trial. The Law Lords held that, after applying s 3, s 41 provided for something rather different from what its ordinary meaning would indicate: ‘the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention’.⁷⁴

Lord Steyn, who led the majority Law Lords in their extreme approach to the legislation at issue had earlier emphasized extra-judicially the importance of the ‘higher legal order status’ of the UKHRA, asserting that ‘The fact that a right is entrenched in a Bill of Rights is compelling testimony that it is to be accorded a higher normative status than other rights.’⁷⁵ This perhaps coloured his view of how s 3 should be applied and goes towards explaining why not all of the Law Lords agreed with him completely.

⁷⁴ *R v A* (n 16) [46] (Lord Steyn, Lord Slynn, Lord Hope, Lord Clyde and Lord Hutton agreeing on this formulation).

⁷⁵ Lord Steyn, ‘The New Legal Landscape’ [2000] EHRLR 549, 550.

Lord Hope, who agreed in the result, expressed concern at the majority's approach: 'It seems to me that it would not be possible, without contradicting the plain intention of Parliament, to read in a provision which would enable the court to exercise a wider discretion than that permitted by section 41(2).'⁷⁶ Lord Hope's position has been expressly supported by some commentators⁷⁷ and, extra-judicially, Lord Phillips.⁷⁸ Indeed, the decision has itself been the subject of fierce criticism, especially for its departure from the intention of the enacting legislature.⁷⁹ For example, *R v A* has been (exaggeratedly) said to be 'where Parliament's view of what a fair trial is in a rape case has been set to nought by the House of Lords ...'⁸⁰ Its supporters,⁸¹ who also acknowledge that intention was departed from, are few.

⁷⁶ *R v A* (n 16) [109].

⁷⁷ Bonner, Fenwick and Harris-Short (n 5) 560.

⁷⁸ Lord Phillips, 'The Interpretation of Contracts and Statutes' (2002) 68 Arb 17, 30; Phillips, 'The Art of the Possible' (n 35) 25–27.

⁷⁹ Gavin Dingwall, 'Statutory Exceptions, Burdens of Proof and the Human Rights Act 1998' (2002) 65 MLR 450, 461; Gearty, 'The Human Rights Act and the Criminal Law' (n 62) 304–05; Lester, 'The Magnetism of the Human Rights Act' (n 60) 66; Ekins, 'A Critique' (n 45) 646–48; Robert Wintemute, 'Same-sex Partners, "Living as Husband and Wife", and Section 3 of the Human Rights Act 1998' [2003] PL 621, 630; Danny Nicol, 'Gender Reassignment and the Transformation of the Human Rights Act' (2004) 120 LQR 194, 195; Phillipson, 'Deference, Discretion, and Democracy' (n 72) 54; Pamela Tate, 'Some Reflections on Victoria's Charter of Human Rights and Responsibilities' (2007) 52 AIALF 18, 28; Alec Samuels, 'Human Rights Act 1998 Section 3: A New Dimension to Statutory Interpretation?' (2008) 29 Stat LR 130, 133; Dixon (n 11) 346; Pamela Tate, 'A National Charter on Human Rights in Australia? Views from Victoria' (2009) 18 Com Lawyer 27, 33; Gardbaum, 'Reassessing the New Commonwealth Model' (n 41) 196; Conor Gearty, 'The Human Rights Act — An Academic Sceptic Changes His Mind but Not His Heart' [2010] EHRLR 582, 583; Gardbaum, 'How Successful and Distinctive' (n 41) 208.

⁸⁰ Conor Gearty, 'The Human Rights Act — One Year On' (2001) 10 Nott LJ v, vi. cf Lord Walker of Gestingthorpe, 'Problems of Human Rights Legislation: What Difference Can a Human Rights Charter Make?' (2007) 81 ALJ 923, 925.

⁸¹ Rose and Weir (n 67) 54; Aileen Kavanagh, 'Unlocking the Human Rights Act: The "Radical" Approach to Section 3(1) Revisited' [2005] EHRLR 259, 268; Ian Cram, 'Judging Rights in the United Kingdom: The *Human Rights Act* and the New Relationship between Parliament and the Courts' (2006) 12 Rev Const Stud 53, 71–72; Kavanagh, *Constitutional Review* (n 15) 41. cf TRS Allan (n 9) 41–42, supporting *R v A* but not identifying it as inconsistent with intention.

One factor that is often emphasized in explaining the majority's approach is the importance of the intention behind s 3 of the UKHRA.⁸² The balancing of conflicting intentions — that behind s 3 and that behind the impugned legislation — is a relatively common way of characterizing the dilemma of rights-consistent interpretation.⁸³ However, this thesis advances an alternative view which involves a shift of focus from intention to purpose. On this view, *R v A* may prima facie be justified as conferring, in the words of Lord Walker, 'a case-management discretion on the trial judge while preserving the *central purpose* of the enactment ['to prevent traumatising cross-examination of complainants in rape cases']'.⁸⁴ This will be explored further throughout this and later chapters.

Another case from around the same time, *R v Lambert*,⁸⁵ has been variously described as '[a] less extreme, but still striking, application of section 3(1)',⁸⁶ involving 'radical surgery on a settled and longstanding piece of primary legislation',⁸⁷ and 'the high water mark of the application of the interpretative obligation' (with *R v A*).⁸⁸ It arose from a drug prosecution in which the appellant had

⁸² Mirfield (n 38) 24, 25–26.

⁸³ Starmer and Klug, 'Incorporation through the "Front Door"' (n 41) 657–58, 664; Clayton, 'The Limits of What's "Possible"' (n 15) 566; Rose and Weir (n 67) 43–44, 49; Starmer, 'Two Years' (n 68) 16; Jeffrey Goldsworthy, 'Parliamentary Sovereignty and Statutory Interpretation' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004) 197, 204; Laws, 'The Impact of the Human Rights Act' (n 58) 248; Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 OJLS 179, 187–90; Kavanagh, *Constitutional Review* (n 15) 68–70. See also James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press 2008) 77.

⁸⁴ Walker, 'Problems of Human Rights Legislation' (n 80) 925 (emphasis added). cf Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths Australia 2008) para 3.34.

⁸⁵ *Lambert* (n 40).

⁸⁶ Mirfield (n 38) 26.

⁸⁷ Gearty, 'The Human Rights Act and the Criminal Law' (n 62) 303.

⁸⁸ Arden, 'The Interpretation of UK Domestic Legislation' (n 44) 175. cf *Lambert* (n 40) [157] (Lord Clyde); JJ Spigelman, 'Blackstone, Burke, Bentham and the Human Rights Act 2004' (2005) 26 Aust

been convicted of possession with intent to supply. Section 28(2) of the Misuse of Drugs Act 1971 provided, in part:

it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

The appellant submitted that the burden of proof, thus expressed, breached his right to a fair trial under art 6 of the ECHR and that s 3 should be applied to render the burden of proof evidential rather than legal.

Their Lordships accepted these submissions, effectively reading the words ‘to prove’ as ‘to give sufficient evidence’.⁸⁹ Lord Hope indicated his view that s 3 ‘does not give power to the judges to overrule decisions which the language of the statute shows have been taken on the very point at issue by the legislator’.⁹⁰ He added that s 3 compatibility could not be allowed to make the statute ‘unintelligible or unworkable’.⁹¹ It has been argued that

this seems to be precisely what the House of Lords (including Lord Hope) did in *Lambert*. Their Lordships were agreed that according to the ordinary principles of construction, s.28 clearly imposed a legal burden of proof. That

Bar Rev 1, 8, asserting that *Lambert*, unlike *R v A*, involved applying s 3 ‘in a way in which the application of the common law principles of statutory interpretation would have led to a similar result’. See also JJ Spigelman, ‘The Truth Can Cost Too Much: The Principle of a Fair Trial’ (2004) 78 ALJ 29, 48; TRS Allan (n 9) 39; Dan Meagher, ‘The Scope of Judicial Rights Interpretation under Bills of Rights (and Its Political Consequences)’ (2009) 20 PLR 214, 221–22. However, a different view has been taken in the English High Court: *Okendeji v Government of the Commonwealth of Australia* [2005] EWHC 471 (Admin), [2005] Extrad LR 57 [20] (Moses J).

⁸⁹ cf *Lambert* (n 40) [94]. For an argument that this reading is problematic because it ignores that these are distinct evidentiary concepts, see Paul Roberts, ‘Drug Dealing and the Presumption of Innocence: The Human Rights Act (Almost) Bites’ (2002) 6 E & P 17, 33–35.

⁹⁰ *Lambert* (n 40) [79]. cf TRS Allan (n 9) 36–37.

⁹¹ *Lambert* (n 40) [80]; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 [52] (Lord Hope, Lord Scott agreeing).

was the decision taken by the legislator on this very point, but the court nonetheless found it possible to adjust or amend that language in order to render it Convention-compatible.⁹²

However, in both judicial⁹³ and non-judicial⁹⁴ contexts intention continued to be referred to, and its continuing relevance seemed to be reasserted with some strength in *R (Anderson) v Secretary of State for the Home Dept.*,⁹⁵ a case which one commentator has identified as evincing ‘an alertness to the political importance of a question [that] has been able to trump common law assumptions about the judicial function’.⁹⁶ The appellant was a convicted murderer on whom a mandatory life sentence had been imposed. Under s 29(1) of the Crime (Sentences) Act 1997, the Secretary of State for the Home Department (Home Secretary) could ‘after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not [a discretionary life prisoner]’. The appellant submitted that the exercise of this discretion breached his right to a fair trial by an independent and impartial tribunal under art 6(1) of the ECHR because the Home Secretary was not such a tribunal (a problem which one of the Law Lords sitting in the case had foreshadowed extra-judicially⁹⁷). He submitted that s 3 should be applied to ensure compatibility with the ECHR.

⁹² Kavanagh, ‘Unlocking the Human Rights Act’ (n 81) 265 (citation omitted). See also Gearty, ‘The Human Rights Act and the Criminal Law’ (n 62) 304; Helen Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 178. cf, on *R v A*, Keith Mason, ‘Legislator’s Intent: How Judges Discern It and What They Do If They Find It’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 54–55.

⁹³ *Re S* (n 21) [25] (Lord Nicholls, Lord Mackay, Lord Browne-Wilkinson, Lord Mustill and Lord Hutton agreeing).

⁹⁴ Gearty, ‘Reconciling Parliamentary Democracy’ (n 8) 257; Anthony Lester, ‘The Human Rights Act 1998 — Five Years On’ [2004] EHRLR 258, 260.

⁹⁵ *Anderson* (n 54).

⁹⁶ Gearty, ‘The Human Rights Act and the Criminal Law’ (n 62) 306.

⁹⁷ Steyn, ‘The New Legal Landscape’ (n 75) 552.

The House of Lords held that this was impossible.⁹⁸ Lord Bingham (Lord Nicholls, Lord Steyn, Lord Hutton, Lord Hobhouse, Lord Scott and Lord Rodger agreeing) concluded that

To read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: *it would give the section an effect quite different from that which Parliament intended* and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act ...⁹⁹

Lord Steyn (Lord Bingham, Lord Nicholls, Lord Hutton, Lord Scott and Lord Rodger agreeing), who had led the majority in its bold approach in *R v A*, emphasized intention even more forcefully: ‘It would not be interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary, who was intended to be free to follow or reject judicial advice.’¹⁰⁰

While *Anderson* could be argued to represent a retreat from the extreme position in *R v A*, it is also possible that ‘A better way to understand the dicta in *Anderson* is to view them as a statement about the limits of judicial rectification in the particular circumstances of the *Anderson* case.’¹⁰¹ This raises an issue as to whether context — most particularly the subject matter of legislation — impacts upon how boldly s 3 is applied. This crucial issue will be explored in the final section of this chapter. Before leaving *Anderson*, it is worth noting that Parliament later amended the

⁹⁸ See *Ghaidan* (n 13) [34] (Lord Nicholls), [49] (Lord Steyn).

⁹⁹ *Anderson* (n 54) [30] (emphasis added), citing *Re S* (n 21) [41]. See also Lester, ‘Five Years On’ (n 94) 267.

¹⁰⁰ *Anderson* (n 54) [59].

¹⁰¹ Kavanagh, ‘The Role of Parliamentary Intention’ (n 83) 202 (citation omitted).

offending legislation, establishing '[a] proper judicial system for fixing the minimum term before release ...',¹⁰²

It was noted above that the leading case on s 3 is *Ghaidan v Godin-Mendoza*,¹⁰³ 'best known for resolving, at least for the time being, the nature of the interpretative obligation'.¹⁰⁴ Under para 2(1) of sch 1 to the Rent Act 1977, on the death of a protected tenant, the surviving spouse of the original tenant of a dwelling-house, if residing there immediately before the death of the original tenant, succeeded to the tenancy. Paragraph 2(2) had been inserted in 1988¹⁰⁵ to extend the scope of this provision to 'a person who was living with the original tenant *as his or her wife or husband*' (emphasis added). The respondent male had been in a homosexual relationship with a tenant and had been living with the tenant at the latter's residence immediately prior to the tenant's death. The respondent submitted that he fell within para 2(2), and therefore had succeeded to a statutory tenancy, on the basis of arts 8 and 14 of the ECHR, which protect privacy and prohibit discrimination respectively. If this submission failed, he was only eligible for a less favourable assured tenancy, under para 3(1).

In an earlier case, *Fitzpatrick v Sterling Housing Association Ltd*,¹⁰⁶ the House of Lords had held that the phrase 'as his or her wife or husband' was limited to heterosexual relationships. However, that case was decided in 1999 — before the UKHRA came into force — and the question in *Ghaidan* was whether s 3 could be

¹⁰² Samuels (n 79) 137, fn 25. See also Cram (n 81) 77.

¹⁰³ *Ghaidan* (n 13).

¹⁰⁴ Keir Starmer, 'The Human Rights Act: Review of the Year: 2004–2005' [2006] EHRLR 1, 1.

¹⁰⁵ Housing Act 1988, s 39, sch 4.

¹⁰⁶ [2001] 1 AC 27 (HL).

applied to produce a different result. At least one commentator had argued some years earlier that this approach was open¹⁰⁷ and the High Court had applied it in making consent orders in a mental health case.¹⁰⁸

Over the dissent of Lord Millett, a majority of four out of five Law Lords found that s 3 could be applied to remedy the incompatibility. In a leading speech which ‘can be seen as an attempt to reconcile the radical and restrained approaches of Lord Steyn and Lord Hope first seen in *R v A*, but one which in so doing leaves the domestic judge with a considerable degree of linguistic and interpretative freedom’,¹⁰⁹ Lord Nicholls dealt with intention in these terms:

In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.¹¹⁰

The reliance on the intention behind s 3 in this passage was brought out even more clearly by Lord Steyn in his speech:

there is the constant refrain that a judicial reading down, or reading in, under section 3 would flout the will of Parliament as expressed in the statute under examination. This question cannot sensibly be considered without giving full

¹⁰⁷ Wintemute, ‘Lesbian and Gay Inequality’ (n 59) 611.

¹⁰⁸ *R (SSG) v Liverpool City Council* [2002] EWHC 4000 (Admin) [10] (Maurice Kay J). See David Hewitt, *The Nearest Relative Handbook* (2nd edn, Jessica Kingsley Publishers 2009) 22–23.

¹⁰⁹ Leigh and Masterman (n 22) 103.

¹¹⁰ *Ghaidan* (n 13) [30]. cf Arden, ‘The Interpretation of UK Domestic Legislation’ (n 44) 178; Julie Debeljak, ‘Who Is Sovereign Now? The Momcilovic Court Hands Back Power over Human Rights That Parliament Intended It to Have’ (2011) 22 PLR 15, 19–20.

weight to the countervailing will of Parliament as expressed in the 1998 Act.¹¹¹

However, again, it is possible to focus on purpose instead of intention. Lord Nicholls referred to the ‘concept’ expressed in the language of impugned legislation. As one commentator has explained,

It seems that Lord Nicholls had in mind the purpose of the statute, assessed at a relatively abstract level. This is borne out by what he did in the case. Lord Nicholls observed that ‘the social policy underlying the 1988 extension ... is equally applicable to the survivor of homosexual couples living together in a close and stable relationship’. This ‘social policy’ is that Parliament in 1988 extended succession rights beyond married couples to other couples who had made their home together. Lord Nicholls halts his enquiry into the purpose of the statute at this level of abstraction. Instead of attending to how Parliament in 1988 further specified this purpose (succession granted to unmarried heterosexual couples) he offers a new specification which relies on the Convention right against discrimination.¹¹²

Lord Nicholls had applied a similar approach in an earlier case:

As to the objective of the statute, at one level this will be coincident with its effect. ... But that is not the relevant level for Convention purposes. What is relevant is the underlying social purpose sought to be achieved by the statutory provision.¹¹³

¹¹¹ *Ghaidan* (n 13) [40].

¹¹² Jan van Zyl Smit, ‘The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*’ (2007) 70 MLR 294, 299–300 (citations omitted), cf 301, on Lord Millett’s dissent. See also *Re Kracke and Mental Health Review Board* [2009] VCAT 646, (2009) 29 VAR 1 [230] (Bell J, President); Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-making’ (2007) 33 Mon LR 9, 54–55; Aileen Kavanagh, ‘Choosing between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v. Mendoza*’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 120; Leigh and Masterman (n 22) 105–06; Robertson (n 32) 135–36; Debeljak, ‘Who Is Sovereign Now?’ (n 110) 20, 28. cf Kavanagh, ‘The Role of Parliamentary Intention’ (n 83) 184–85; Jim South, ‘Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)’ (2009) 28 UQLJ 143, 158–59. cf *Ghaidan* (n 13) [78] (Lord Millett, in dissent).

¹¹³ *Wilson* (HL) (n 42) [61].

To put that comment in context, and shed light on what is involved in the abstraction of purpose in a given case, it followed from Lord Nicholls' explanation that

In carrying out this evaluation [of the effect of primary legislation in terms of Convention rights] the court has to compare the effect of the legislation with the Convention right. If the legislation impinges upon a Convention right the court must then compare the policy objective of the legislation with the policy objective which under the Convention may justify a prima facie infringement of the Convention right. When making these two comparisons the court will look primarily at the legislation, but not exclusively so. Convention rights are concerned with practicalities. When identifying the practical effect of an impugned statutory provision the court may need to look outside the statute in order to see the complete picture ...¹¹⁴

Of course the courts are not unconstrained in this exercise; they must not usurp Parliament by identifying purpose at such a high level of abstraction that they can attribute virtually any meaning to a provision.

Lord Rodger in *Ghaidan* appears to have taken an approach similar to that of Lord Nicholls in saying that 'What matters is not so much the particular phraseology chosen by the draftsman as the substance of the measure which Parliament has enacted in those words.'¹¹⁵ Similarly, the requirements that 'The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed'¹¹⁶ and 'an implication will go with the grain of the legislation'¹¹⁷ can easily be understood as referring to purpose at a high level of abstraction.

¹¹⁴ *ibid.*

¹¹⁵ *Ghaidan* (n 13) [123]. See Kavanagh, 'Choosing between Sections 3 and 4' (n 112) 120.

¹¹⁶ *Ghaidan* (n 13) [33] (Lord Nicholls).

¹¹⁷ *ibid* [121] (Lord Rodger), see also [33] (Lord Nicholls).

In this context, it is of particular note that Lord Walker, referring to the Victorian equivalent of s 3 of the UKHRA, has remarked that ‘The words “consistently with their purpose” do not occur in s 3 of the UK Act but they have been read in as a matter of interpretation.’¹¹⁸

The problem presented by *Fitzpatrick* and *Ghaidan* has now been resolved by the Civil Partnership Act 2004.¹¹⁹ This was arguably the more appropriate course than the court applying s 3, as *Ghaidan* is accurately characterized as involving ‘fundamental social issues’.¹²⁰

The legislation had a clear social and economic policy dimension. It reflected widely held views about what sorts of partnerships deserve the privileges of marriage and it sought not to encroach excessively on the interests of landlords.¹²¹

This was reflected in Lord Millett’s dissenting conclusion that ‘all these questions are essentially questions of social policy which should be left to Parliament’.¹²²

The extent to which courts engage with issues of social policy, and the desirability thereof, will be briefly addressed in the penultimate section of this chapter. Also, while Lord Rodger saw no ‘reason to fear that the proposed interpretation would entail far-reaching practical repercussions which the House is not

¹¹⁸ Lord Walker of Gestingthorpe, ‘A United Kingdom Perspective on Human Rights Judging’ (2007) 8 TJR 295, 297. See also Luke Beck, ‘The Interpretation Provisions of Statutory Bills of Rights: A Little Bit Humpty Dumpty?’ (2011) 22 PLR 97, 101–02. cf Ian Dennis, ‘The *Human Rights Act* and the Law of Criminal Evidence: Ten Years On’ (2011) 33 Syd LR 333, 334–35.

¹¹⁹ Samuels (n 79) 134; Zyl Smit, ‘Statute Law’ (n 14) 78.

¹²⁰ George Winterton, ‘The ACT Bill of Rights’ (2004) 7 CLPR 47, 47.

¹²¹ Denise Meyerson, ‘Why Courts Should Not Balance Rights against the Public Interest’ (2007) 31 MULR 873, 901.

¹²² *Ghaidan* (n 13) [101].

in a position to evaluate’,¹²³ the use of the phrase that was under scrutiny in *Ghaidan* in other legislation arguably undercut this conclusion.¹²⁴

The principles set out in *Ghaidan* were confirmed¹²⁵ in a reverse onus case (cf *Lambert* above), *Sheldrake v DPP*,¹²⁶ with Lord Bingham (Lord Steyn and Lord Phillips agreeing) reiterating that ‘the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament’.¹²⁷ He concluded that

reading down [the relevant provision] so as to impose an evidential instead of a legal burden falls well within the interpretative principles discussed ... Such was not the intention of Parliament when enacting the 2000 Act, but it was the intention of Parliament when enacting section 3 of the 1998 Act.¹²⁸

There is one qualification to the authority of *Ghaidan*, arising from the case of *R (Wilkinson) v IRC*,¹²⁹ which ‘arguably ... rolled back the standard of impossibility a little further still [after *Ghaidan* signalled a retreat from *R v A*]’.¹³⁰ Lord Hoffmann

¹²³ *ibid* [128].

¹²⁴ Wintemute, ‘Same-sex Partners’ (n 79) 630.

¹²⁵ cf Michael McHugh, ‘A Human Rights Act, the Courts and the Constitution’ (2009) 11 CLPR 86, 93.

¹²⁶ [2004] UKHL 43, [2005] 1 AC 264.

¹²⁷ *ibid* [28]. See also Tom Bingham, ‘The Human Rights Act’ [2010] EHRLR 568, 571.

¹²⁸ *Sheldrake* (n 126) [53]. cf *Secretary of State for the Home Dept v MB* [2007] UKHL 46, [2008] 1 AC 440 [44] (Lord Bingham).

¹²⁹ [2005] UKHL 30, [2005] 1 WLR 1718.

¹³⁰ Gardbaum, ‘Reassessing the New Commonwealth Model’ (n 41) 195 (citation omitted); Gardbaum, ‘How Successful and Distinctive’ (n 41) 207 (citation omitted). See also *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 [152] (Tipping J); *R v Momcilovic* [2010] VSCA 50, (2010) 25 VR 436 [57] (Maxwell P, Ashley and Neave JJA); *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 [47] (French CJ), [150] (Gummow J), [546] (Crennan and Kiefel JJ); Claudia Geiringer, ‘The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*’ (2008) 6 NZJPIL 59, 81–82; Beck (n 118) 103; Debeljak, ‘Who Is Sovereign Now?’ (n 110) 20–21, 24–25; Ekins, ‘Rights, Interpretation and the Rule of Law’ (n 57) 172–74; Anthony Mason, ‘Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power’ (2011) 9 NZJPIL 1, 2, 3, 6. cf Kavanagh, *Constitutional Review* (n 15) 92–97.

(Lord Nicholls, Lord Hope, Lord Scott and Lord Brown agreeing) set out the issue succinctly:

the appellant Mr Wilkinson is a widower. ... If he had been a widow, he would have been entitled to a widow's bereavement allowance by way of deduction from his liability for income tax under section 262 of the Income and Corporation Taxes Act 1988 ("ICTA") (as amended):

"(1) Where a married man whose wife is living with him dies, his widow shall be entitled—(a) for the year of assessment in which the death occurs, to an income tax reduction calculated ... (b) (unless she marries again before the beginning of it) for the next following year of assessment, to an income tax reduction calculated ..."

There was no similar allowance for widowers.¹³¹

The appellant submitted that it was possible to read s 262 as including widowers, which avoided infringement of the prohibition of discrimination (including sex discrimination) under art 14 of the ECHR. He relied primarily on section 6(1) of the Interpretation Act 1978, which provided that 'unless the contrary intention appears ... (b) words importing the feminine gender include the masculine'. However, he also relied on s 3 of the UKHRA to rebut various indications of contrary intention which appeared in the impugned legislation. In the result, Lord Hoffman concluded that 'there is no way in which any reasonable reader could understand the word "widow" to refer to the more general concept of a surviving spouse. The contrary indications in the language of Pt VII of the 1988 Act are too strong.'¹³²

The importance of *Wilkinson* in this context lies in the way in which Lord Hoffmann dealt with *Ghaidan* in his consideration of s 3. He emphasized that 'the question is still one of *interpretation*, i e, the ascertainment of what, taking into

¹³¹ *Wilkinson* (n 129) [2].

¹³² *ibid* [19].

account the presumption created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute’.¹³³ He continued:

It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in the *Ghaidan* case that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the ‘intention of Parliament’. But that is not normally what one means by the intention of Parliament. One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights.¹³⁴

It is arguable that Lord Phillips was right in saying that ‘This is not what the House held in *Ghaidan*. *Ghaidan* goes further than basing an interpretation on the actual language used in the light of a strong presumption that it should comply with the Convention.’¹³⁵

In any event, the relatively sophisticated notion of intention which Lord Hoffmann accurately described has been applied by some commentators in setting out how s 3 operates. Sales and Ekins describe s 3 as creating, in relation to post-UKHRA legislation, ‘a new presumption which informs the true meaning intended by the legislature’.¹³⁶ This had been noted in the parliamentary debates on the Bill which

¹³³ *ibid* [17]. cf *Momcilovic* (VSCA) (n 130) [56] (Maxwell P, Ashley and Neave JJA).

¹³⁴ *Wilkinson* (n 129) [18]. See also Samuels (n 79) 136. This passage has been quoted with approval in the Supreme Court of New Zealand: *Hansen* (n 130) [14] (Elias CJ). It has also been noted that ‘This is equally true in Australia’: Evans and Evans (n 84) para 3.27. See also Meagher (n 88) 225.

¹³⁵ Phillips, ‘The Art of the Possible’ (n 35) 40.

¹³⁶ Sales and Ekins (n 16) 230. See also *Ghaidan* (n 13) [50] (Lord Steyn); *Wilkinson* (n 129) [17] (Lord Hoffmann, Lord Nicholls, Lord Hope, Lord Scott and Lord Brown agreeing); Steyn, ‘Incorporation and Devolution’ (n 27) 155, cited with approval in Beloff (n 28) 29–30; Edwards (n 59) 355–56; Fenwick, *Civil Rights* (n 28) 44; Jeffrey Jowell, ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ [2000] PL 671, 675; Peter Lewis, ‘The Human Rights Act 1998: Shifting the Burden’ [2000] Crim LR 667, 673; Campbell, ‘Incorporation through Interpretation’ (n 18) 80; McGoldrick (n 4) 915; Lord Steyn, ‘2000–2005: Laying the Foundations of Human Rights Law in

became the UKHRA.¹³⁷ In relation to pre-UKHRA legislation, the position is more complex:

the word ‘possible’ is used in a special sense, as a direction to those interpreting statutes to read them as if they had been enacted by Parliament in light of s.3 and the Convention rights. The section requires that one reads past statutes to identify what they mean when one deems the enacting legislature to have formed its intentions in light not just of all the other relevant considerations applicable at the time it passed them into law, but also in light of the current importance attached to compliance with the ECHR.¹³⁸

While, in terms of interpretive theory, this is the best explanation as to how to reconcile s 3 with the concept of intention, the sophisticated notion of intention on which it depends does not tend to be reflected in the case law on s 3, where courts are more likely to use the term ‘intention’ to refer an historical or original intention held by an enacting legislature.¹³⁹ This is one of the reasons why a focus on purpose is worthwhile, avoiding as it does the confusion as to different uses of the term ‘intention’. While purpose can also be difficult to define, it is a more flexible concept and the courts are less likely to apply it in a way which jars with interpretive theory.

the United Kingdom’ [2005] EHRLR 349, 359; Kavanagh, ‘The Role of Parliamentary Intention’ (n 83) 188–89; Kavanagh, *Constitutional Review* (n 15) 95–101; Ekins, ‘Rights, Interpretation and the Rule of Law’ (n 57) 185.

¹³⁷ HL Deb 3 November 1997, vol 583, col 1273 (Lord Cooke of Thorndon).

¹³⁸ Sales and Ekins (n 16) 231. See also Kavanagh, *Constitutional Review* (n 15) 69, cf 62. cf *Poplar Housing* (n 63) [75] (Lord Woolf CJ, for the Court); *Ghaidan* (n 13) [121] (Lord Rodger); Campbell, ‘Incorporation through Interpretation’ (n 18) 84–85; Goldsworthy, ‘Parliamentary Sovereignty’ (n 83) 208; Daniel Greenberg, ‘The Nature of Legislative Intention and Its Implications for Legislative Drafting’ (2006) 27 Stat LR 15, 26, fn 24; Spigelman, *Statutory Interpretation and Human Rights* (n 83) 48–49; South (n 112) 157–58; Ekins, ‘Rights, Interpretation and the Rule of Law’ (n 57) 185; Zyl Smit, ‘Statute Law’ (n 14) 83. One commentator seems to have applied this approach to post-UKHRA legislation: Andrew Henderson, ‘Readings and Remedies: Section 3(1) of the HRA and Rectifying Constructions’ [2000] JR 258, 260.

¹³⁹ See, eg, *Ghaidan* (n 13) [30] (Lord Nicholls); Spigelman, *Statutory Interpretation and Human Rights* (n 83) 75.

The tension between the dicta in *Ghaidan* and *Wilkinson* indicates a lingering uncertainty as to how to approach s 3. While some commentators,¹⁴⁰ and at least one judge,¹⁴¹ maintain that intention is still relevant, other judges, writing extra-judicially, have suggested that ‘Where a question arises as to compatibility with the [ECHR] ... the courts do not have to seek the intention of Parliament in the particular text’,¹⁴² as the focus shifts instead to the ECHR rights ‘rather than ... the true intention of Parliament derived from the language it has used’.¹⁴³

(c) Intention and Legislative Language

It will be recalled that the concepts of express provision and necessary implication were explored in Chapter Four on common law principles. Under the UKHRA, the same issue arose and prompted conflicting dicta on the subject, which were later reconciled. This debate provides an entry point into a discussion of the role of legislative language in interpretation under s 3.

In *Lambert*, Lord Hope referred to the obligation under s 3, stating that

Resort to it will not be possible if the legislation contains provisions, either in the words or phrases which are under scrutiny or elsewhere, which expressly contradict the meaning which the enactment would have to be given to make it

¹⁴⁰ Leigh and Masterman (n 22) 103.

¹⁴¹ Jack Beatson, ‘Common Law, Statute Law, and Constitutional Law’ (2006) 27 Stat LR 1, 12.

¹⁴² Arden, ‘The Changing Judicial Role’ (n 44) 497, see also 495–96; Arden, ‘The Impact of Judicial Interpretation’ (n 44) 10–11, 11–12.

¹⁴³ Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998’ (2009) 125 LQR 598, 607. This appears to be somewhat inconsistent with Sales J’s article co-authored with Ekins, discussed above. The difference is perhaps explained by different uses of the term ‘intention’ in the different contexts, though this illustrates the drawback of Sales and Ekins’ reliance on a relatively sophisticated notion of intention.

compatible. The same consequence will follow if legislation contains provisions which have this effect by necessary implication.¹⁴⁴

He reiterated this in *R v A*, relying on *Simms* (as discussed in Chapter Four).¹⁴⁵

However, Lord Steyn in *R v A* also relied on *Simms* but omitted to mention necessary implication: 'If a *clear* limitation on Convention rights is stated in terms, such an impossibility will arise.'¹⁴⁶ This approach has been likened to Canadian manner and form requirements.¹⁴⁷

The uncertainty that sprang from this inconsistency was dispelled by Lord Nicholls (Lord Mackay, Lord Browne-Wilkinson, Lord Mustill and Lord Hutton agreeing) in *Re S (minors) (Care Order: Implementation of Care Plan)*:¹⁴⁸ 'Lord Steyn's observations ... are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise.'¹⁴⁹ Furthermore, Lord Steyn (Lord Bingham, Lord Hutton, Lord Scott and Lord Rodger agreeing) confirmed this position in *Anderson*, citing *Re S* with approval.¹⁵⁰

¹⁴⁴ *Lambert* (n 40) [79].

¹⁴⁵ *R v A* (n 16) [108].

¹⁴⁶ *ibid* [44] (citation omitted).

¹⁴⁷ Francesca Klug, 'The United Kingdom Experience' in Christine Debono and Tania Colwell (eds), *Comparative Perspectives on Bills of Rights* (National Institute of Social Sciences & Law 2004) 5; Jeremy Webber, 'A Modest (but Robust) Defence of Statutory Bills of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate 2006) 270. cf Lord Lester of Herne Hill, 'The Impact of the Human Rights Act on Public Law' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998) 106; Campbell, 'Incorporation through Interpretation' (n 18) 99.

¹⁴⁸ *Re S* (n 21).

¹⁴⁹ *ibid* [40].

¹⁵⁰ *Anderson* (n 54) [59].

It seems unlikely that the concept of necessary implication differs in this context from where it is applied under the common law principles. One commentator has summarized it as encompassing ‘those implications which are so integral to a legislative provision or series of provisions, that they could bear no other meaning’.¹⁵¹ Of course, deciding that an implication is necessary is essentially a labelling exercise and does not reveal much about how to apply s 3: ‘Holding that a statute is “by necessary implication” incompatible with a Convention right does not reveal a judge’s interpretative method but merely states the conclusion he or she has reached.’¹⁵²

We must therefore turn to broader considerations to do with the role of legislative language in relation to s 3. From the outset, it was clear that this would be a key issue under the UKHRA. Lord Steyn identified two questions: ‘(1) What meanings are the words capable of yielding? (2) And, critically, can the words be made to yield a sense consistent with Convention rights?’¹⁵³ The promoter in the House of Commons of the Bill which became the UKHRA declared that ‘it is not our intention that the courts, in applying what is now clause 3, should contort the meaning of words to produce implausible or incredible meanings’.¹⁵⁴ Its promoter in the House of Lords stated in a lecture that ‘the logical effect of section 3 of the Act is to introduce very clear statutory language as a condition precedent to legislative interference with human rights’.¹⁵⁵ Early indications in the courts pointed in both

¹⁵¹ Kavanagh, ‘The Elusive Divide’ (n 15) 277.

¹⁵² Zyl Smit, ‘The New Purposive Interpretation of Statutes’ (n 112) 296.

¹⁵³ Steyn, ‘Incorporation and Devolution’ (n 27) 155.

¹⁵⁴ HC Deb 3 June 1998, vol 313, col 422 (Jack Straw).

¹⁵⁵ Lord Irvine of Lairg, ‘Sovereignty in Comparative Perspective: Constitutionalism in Britain and America’ (2001) 76 NYUL Rev 1, 22, fn 93.

directions, that is, towards a high degree of malleability of legislative language¹⁵⁶ and towards caution in departing from the ordinary sense of the same.¹⁵⁷

In *R v A*, Lord Hope leaned towards the latter. In referring to the possibility of reading down (to be explained below), he said that

if that were to be done it would be necessary to identify precisely (a) the words used by the legislature which would otherwise be incompatible with the Convention right and (b) how these words were to be construed, according to the rule which section 3 lays down, to make them compatible.¹⁵⁸

On the other hand, Lord Steyn supported greater flexibility, opining that ‘In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained.’¹⁵⁹ He continued:

In my view section 3 requires the court to subordinate the niceties of the language of section 41(3)(c), and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances.¹⁶⁰

¹⁵⁶ *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 (HL) 301 (Lord Cooke). See also JC Smith, ‘Case Comment: Prosecution — Terrorist Offences — Director of Public Prosecutions Consenting to Prosecution’ [1999] Crim LR 994, 996.

¹⁵⁷ *R (H) v London North and East Region Mental Health Review Tribunal* [2001] EWCA Civ 415, [2002] QB 1 [27] (Lord Phillips MR, for the Court); *Wilson v First County Trust Ltd (No 2)* [2001] EWCA Civ 633, [2002] QB 74 [42] (Sir Andrew Morritt V-C, for the Court) (overruled on the ground that the UKHRA did not apply retrospectively: *Wilson* (HL) (n 42)). See also Edwards (n 59) 356–57. cf Stephen Sedley, ‘A Bill of Rights for the United Kingdom: From London to Strasbourg by the Northwest Passage?’ (1998) 36 Osgoode Hall LJ 63, 75; Phillips, ‘The Interpretation of Contracts and Statutes’ (n 78) 27.

¹⁵⁸ *R v A* (n 16) [110].

¹⁵⁹ *ibid* [44].

¹⁶⁰ *ibid* [45].

On the basis of the result in the case, it was tempting to conclude that the role of language had been significantly diminished: the particular interpretation at least involved ‘a significant disregard for statutory language’,¹⁶¹ even if it fell short of bearing ‘no relation to the words Parliament had used’.¹⁶²

Lord Hope expanded on his relatively conservative view in *Lambert*:

great care must be taken, in cases where a different meaning has to be given to the legislation from the ordinary meaning of the words used by the legislator, to identify precisely the word or phrase which, if given its ordinary meaning, would otherwise be incompatible. Just as much care must then be taken to say how the word or phrase is to be construed if it is to be made compatible. The justification for this approach to the use of section 3(1) is to be found in the nature of legislation itself. Its primary characteristic, for present purposes, is its ability to achieve certainty by the use of clear and precise language. It provides a set of rules by which, according to the ordinary meaning of the words used, the conduct of affairs may be regulated. So far as possible judges should seek to achieve the same attention to detail in their use of language to express the effect of applying section 3(1) as the parliamentary draftsman would have done if he had been amending the statute. It ought to be possible for any words that need to be substituted to be fitted in to the statute as if they had been inserted there by amendment. If this cannot be done without doing such violence to the statute as to make it unintelligible or unworkable, the use of this technique will not be possible. It will then be necessary to leave it to Parliament to amend the statute and to resort instead to the making of a declaration of incompatibility.¹⁶³

Lord Nicholls (Lord Mackay, Lord Browne-Wilkinson, Lord Mustill and Lord Hutton agreeing) picked up on Lord Hope’s dictum in *Re S*:

When a court, called upon to construe legislation, ascribes a meaning and effect to the legislation pursuant to its obligation under section 3, it is important the court should identify clearly the particular statutory provision or

¹⁶¹ Fenwick, *Civil Liberties* (n 92) 174.

¹⁶² Nicol, ‘Gender Reassignment’ (n 79) 195. cf Richard Clayton, ‘Judicial Deference and “Democratic Dialogue”: The Legitimacy of Judicial Intervention under the Human Rights Act 1998’ [2004] PL 33, 34.

¹⁶³ *Lambert* (n 40) [80].

provisions whose interpretation leads to that result. Apart from all else, this should assist in ensuring the court does not inadvertently stray outside its interpretation jurisdiction.¹⁶⁴

Lord Steyn, speaking extra-judicially in 2005, lamented

a persistent preoccupation with purely linguistic considerations in statutes under consideration. The result was uncertainty. By the decision in *Ghaidan v Godin-Mendoza* the House by, a majority of 4:1, may have succeeded in restoring the correct balance. ... In *Ghaidan* the House eschewed linguistic arguments in favour of a broader approach.¹⁶⁵

So we return to the leading judgment on s 3. Lord Nicholls set out his view at some length:

On [‘the intention reasonably to be attributed to Parliament in enacting section 3’] the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the ‘interpretation’ of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.¹⁶⁶

¹⁶⁴ *Re S* (n 21) [41]. cf Jonathan Herring, ‘The Human Rights of Children in Care’ (2002) 118 LQR 534, 536.

¹⁶⁵ Steyn, ‘Laying the Foundations’ (n 136) 358–59 (citation omitted).

¹⁶⁶ *Ghaidan* (n 13) [31].

He continued: ‘The precise form of words read in ... is of no significance. It is their substantive effect which matters.’¹⁶⁷ This chimes with Lord Rodger’s focus on the substance of the provision.¹⁶⁸

Lord Steyn complained of

an excessive concentration on linguistic features of the particular statute. Nowhere in our legal system is a literalistic approach more inappropriate than when considering whether a breach of a Convention right may be removed by interpretation under section 3. Section 3 requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved.¹⁶⁹

Lord Rodger similarly warned of paying too much attention to legislative language:

the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1).¹⁷⁰

He continued:

Attaching decisive importance to the precise adjustments required to the language of any particular provision would reduce the exercise envisaged by

¹⁶⁷ *ibid* [35].

¹⁶⁸ See text to n 115.

¹⁶⁹ *Ghaidan* (n 13) [41], see also [47], [49].

¹⁷⁰ *ibid* [122].

section 3(1) to a game where the outcome would depend in part on the particular turn of phrase chosen by the draftsman and in part on the skill of the court in devising brief formulae to make the provision compatible with Convention rights. The statute book is the work of many different hands in different parliaments over hundreds of years and, even today, two different draftsmen might choose different language to express the same proposition. In enacting section 3(1), it cannot have been the intention of Parliament to place those asserting their rights at the mercy of the linguistic choices of the individual who happened to draft the provision in question. What matters is not so much the particular phraseology chosen by the draftsman as the substance of the measure which Parliament has enacted in those words. Equally, it cannot have been the intention of Parliament to place a premium on the skill of those called on to think up a neat way round the draftsman's language. Parliament was not out to devise an entertaining parlour game for lawyers, but, so far as possible, to make legislation operate compatibly with Convention rights. This means concentrating on matters of substance, rather than on matters of mere language.¹⁷¹

Even the dissentient, Lord Millett, described quite a free approach:

It means only that the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point.¹⁷²

One aspect of this passage has been criticized: 'the requirement that interpretations be "intellectually defensible" is too vague to give us any meaningful indication about when the limits of section 3 might be reached. It is hard to imagine any judgment which would not meet this minimal criterion.'¹⁷³

¹⁷¹ *ibid* [123].

¹⁷² *ibid* [67], see also [77]. cf Lord Irvine of Lairg, 'Activism and Restraint: Human Rights and the Interpretative Process' [1999] EHRLR 350, 367; Lord Irvine of Lairg, 'Activism and Restraint: Human Rights and the Interpretative Process' (1999) 10 KCLJ 177, 192; Irvine, 'The Impact of the Human Rights Act' (n 66) 319–20; TRS Allan (n 9) 36.

¹⁷³ Kavanagh, *Constitutional Review* (n 15) 85, citing James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-first Century' (2006) 17 KCLJ 1, 11.

The upshot of these dicta appears to be that ‘The linguistic constraints imposed by the specific language adopted by the Parliament responsible for the provision under scrutiny would appear — on this reading of section 3(1) — to be few’,¹⁷⁴ albeit ‘The valid point which their Lordships sought to make in *Ghaidan* was that statutory language *alone* was not determinative or conclusive on the question of whether they should adopt a section 3(1) interpretation, not that it was of no significance whatsoever.’¹⁷⁵ This has met with both approval¹⁷⁶ and disapproval.¹⁷⁷ The effect on legal certainty is disquieting:

the consequence of the application of s 3 is that statutes are going to have meanings that differ from any literal or linguistic meaning and which no layperson could get to without an awareness of the decisions of the courts. So even a sophisticated user of the English language, a person familiar with Swift, Milton, and Shakespeare (indeed even a legislative drafter) may not be able to understand the meaning of an Act.¹⁷⁸

However, as we saw in relation to the issue of intention, the case of *Wilkinson* arguably qualifies *Ghaidan* to some extent. Lord Hoffmann pointed out — note his emphasis — that ‘the words “as his or her wife or husband” ... were interpreted to refer to a relationship of social and sexual intimacy exemplified by, but not limited to, the heterosexual relationship of husband and wife’.¹⁷⁹

¹⁷⁴ Leigh and Masterman (n 22) 105.

¹⁷⁵ Kavanagh, *Constitutional Review* (n 15) 59.

¹⁷⁶ Beatson and others (n 56) para 5–85.

¹⁷⁷ *Re Application for Bail by Islam* [2010] ACTSC 147, (2010) 4 ACTLR 235 [75] (Penfold J); Wintemute, ‘The Human Rights Act’s First Five Years’ (n 11) 214–15.

¹⁷⁸ Beatson, ‘Common Law’ (n 141) 13. See also Beatson and others (n 56) paras 5–122–5–123.

¹⁷⁹ *Wilkinson* (n 129) [18]. cf *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 [117] (Lady Hale, in dissent).

Precisely the same emphasis on the word ‘as’ in supporting the same result appeared in Ward LJ’s reasons for his dissent in the Court of Appeal in *Fitzpatrick*¹⁸⁰ and an early journal article on the UKHRA,¹⁸¹ which makes it even more puzzling that this argument did not find its way into the speeches in *Ghaidan* (although arguably Lady Hale’s approach of using ‘the term “marriage-like” to describe the sort of relationship which meets the statutory test of living together “as husband and wife”’¹⁸² is similar).¹⁸³

One commentator has argued that the emphasis on a ‘general and evaluative’ word in this context points to a useful precondition for s 3 interpretation,¹⁸⁴ having criticized Lord Nicholls’ speech in *Ghaidan* for its ‘major departure, perhaps even an alarming one, from established methods of statutory interpretation’.¹⁸⁵

(d) Two Interpretive Techniques: Reading Down and Reading In

It has been said that

¹⁸⁰ *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304 (CA) 338.

¹⁸¹ Wintemute, ‘Lesbian and Gay Inequality’ (n 59) 619. cf Wintemute, ‘Same-sex Partners’ (n 79) 627–28; Claudia Geiringer, ‘It’s Interpretation, Jim, but Not As We Know It: *Ghaidan v Mendoza*, the House of Lords and Rights-consistent Interpretation’ [2005] HRR 6, 6–7 <www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-3/Geiringer.pdf> accessed 9 October 2013, dealing with Buxton LJ’s reasons in the Court of Appeal in *Ghaidan*.

¹⁸² *Ghaidan* (n 13) [144]. See also Brenda Hale, ‘High Points and Low Points in the First Ten Years: A View from the Bench’ in Nicholas Kang-Riou, Jo Milner and Surya Nayak (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge 2012) 56. See Meagher (n 88) 223. cf Tate, ‘A National Charter’ (n 79) 32–33.

¹⁸³ cf the submissions of Philip Sales for the First Secretary of State intervening, at 563.

¹⁸⁴ Zyl Smit, ‘The New Purposive Interpretation of Statutes’ (n 112) 305–06. See also Zyl Smit, ‘Statute Law’ (n 14) 86.

¹⁸⁵ Zyl Smit, ‘The New Purposive Interpretation of Statutes’ (n 112) 299.

The principal techniques of interpretation under section 3 are to ‘read in’ Convention rights (by *implying* words in a statute) or to ‘read down’ (by applying a *narrow* interpretation in order to ensure that the legislation remains valid).¹⁸⁶

Addressing the latter first, as it ‘has been utilised more frequently’,¹⁸⁷ we may note that it was predicted early in the life of the UKHRA that it would be applied.¹⁸⁸ Judicial approval followed¹⁸⁹ and, indeed, it has been applied quite often¹⁹⁰ — examples include the reverse onus cases.

With the occasional exception,¹⁹¹ the ‘extremely bold interpretative technique’¹⁹² of reading in also gained support in the UKHRA’s early years,¹⁹³ with one confident prediction claiming that ‘The result of such an approach would be that in virtually all cases primary legislation will be capable of interpretation in line with the Convention.’¹⁹⁴ However it is fair to say that ‘[t]here have been very few instances where section 3 has been used to imply words into a statute ...’,¹⁹⁵ perhaps because, as ‘the most powerful of the tools used to achieve compatibility ... [its] results are

¹⁸⁶ Clayton, ‘The Limits of What’s “Possible”’ (n 15) 562. See also Beatson and others (n 56) para 5–105.

¹⁸⁷ Clayton, ‘The Limits of What’s “Possible”’ (n 15) 563.

¹⁸⁸ Lester, ‘The Art of the Possible’ (EHRLR) (n 60) 670; Lester, ‘The Art of the Possible’ (Hart Publishing) (n 60) 28; Lester, ‘Interpreting Statutes’ (n 60) 223; Edwards (n 59) 356; Lewis (n 136) 673.

¹⁸⁹ *Lambert* (n 40) [81] (Lord Hope).

¹⁹⁰ Kavanagh, ‘The Role of Parliamentary Intention’ (n 83) 198; Beatson and others (n 56) paras 5–100–5–104.

¹⁹¹ Edwards (n 59) 366.

¹⁹² Fenwick, *Civil Liberties* (n 92) 174.

¹⁹³ Lester, ‘The Art of the Possible’ (EHRLR) (n 60) 670; Coppel (n 28) para 2.49; Lester, ‘The Art of the Possible’ (Hart Publishing) (n 60) 28; Lester, ‘Interpreting Statutes’ (n 60) 223; Fenwick, *Civil Rights* (n 28) 43. cf Mary Childs, ‘Constitutional Review and Underinclusive Legislation’ [1998] PL 647, 656–58.

¹⁹⁴ Coppel (n 28) para 2.49 (citation omitted).

¹⁹⁵ Clayton, ‘The Limits of What’s “Possible”’ (n 15) 563.

radical and sometimes controversial'.¹⁹⁶ Nevertheless, it has received judicial approval¹⁹⁷ and there are a few notable examples,¹⁹⁸ including *R v A* and *Ghaidan*. The willingness of courts to apply the technique of reading in under s 3 distinguishes it from the common law principles (in this regard the Marleasing principle, briefly mentioned in the Introduction to this Chapter, has been more influential in the UK¹⁹⁹).²⁰⁰

4 Section 3 and 'the Chaps at Strasbourg'²⁰¹

In this section, we consider the legislative history of the UKHRA with two points in mind: first, to highlight material relating to s 3; and, secondly, to establish that the primary purpose of the Act was to allow for remedies for breaches of ECHR rights to be obtained in domestic courts, obviating in most (or at least many) cases the need for litigants to take their cases to Strasbourg.

It is interesting to note that, well before the advent of the UKHRA, it was recognized that a UK bill of rights of some sort would need to include an interpretive

¹⁹⁶ Beatson and others (n 56) para 5–106.

¹⁹⁷ *R v A* (n 16) [44] (Lord Steyn); *Lambert* (n 40) [81] (Lord Hope); *Ghaidan* (n 13) [32] (Lord Nicholls).

¹⁹⁸ Beatson and others (n 56) paras 5–106–5–111.

¹⁹⁹ Sales, 'A Comparison' (n 143) 608.

²⁰⁰ *ibid* 610.

²⁰¹ This quaint, if archaic, phrase is that of a former Lord Chancellor: Lord Hailsham in Lord McCluskey, *Law, Justice and Democracy* (Sweet and Maxwell/BBC Books 1987) 63.

provision,²⁰² although some commentators remained to be convinced of the effectiveness thereof.²⁰³

The two most important sources of legislative history for the UKHRA are the Home Office's White Paper which preceded it, and the parliamentary debates on it. Of the clause which became s 3, the former set out:

This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.

This 'rule of construction' is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case law, taking into account the Convention rights.²⁰⁴

Thus support for the UK courts' positions on issues such as ambiguity and revising previous interpretations (dealt with above) can be found in the White Paper.

Likewise, comments made during the course of the parliamentary debates²⁰⁵ on the Bill which became the UKHRA — particularly by its sponsors, Lord Irvine (the Lord Chancellor) and Jack Straw (the Home Secretary) — shed light on the role

²⁰² Peter Wallington and Jeremy McBride, *Civil Liberties and a Bill of Rights* (Cobden Trust 1976) 85–86, 114. See also Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom: Commentary and Documents* (Pinter 1999) 64.

²⁰³ Dawn Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open UP 1991) 159. See Michael Zander, *A Bill of Rights?* (4th edn, Sweet & Maxwell 1997) 114–15.

²⁰⁴ Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) paras 2.7–2.8.

²⁰⁵ See generally Francesca Klug, 'The Human Rights Act 1998, *Pepper v Hart* and All That' [1999] PL 246; Jonathan Cooper and Adrian Marshall-Williams (eds), *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (Hart Publishing 2000).

of s 3. In particular, the remedial role of s 3, in contrast to s 4, and its importance to the scheme of the Act were repeatedly emphasized.

In the second reading speech in the House of Lords, the Lord Chancellor stated that ‘Clause 4 provides for the *rare* cases where the courts may have to make declarations of incompatibility.’²⁰⁶ Lord Cooke surmised from this of cl 3 that ‘the very strength of the clause, as it is now worded, may have been of material assistance to the noble and learned Lord the Lord Chancellor in forming the view which he expressed at Second Reading that declarations of incompatibility would be rare’.²⁰⁷ In the course of the same debate, the Lord Chancellor said of cl 3: ‘We want the courts to strive to find an interpretation of legislation which is consistent with convention rights so far as the language of the legislation allows and *only in the last resort* to conclude that the legislation is simply incompatible with them.’²⁰⁸

Considering a proposed (and, obviously, ultimately unsuccessful) Opposition amendment to replace the term ‘possible’ with ‘reasonable’,²⁰⁹ the Lord Chancellor opined that ‘If this amendment were agreed to, the only intention that I could divine behind it would be to maximise rather than minimise declarations of incompatibility which would tend to bring the statute book into unnecessary disrepute.’²¹⁰

²⁰⁶ HL Deb 3 November 1997, vol 582, col 1231 (emphasis added).

²⁰⁷ HL Deb 18 November 1997, vol 583, col 533.

²⁰⁸ HL Deb 18 November 1997, vol 583, col 535 (emphasis added).

²⁰⁹ See *Ghaidan* (n 13) [44] (Lord Steyn). cf Gardbaum, ‘Reassessing the New Commonwealth Model’ (n 41) 194; Gardbaum, ‘How Successful and Distinctive’ (n 41) 205.

²¹⁰ HL Deb 18 November 1997, vol 583, col 536.

Perhaps because of its statistical allure, the following statement by the Lord Chancellor has become one of the most oft-quoted:

the courts are not to set aside primary legislation under the Bill, but the principle of statutory construction is a strong alternative. It will be unlawful for public authorities to act in a way which is incompatible with the convention rights and that also is a strong and far-reaching provision. Taken together, those measures provide for the convention rights to have a great effect in our domestic law. I go further; *in 99 per cent. of the cases that will arise, there will be no need for judicial declarations of incompatibility.*²¹¹

The Lord Chancellor also stated in a lecture on the Bill: ‘Legislation is to be interpreted so far as possible so as to be compatible with the Convention rights. There will only be a *tiny minority* of cases where this proves impossible.’²¹²

In the House of Commons, the Home Secretary made similar remarks in the course of his second reading speech: ‘We expect that, *in almost all cases*, the courts will be able to interpret legislation compatibly with the convention. However, we need to provide for the *rare* cases where that cannot be done.’²¹³ At the Committee stage, he said that

we want the courts to strive to find an interpretation of legislation that is consistent with convention rights, so far as the plain words of the legislation allow, and only *in the last resort* to conclude that the legislation is simply incompatible with them. The Opposition want the courts to arrive somewhat earlier at the conclusion that the legislation is simply incompatible with the convention. I cannot see what could be gained by that, bearing in mind our responsibilities under the convention, apart from the prospect of more cases ending up in Strasbourg because fewer people would be satisfied with the interpretation of the United Kingdom courts.²¹⁴

²¹¹ HL Deb 5 February 1998, vol 585, col 840 (emphasis added).

²¹² Lord Chancellor, ‘Opening Address’ in Basil S Markesinis (ed), *The Impact of the Human Rights Bill on English Law: The Clifford Chance Lectures: Volume Three* (OUP 1998) 10 (emphasis added).

²¹³ HC Deb 16 February 1998, vol 306, col 778 (emphasis added).

²¹⁴ HC Deb 3 June 1998, vol 313, cols 421–22 (emphasis added).

The theme in all of these quotations is that declarations were expected to be rare,²¹⁵ at least in part because of the remedial breadth of s 3 (other factors may have been in play, such as a belief that most legislation in force was already compatible,²¹⁶ but this does not mean that remedial breadth was irrelevant). The necessity for such breadth is made clear in the last passage quoted; if s 3 were applied narrowly, the stream of litigants to Strasbourg would continue²¹⁷ and thus the overall purpose of the Act would be undermined.

However, it is necessary to confirm the existence and centrality of this purpose. The White Paper was quite clear about this:

We ... believe that the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court in Strasbourg and which may altogether deter some people from pursuing their rights. ...

Our aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home.²¹⁸

²¹⁵ See *Sheldrake* (n 126) [28] (Lord Bingham, Lord Steyn and Lord Phillips agreeing). See also Lord Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (2009) 34 *Alt LJ* 74, 76; Bingham, 'The Human Rights Act' (n 127) 572.

²¹⁶ Klug and Starmer, 'Standing Back' (n 12) 722; Debeljak, 'Parliamentary Sovereignty' (n 112) 69; Kavanagh, 'Choosing between Sections 3 and 4' (n 112) 131; Kavanagh, *Constitutional Review* (n 15) 122.

²¹⁷ cf Nicholas Lyell, 'Whither Strasbourg? Why Britain Should Think Long and Hard Before Incorporating the European Convention on Human Rights' [1997] *EHRLR* 132, 138–39.

²¹⁸ Home Office (n 204) paras 1.18–1.19. cf Conor A Gearty and KD Ewing, 'Rocky Foundations for Labour's New Rights' [1997] *EHRLR* 146, 148–50.

This purpose has been judicially recognized.²¹⁹ For example, in *R (Greenfield) v Secretary of State for the Home Dept*,²²⁰ Lord Bingham (Lord Rodger, Lady Hale, Lord Carswell and Lord Brown agreeing) stated that

the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg.²²¹

This identification is supported by numerous items of commentary.²²²

The focus on Strasbourg was hardly surprising, given that the bill of rights debate as far back as the 1960s was dominated by the ECHR;²²³ the use of the ECHR

²¹⁹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [6] (Lord Nicholls); *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 [33] (Lord Nicholls). See also Phillips, 'The Art of the Possible' (n 35) 19.

²²⁰ [2005] UKHL 14, [2005] 1 WLR 673.

²²¹ *ibid* [19]. See also *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [29] (Lord Bingham, Lord Scott agreeing); *Huang v Secretary of State for the Home Dept* [2007] UKHL 11, [2007] 2 AC 167 [8] (Lord Bingham); Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP 2000) 160–63.

²²² Paul Boateng and Jack Straw, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law' [1997] EHRLR 71, 73–75; Irvine, 'The Development of Human Rights' (n 17) 221, 225; Irvine, 'Constitutional Change' (n 32) 30–31; Lester, 'The Impact of the Human Rights Act' (n 147) 105; Beloff (n 28) 30; Ben Bradshaw, 'The Human Rights Bill: Progress through Parliament' in Lammy Betten (ed), *The Human Rights Act 1998: What It Means: The Incorporation of the European Convention on Human Rights into the Legal Order of the United Kingdom* (Martinus Nijhoff Publishers 1999) 58; ATH Smith, 'The Human Rights Act and the Criminal Lawyer' (n 17) 251–53; ATH Smith, 'The Constitutional Context' (n 51) 4; Hope, 'Where Are We Now?' (n 2) 450; Francesca Klug, *Values for a Godless Age: The Story of the UK's New Bill of Rights* (Penguin Books 2000) 62; John Morrison, *Reforming Britain: New Labour, New Constitution?* (Reuters/Pearson Education 2001) 348–50; Mikael Rask Madsen, 'France, the UK, and the "Boomerang" of the Internationalisation of Human Rights (1945–2000)' in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 80–83; Samantha Besson, 'The Reception Process in Ireland and the United Kingdom' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) 40–41; Rabinder Singh, 'Interpreting Bills of Rights' (2008) 29 Stat LR 82, 98; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 58–59; Kavanagh, *Constitutional Review* (n 15) 3; Dennis (n 118) 334. cf Andrew S Butler, 'The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 Is a Bad Model for Britain' (1997) 17 OJLS 323, 339.

²²³ See Conor Gearty, 'The United Kingdom' in CA Gearty (ed), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers 1997) 65–

‘as the basis for a domestic code of rights [had been] by far the most frequently advocated option’²²⁴ and, indeed, one commentator specified in a 1997 article that ‘by “the Bill of Rights Debate”, I mean whether or not the European Convention on Human Rights should be incorporated into UK law’.²²⁵ Advocates of a bill of rights often argued for incorporation of the ECHR,²²⁶ while those arguing against also took a similar focus.²²⁷

The design of the UKHRA, especially viewed against the background of the ECHR, places pressure on the courts to apply s 3 in order to provide a litigant with a remedy;²²⁸ s 4, as a ‘non-remedy’,²²⁹ generally being nothing more than a ‘booby

83; Zander (n 203) ch 1; Klug, *Values for a Godless Age* (n 222) 152–63; David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (OUP 2010) 115–17.

²²⁴ Clive Walker and Russell L Weaver, ‘The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World’ (2000) 33 U Mich JL Reform 497, 525.

²²⁵ Robert Wintemute, ‘Lesbian and Gay Britons, the Two Europes and the Bill of Rights Debate’ [1997] EHRLR 466, 467.

²²⁶ See, eg, Quintin Hogg, *New Charter: Some Proposals for Constitutional Reform* (Conservative Political Centre 1969) 12; Anthony Lester, *Democracy and Individual Rights* (Fabian Society 1969) 14; Wallington and McBride (n 202) ch 3; Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (Collins 1978) 172–74; Ronald Dworkin, *A Bill of Rights for Britain* (Chatto & Windus 1990) 13–23; Anthony Lester, *A Bill of Rights for Britain* (Charter 88 1991); Thomas H Bingham, ‘The European Convention on Human Rights: Time to Incorporate’ (1993) 109 LQR 390; John Smith, ‘A Citizens’ Democracy’ (Speech at an event hosted by Charter 88, London, 1 March 1993) 7–11; Lord Irvine of Lairg, ‘The Legal System and Law Reform under Labour’ in David Bean (ed), *Law Reform for All* (Blackstone Press 1996) 16–20; Boateng and Straw (n 222).

²²⁷ Joseph Jaconelli, *Enacting a Bill of Rights: The Legal Problems* (Clarendon Press 1980) ch 9; McCluskey (n 201) 50, 63–64; Keith Ewing, *A Bill of Rights for Britain?* (Institute of Employment Rights 1990) paras 4.1–5.5; KD Ewing and CA Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press 1990) 262–74; John Wadham, ‘A Bill of Rights’ in David Bean (ed), *Law Reform for All* (Blackstone Press 1996); John Wadham, ‘Why Incorporation of the European Convention on Human Rights Is Not Enough’ in Richard Gordon and Richard Wilmot-Smith (eds), *Human Rights in the United Kingdom* (OUP 1996); Gearty and Ewing (n 218); Lyell (n 217). See also Joseph Jaconelli, *Incorporating the European Convention on Human Rights: A Critical Guide to the Issues* (Faculty of Law, University of Manchester 1996).

²²⁸ Hunt (n 18) 97; Lester, ‘Developing Constitutional Principles’ (n 60) 691; Thomas Poole, ‘Bills of Rights in Australia’ (2004) 4 OJCLJ 197, 202–03; Kavanagh, ‘Choosing between Sections 3 and 4’ (n 112) 136–37; Dixon (n 11) 343–50; Kavanagh, *Constitutional Review* (n 15) 132; Roger Masterman, ‘Interpretations, Declarations and Dialogue: Rights Protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities’ [2009] PL 112, 122; Gardbaum, ‘Reassessing the New Commonwealth Model’ (n 41) 200; Gardbaum, ‘How Successful and Distinctive’ (n 41) 210.

²²⁹ Marshall, ‘The Lynchpin of Parliamentary Intention’ (n 46) 239. cf Feldman, ‘Human Rights’ (n 15) 559 (‘not a proper remedy’).

prize’.²³⁰ One of the drafters of the UKHRA²³¹ has noted that ‘It is probably misleading to describe [a declaration of incompatibility] as a remedy in itself. It is, after all, the end product of a process in which the court has decided that the statute *prevents* it from providing a remedy.’²³² Indeed, it has been asserted that s 4 ‘decouples right from remedy’.²³³ A declaration under s 4 has been held not to constitute an effective remedy for the purposes of the ECHR.²³⁴ Lord Bingham has referred (Lord Hope and Lord Scott agreeing) to ss 3 and 4, saying ‘the courts are subject to an unusual interpretative duty designed to obviate the need for such a declaration save exceptionally’.²³⁵

To conclude this section, we may note the overarching theme in the legislative history of the UKHRA of the importance of litigants being able to obtain remedies in domestic courts rather than having to venture to Strasbourg, and it is obvious that s 3 was designed to give the courts sufficient remedial breadth or interpretive flexibility to achieve this purpose of the Act. As Lord Steyn concluded after traversing the legislative history, ‘Rights could only be effectively brought home if section 3(1) was the prime remedial measure, and section 4 a measure of last resort.’²³⁶

²³⁰ Marshall, ‘Two Kinds of Compatibility’ (n 18) 382; Leigh (n 2) 324. See also Leigh and Lustgarten (n 17) 537–38; Rose and Weir (n 67) 52–53.

²³¹ Frances Butler (ed), *Human Rights for the New Millennium* (British Institute of Human Rights/Kluwer Law International 2000) x.

²³² Gordon Nardell, ‘The Human Rights Act: Procedure, Standing and Remedies’ in Frances Butler (ed), *Human Rights for the New Millennium* (British Institute of Human Rights/Kluwer Law International 2000) 79.

²³³ Hickman, ‘Constitutional Dialogue’ (n 45) 327. See also Hickman, *Public Law* (n 45) 82.

²³⁴ *Burden v UK* (2008) 47 EHRR 38 [40]–[44]. See also Merris Amos, ‘The Impact of the Human Rights Act on the United Kingdom’s Performance before the European Court of Human Rights’ [2007] PL 655, 666–67.

²³⁵ *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2006] 2 AC 148 [8].

²³⁶ *Ghaidan* (n 13) [46], see also [49]. cf Kavanagh, ‘Choosing between Sections 3 and 4’ (n 112) 130–31; Keith Mason (n 92) 56; Kavanagh, *Constitutional Review* (n 15) 121–22.

This appears to be the primary reason why UK courts have interpreted s 3 more broadly than, as we shall see in the next two chapters, courts in New Zealand and Australia have interpreted the equivalent provisions in those countries. Whereas Australasia lacks a supranational human rights system which incentivizes rights-consistency of legislation, the UK's human rights legislation was designed to give domestic effect to such a system.

There are two results of the UK approach which bear mentioning. The first is that, as the current President of the Supreme Court recently noted, 'Incorporation of the European Convention [has] given the judges significantly greater powers over policy questions.'²³⁷ This consequence of the enactment of the UKHRA had been predicted early in the life of the Act.²³⁸

Secondly, the UKHRA has had a negative impact on legal certainty. This had been predicted prior to incorporation of the ECHR.²³⁹ Cases such as *R v A*²⁴⁰ and *Lambert*²⁴¹ have been identified as examples of cases in which legal certainty has

²³⁷ Lord Neuberger, 'Judges and Policy: A Delicate Balance' (Speech to Institute for Government, London, 18 June 2013) 4 <www.supremecourt.gov.uk/docs/speech-130618.pdf> accessed 15 August 2013. See also Arden, 'The Changing Judicial Role' (n 44) 499; Lord Neuberger of Abbotsbury, 'Who Are the Masters Now?' (Second Lord Alexander of Weedon Lecture, London, 6 April 2011) para 62 <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-weedon-lecture-110406.pdf> accessed 10 September 2013; Jonathan Sumption, 'Judicial and Political Decision-making: The Uncertain Boundary' [2011] JR 301, 307–08. On policy in judicial decision-making generally, see John Bell, *Policy Arguments in Judicial Decisions* (Clarendon Press 1983).

²³⁸ Lester, 'The Art of the Possible' (EHRLR) (n 60) 672; Lester, 'The Art of the Possible' (Hart Publishing) (n 60) 29; Lester, 'Interpreting Statutes' (n 60) 226; Campbell, 'Incorporation through Interpretation' (n 18) 80.

²³⁹ McCluskey (n 201) 50; Richard Wilmot-Smith, 'Incorporation and the Loss of Illusions' in Richard Gordon and Richard Wilmot-Smith (eds), *Human Rights in the United Kingdom* (OUP 1996) 97.

²⁴⁰ Arden, 'The Interpretation of UK Domestic Legislation' (n 44) 178–79; Nicol, 'Statutory Interpretation' (n 69) 279.

²⁴¹ Arden, 'The Interpretation of UK Domestic Legislation' (n 44) 178–79.

been undermined, while *Anderson*²⁴² has been identified as a contrary example. Numerous items of commentary, including a lecture given by a current Justice of the Supreme Court,²⁴³ have highlighted the phenomenon²⁴⁴ and it has been recognized by a unanimous Court of Appeal:

Those who are governed by, and seek to order their conduct according to, statutory words are entitled to a broad measure of certainty as to what they mean, not some contrary or wholly different meaning which a court, if and when the matter reaches it, might or might not consider permissible under section 3(1) driven by an imperative to find compatibility at all costs.²⁴⁵

While this issue also arises in New Zealand²⁴⁶ and Australia,²⁴⁷ it is most acute in the UK because of the broader approach that has been adopted towards s 3 of the UKHRA.

²⁴² Nicol, 'Statutory Interpretation' (n 69) 279.

²⁴³ Lord Mance, 'Should the Law Be Certain?' (The Oxford Shrieval Lecture, Oxford, 11 October 2011) paras 27–28 <www.supremecourt.gov.uk/docs/speech_111011.pdf> accessed 17 September 2013.

²⁴⁴ JC Smith (n 156) 997; Bennion, 'What Interpretation Is "Possible"' (n 3) 78; Bennion, *Understanding Common Law Legislation* (n 3) 151; Beatson, 'Common Law' (n 141) 13; Francis Bennion, 'Fractured Law — or Three Strikes against the HRA — Part 2' (2007) 171 JPN 380, 381–82; FAR Bennion, *Bennion on Statutory Interpretation: A Code* (5th edn, LexisNexis 2008) 1331; Felicity McMahon, 'The Human Rights Act 1998 (UK): An Impossible Compromise' in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre 2009) 276; James Allan, 'Reasonable Disagreement and the Diminution of Democracy: Joseph's Morally Laden Understanding of "The Rule of Law"' in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011) 90–91; James Allan, 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About—Doin' the Sankey Hanky Panky' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 113; Ekins, 'Rights, Interpretation and the Rule of Law' (n 57) 179–82, see also 174–78; Sales, 'Three Challenges' (n 22) 198–200; Sales and Ekins (n 16) 223, 231; Zyl Smit, 'Statute Law' (n 14) 70, 81. See also Jeffrey Goldsworthy, 'Legislative Sovereignty and the Rule of Law' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 74; James Allan, 'Portia, Bassanio or Dick the Butcher?' (n 173) 11. cf Raymond Geuss, *History and Illusion in Politics* (CUP 2001) 152.

²⁴⁵ *R v Daniel* [2002] EWCA Crim 959, [2003] 1 Cr App R 6 [27] (Auld LJ, for the Court). See Starmer, 'Two Years' (n 68) 18. See also *Momcilovic* (VSCA) (n 130) [97] (Maxwell P, Ashley and Neave JJA), on which see Ronald Sackville, 'Bills of Rights: Chapter III of the Constitution and State Charters' (2011) 18 AJ Admin L 67, 71.

²⁴⁶ James Allan, 'Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990' (2000) 9 Otago LR 613, 626–27; James Allan, 'The Effect of a Statutory Bill of Rights Where

Of course, we cannot fully appreciate all of the factors that distinguish the relevant jurisdictions until we have considered them all — other points will be dealt with in the following two chapters. First, we must draw some conclusions as to the reconciliation of rights-consistent interpretation with purposive interpretation.

5 Reconciling Rights-consistent Interpretation with Purposive Interpretation

In relation to post-UKHRA legislation, s 3's role is relatively clear: it operates as a strong rebuttable presumption of rights-consistency. The real difficulty arises in relation to impugned legislation which pre-dates the UKHRA. One way of characterizing this dilemma is to refer to conflicting intentions — that behind s 3 and that behind the impugned legislation. While intention is still relevant as a matter of interpretive theory, the confusion between the different senses of the term 'intention' — is it an historical intention of an enacting legislature or can later context (eg deeming ECHR rights to be part of the context) alter the notional intention? — muddies the waters considerably.

Parliament Is Sovereign: The Lesson from New Zealand' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 388.

²⁴⁷ *Momcilovic* (VSCA) (n 130) [97] (Maxwell P, Ashley and Neave JJA); Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32 FL Rev 57, 75; Winterton (n 120) 48; Trent Glover, 'The Devil in the Detail: Lessons from the ACT Human Rights Act' in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre 2009) 308; Ben Jellis, 'Look but Don't Leap: Lessons from the Victorian Statutory Bill of Rights' in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre 2009) 323–24; Christian Porter, 'Pluralism, Parliamentary Democracy and Bills of Rights' in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre 2009) 141.

The alternative approach proposed in this thesis relies instead on the broader concept of purpose, taking into account the fact that the sense in which courts tend to use the term is more likely to allow for its identification and application at different levels of abstraction. That purpose tends to be used more broadly is indicated by the former Lord Chief Justice's reasons in a criminal case involving s 3: 'Lord Woolf presented the ruling of the court as one which in fact gave effect to the underlying purpose of the provision under scrutiny'.²⁴⁸ This phenomenon has been noted as being part of a definite pattern.²⁴⁹

Of course, it is necessary to identify criteria which will assist in determining whether an application of a statute or provision's purpose at a high level of abstraction will be appropriate. I propose two. The first is that, in some cases, the indications in the legislative language or context (including extrinsic materials, where relevant) will be so strong as to militate against a high level of abstraction. *Anderson* is an example of this.

The second criterion is the subject matter of the legislation in question.²⁵⁰ Where this lies within the courts' expertise, the courts are,²⁵¹ and should be, more

²⁴⁸ Gearty, 'Reconciling Parliamentary Democracy' (n 8) 267. See also Kavanagh, *Constitutional Review* (n 15) 76.

²⁴⁹ Kavanagh, 'The Role of Parliamentary Intention' (n 83) 192–93, see also 194; Kavanagh, *Constitutional Review* (n 15) 71, 73–75; Bellamy (n 45) 108, cf 109.

²⁵⁰ See Kavanagh, 'Statutory Interpretation and Human Rights after *Anderson*' (n 12); Cram (n 81) 73–74; Kavanagh, *Constitutional Review* (n 15) 41; Masterman, 'Interpretations, Declarations and Dialogue' (n 228) 121; Hickman, *Public Law* (n 45) 94.

²⁵¹ Gearty, 'One Year On' (n 80) vi; O'Brien and Klug, 'The First Two Years' (n 41) 654; Phillipson, '(Mis)-reading Section 3' (n 9) 188; Klug, 'The United Kingdom Experience' (n 147) 6; Nicol, 'Statutory Interpretation' (n 69) 279; Fenwick, *Civil Liberties* (n 92) 185, see also 186, fn 164; Besson (n 222) 81–82; Andrew Geddis and Bridget Fenton, "'Which Is to Be Master?" — Rights-friendly Statutory Interpretation in New Zealand and the United Kingdom' (2008) 25 *Ariz J Intl & Comp L* 733, 759; Ekins, 'Rights, Interpretation and the Rule of Law' (n 57) 179; Masterman, *The Separation of Powers* (n 1) 159, 164.

prepared to use purpose at a high level of abstraction. On the other hand, where issues of social policy or significant practical ramifications are in play, they should be more inclined to use purpose at a low level of abstraction — which will often coincide with intention in the sense in which it is usually used in the cases. This approach is not new; it applied under the common law, and this continuity has been noted by several commentators,²⁵² though the courts may be more willing to engage with social policy issues than previously.²⁵³

Let us consider two cases in which practical ramifications dissuaded the courts from applying s 3, starting with *Re S*, which related to care orders in family law proceedings. As Lord Nicholls described:

a cardinal principle of the Children Act 1989 is that when the court makes a care order it becomes the duty of the local authority designated by the order to receive the child into its care while the order remains in force. So long as the care order is in force the authority has parental responsibility for the child. ... While a care order is in force the court's powers, under its inherent jurisdiction, are expressly excluded ...²⁵⁴

There were 'limited exceptions to this principle of non-intervention'²⁵⁵ but these were held not to 'detract significantly from the basic principle'.²⁵⁶

The Court of Appeal had applied s 3 in a very creative way, propounding a new procedure which would reactivate the court's jurisdiction if certain milestones in

²⁵² Gearty, *Principles of Human Rights Adjudication* (n 8) 159; Beatson and others (n 56) para 5–118; Hickman, 'The Courts and Politics' (n 45) 98–99; Leigh and Masterman (n 22) 94–95.

²⁵³ Kavanagh, *Constitutional Review* (n 15) 112–13. See further Masterman, *The Separation of Powers* (n 1) 166; Young (n 35) 267–68. See also text to n 237.

²⁵⁴ *Re S* (n 21) [23]. cf Herring (n 164) 535–36.

²⁵⁵ *Re S* (n 21) [24].

²⁵⁶ *ibid* [25].

a care plan were not achieved within a reasonable time.²⁵⁷ Lord Nicholls (Lord Mackay, Lord Browne-Wilkinson, Lord Mustill and Lord Hutton agreeing) rejected the lower court's approach,²⁵⁸ saying of the proposed starring system:

It would have far-reaching practical ramifications for local authorities and their care of children. The starring system would not come free from additional administrative work and expense. It would be likely to have a material effect on authorities' allocation of scarce financial and other resources. This in turn would affect authorities' discharge of their responsibilities to other children. Moreover, the need to produce a formal report whenever a care plan is significantly departed from, and then await the outcome of any subsequent court proceedings, would affect the whole manner in which authorities discharge, and are able to discharge, their parental responsibilities.

These are matters for decision by Parliament, not the courts. It is impossible for a court to attempt to evaluate these ramifications or assess what would be the views of Parliament if changes are needed.²⁵⁹

Parliament quickly addressed the issue.²⁶⁰

The second case which it is helpful to consider in this context is *Bellinger v Bellinger*.²⁶¹ The petitioner was a transsexual who had been born male but had undergone gender reassignment surgery. She had unsuccessfully sought a declaration that her marriage to the male respondent, dating from after her surgery, was valid at its inception and subsisted. Section 11(c) of the Matrimonial Causes Act 1973 provided that a marriage was void unless the parties were 'respectively male and female'.

²⁵⁷ See Hale, 'High Points' (n 182) 56–57. cf *R (Wright) v Secretary of State for Health* [2009] UKHL 3, [2009] 1 AC 739 [38]–[39] (Lady Hale, Lord Phillips, Lord Hoffmann, Lord Hope and Lord Brown agreeing).

²⁵⁸ This was not a bolt from the blue: Gearty, 'One Year On' (n 80) v.

²⁵⁹ *Re S* (n 21) [43]–[44], see also [40].

²⁶⁰ Adoption and Children Act 2002, ss 118, 121. See Hickman, 'Constitutional Dialogue' (n 45) 334.

²⁶¹ [2003] UKHL 21, [2003] 2 AC 467.

Lord Nicholls set out the issue before explaining why the court could not apply s 3:

Recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would necessitate giving the expressions ‘male’ and ‘female’ in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex.

This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently 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.²⁶²

In the result, the House made a declaration under s 4 that ‘section 11(c) of the 1973 Act is incompatible with the petitioner’s right to respect for her private life and with her right to marry’.²⁶³ It is noteworthy that Parliament did deal with the issue shortly after the case was decided.²⁶⁴ Some commentators have sought to explain *Bellinger* on the basis that the court was expecting Parliament to fix the problem in any event²⁶⁵ but they have nevertheless conceded the importance of subject matter.²⁶⁶

²⁶² *ibid* [36]–[37], see also [69] (Lord Hope), [78] (Lord Hobhouse). cf Wintemute, ‘Same-sex Partners’ (n 79) 630.

²⁶³ *Bellinger* (n 261) 490.

²⁶⁴ Gender Recognition Act 2004. See Cram (n 81) 77.

²⁶⁵ Hickman, ‘Constitutional Dialogue’ (n 45) 332; Dickson (n 70) 338; Kavanagh, *Constitutional Review* (n 15) 133, 134–36; Hickman, *Public Law* (n 45) 93–94.

²⁶⁶ See n 250.

Care is required to ensure that taking account of legislative subject matter does not lead to incorrect applications of the doctrine of deference, which could lead to s 3 losing much of its force.²⁶⁷ But, subject to this qualification, and in tandem with the first criterion of legislative language and context, this approach offers a coherent and methodologically sound explanation of s 3. Indeed, I would suggest that the reasoning process involving the identification of the level of abstraction at which purpose is applied is a useful alternative to the approach of deeming ECHR rights to form part of the interpretive context.

²⁶⁷ Francesca Klug, 'Judicial Deference under the Human Rights Act 1998' [2003] EHRLR 125, 133; Alison L Young, 'Ghaidan v Godin-Mendoza: Avoiding the Deference Trap' [2005] PL 23, 30–33; Alison L Young, 'A Peculiarly British Protection of Human Rights?' (2005) 68 MLR 858, 862–65.

CHAPTER SIX
LEGISLATIVE RIGHTS-CONSISTENT
INTERPRETATION IN NEW ZEALAND

1 Introduction

The provisions in the NZBORA relating to interpretation are as follows:

4 Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective;

or

(b) Decline to apply any provision of the enactment— by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The crucial provision for the purposes of this thesis is s 6, which is the equivalent provision to s 3 of the UKHRA, discussed in the previous chapter. One point of comparison with the UKHRA (and indeed the ACTHRA and the Charter) is that the

NZBORA lacks a declaration provision equivalent to s 4, although the courts may have a power to issue similar declarations.¹

In a 1998 article, one commentator, comparing the NZBORA with the UKHRA in its form as a Bill tried

as far as possible to avoid cases and issues which raise the complicating factor of section 5 (which is absent from the HRB), in order to give a more apposite assessment of the interpretative lessons from the New Zealand experience for the HRB. In so doing, there is inevitably some risk of distortion, but that cannot be helped.²

In this chapter, I adopt the same approach. Even though s 5 is replicated in the Australian legislation,³ the fact that there is no equivalent in the UKHRA⁴ limits its relevance for the comparative purposes of this thesis.⁵ Section 5 also raises fraught questions as to the methodology to be adopted in its application,⁶ which cannot find space here.

¹ See, eg, Claudia Geiringer, 'On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act' (2009) 40 VUWLR 613.

² Michael Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' [1998] PL 266, 281–82 (citation omitted); Michael Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998) 94 (citation omitted).

³ ACTHRA, s 28(1); Charter, s 7(2).

⁴ On the possibility of enacting one in any new UK human rights instrument, see Helen Fenwick, 'The Human Rights Act or a British Bill of Rights: Creating a Down-grading Recalibration of Rights against the Counter-terror Backdrop?' [2012] PL 468, 470–77.

⁵ The doctrine of proportionality serves a similar function but it is derived from the case law of the European Court of Human Rights rather than a provision in the UKHRA. As stated in the Introduction to Chapter Three, it is beyond the scope of this thesis.

⁶ More than 20 years after the enactment of the NZBORA, these are still a theme in case law and commentary: see Paul Rishworth, 'Human Rights' [2012] NZL Rev 321. cf, in Australia, Julie Debeljak, 'Momcilovic v The Queen and Ors: From Definite Pessimism to Cautious Optimism in 273 Pages!' (Centre for International and Public Law, Australian National University, Public Law Weekend — 10 Years on from September 11: The Impact on Public Law, Canberra, 10 September 2011) 9–15 <www.law.monash.edu.au/castancentre/projects/momcilovic_v_queen_debeljak_public_law_weekend.pdf> accessed 23 April 2013.

The ways in (and the extent to) which the approaches of UK and New Zealand courts to their respective interpretive provisions have diverged are neatly captured in the 2007 case in the Supreme Court of the latter country, *R v Hansen*.⁷ In this case, most of the judges expressly rejected the broad ‘*Ghaidan* approach’, concluding that it was not appropriate for New Zealand. The New Zealand-specific reasons for this divergence will be addressed in the penultimate section of this chapter, when we shall consider s 4 of the NZBORA and that statute’s legislative history.

One reason for the divergence can be addressed here. In *Hansen*, McGrath J (Tipping J agreeing on this point) considered the role of the UKHRA in relation to Strasbourg, as discussed in the previous chapter, and drew a distinction in this respect between the UKHRA and the NZBORA.⁸ Most of the rights in the NZBORA are drawn from the ICCPR. Yet the role of the Human Rights Committee in relation to the ICCPR is different from that of the European Court of Human Rights in relation to the ECHR, and does not put the same remedial pressure on s 6 of the NZBORA; ‘the only sanction the government faces for failing to follow [a] recommendation is naming and shaming in subsequent HRC reports’.⁹

⁷ [2007] NZSC 7, [2007] 3 NZLR 1.

⁸ *ibid* [246]. See Rishworth, ‘Human Rights’ (2012) (n 6) 336. See also David Erdos, ‘Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)’ (2007) 5 *ICON* 343, 368, fn 113; David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (OUP 2010) 101, fn 53. See further Andrew Geddis and Bridget Fenton, “‘Which Is To Be Master?’ — Rights-friendly Statutory Interpretation in New Zealand and the United Kingdom’ (2008) 25 *Ariz J Intl & Comp L* 733, 764–70. cf Priyanga Hettiarachi, ‘*Some Things Borrowed, Some Things New: An Overview of Judicial [sic] Review of Legislation under the Charter of Human Rights and Responsibilities*’ (2007) 7 *OUCLJ* 61, 84, fn 101.

⁹ Andrew Geddis, ‘The Comparative Irrelevance of the NZBORA to Legislative Practice’ (2009) 23 *NZULR* 465, 488 (citations omitted); Andrew Geddis, ‘Inter-institutional “Rights Dialogue” under the New Zealand Bill of Rights Act’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 105 (citations omitted). See also JS Davidson, ‘The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights’ (1991) 4 *Canta LR* 337, 353; Scott Davidson, ‘Individual Communications to the United Nations Human Rights Committee: A New Zealand Perspective’ [1997] *NZL Rev* 375, 391; Don MacKay, ‘The UN Covenants and the Human

2 The Relationship of the Interpretive Provision to the Common Law Interpretive Principles

As in the UK, a distinct aspect of the relationship of the interpretive provision to common law principles is the role of ambiguity in the application of these principles. In the context of the NZBORA, one then High Court judge noted extra-judicially in 2004 that ‘There has been debate since the beginning of the Bill of Rights jurisprudence over how ambiguous words must be for the s 6 injunction to apply.’¹⁰ It has been said that

Most Bill of Rights cases are not about classic verbal ambiguity (or claims to it): they involve giving meaning to vague concepts, reading general words into enactments to create implicit exceptions or extensions, or reading in ‘side-constraints’ to protect rights that could be incidentally impaired by exercise of statutory powers. Of course, even in such cases there is always a trivial sort of

Rights Committee’ (1999) 29 VUWLR 11, 16–17; JS Davidson, ‘Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee’ [2001] NZL Rev 125, 142; Scott Davidson, ‘Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee’ in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 319; Paul Rishworth ‘The Rule of International Law?’ in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 275–79; Paul Rishworth and others, *The New Zealand Bill of Rights* (OUP 2003) 64–65; Petra Butler, ‘Australian Bills of Rights: The ACT and Beyond: Lessons from New Zealand’ (Australian Bills of Rights: The ACT and Beyond conference, Canberra, 21 June 2006) 9 <http://acthra.anu.edu.au/documents/abor_conf_2006/ButlerP_Lessons_from_NZ.pdf> accessed 4 September; Michael Taggart, ‘“Dialogue” as Inter-branch Communication’ in Claudia Geiringer and Dean R Knight (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008) 346; Richard Ekins, ‘Rights, Interpretation and the Rule of Law’ in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011) 186; Mark Elliott, Interpretative Bills of Rights and the Mystery of the Unwritten Constitution [2011] NZL Rev 591, 598–99. cf *R v Goodwin (No 2)* [1993] 2 NZLR 390 (NZCA) 393 (Cooke P, for the Court); *R v N (No 2)* (1999) 5 HRNZ 72 (NZCA) [9] (Keith J, for the Court); Jerome Elkind, ‘The Optional Protocol: A Bill of Rights for New Zealand’ [1990] NZLJ 96, 100; J Elkind, ‘The Optional Protocol and the Covenant on Civil and Political Rights’ [1991] NZLJ 409, 410. For a more general discussion of this point (not specific to New Zealand), see Davidson, ‘Intention and Effect’ (NZL Rev) (n 9) 127–42; Davidson, ‘Intention and Effect’ (Huscroft and Rishworth) (n 9) 306–18; Elizabeth Evatt, ‘The Impact of International Human Rights on Domestic Law’ in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 295, 300–03.

¹⁰ Susan Glazebrook, ‘The New Zealand Bill of Rights Act 1990: Its Operation and Effectiveness’ (South Australian State Legal Convention, Adelaide, 22–23 July 2004) para 38 <www.courtsofnz.govt.nz/speechpapers/Speech22-07-2004.pdf> accessed 5 February 2012.

‘A’ or ‘B’ ambiguity, but only after one has articulated the interpretive choice — to either imply or not imply the exception or side-constraint, or to hold that the facts do or do not fall within the vague statutory term.¹¹

Early in the life of the NZBORA, the view was expressed by one Court of Appeal judge that ‘Section 6 is unlikely to be available except where there is ambiguity or uncertainty’¹² (although it has been noted that this is ‘admittedly readily enough found in many cases’¹³). At least one academic commentator approved this approach.¹⁴ However, the same judge soon stated that ‘It is plainly Parliament’s intention that the rights and freedoms affirmed by the Act should be upheld unless there is clear legislative intention to the contrary.’¹⁵

The statement of highest authority on the issue appeared in the reasons of the Chief Justice in the leading case of *Hansen*, where she stated that ‘s 6 of the Bill of Rights Act now makes it clear that textual ambiguity is not required ...’¹⁶ Elias CJ relied on *Ghaidan v Godin-Mendoza*¹⁷ on this point, and the *Ghaidan* position was also noted by McGrath J.¹⁸ The Chief Justice seems to be correct, as it would be an

¹¹ Rishworth, ‘Human Rights’ (2012) (n 6) 334. See also Janet McLean, Paul Rishworth and Michael Taggart, ‘The Impact of the New Zealand Bill of Rights on Administrative Law’ in Legal Research Foundation, *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation 1992) 72, fn 55.

¹² *Knight v Comr of Inland Revenue* [1991] 2 NZLR 30 (NZCA) 43 (Hardie Boys J). cf Judith Potter and Richard Ekins, ‘The New Zealand Bill of Rights Act 1990: A Judicial Perspective’ (2002) 12 JJA 85, 91. The context of Potter and Ekins’ comment suggest that they are referring to latent rather than patent ambiguity, as they link ambiguity to the plausibility of meanings contended for.

¹³ Cheryl Saunders, ‘Protecting Rights in Common Law Constitutional Systems: A Framework for a Comparative Study’ (2002) 33 VUWLR 83, 93.

¹⁴ FM Brookfield, ‘Constitutional Law’ [1991] NZRL Rev 253, 262. cf McLean, Rishworth and Taggart, ‘The Impact of the New Zealand Bill of Rights’ (n 11) 73.

¹⁵ *Ministry of Transport v Noort* [1992] 3 NZLR 260 (NZCA) 287 (Hardie Boys J). cf *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (NZCA) [78] (Thomas J).

¹⁶ *Hansen* (n 7) [13] (Elias CJ).

¹⁷ [2004] UKHL 30, [2004] 2 AC 557.

¹⁸ *Hansen* (n 7) [240], cf [56] (Blanchard J).

odd position if the principle of legality (and, in New Zealand, the treaty presumption) did not require ambiguity but s 6 did, thus making the statutory rule weaker than the common law rule(s). Elias CJ rightly noted that ambiguity was not required by the principle of legality.¹⁹

As Elias CJ's reference to the principle of legality exemplifies, the courts have tended to focus more on the relationship between that principle and s 6, rather than that between the treaty presumption and the interpretive provision. Of course, since the ambiguity requirement for the application of the treaty presumption was abandoned in the 1990s,²⁰ the common law principles have been of equal strength to each other and can therefore be considered as of equal importance. Although much less has been written about the treaty presumption as it relates to s 6, at least one commentator has drawn the link.²¹ This was reinforced in *Zaoui v A-G (No 2)*,²² in which the Supreme Court invoked s 6 together with obligations under the ICCPR.²³ Having noted the treaty presumption in this context, we may turn to the courts' consideration of the relationship between the principle of legality and the interpretive provision.

¹⁹ *ibid* [13]. See Chapter Four.

²⁰ See Chapter Four.

²¹ Petra Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand' (2004) 35 VUWLR 341, 365. cf Ben Emmerson, 'This Year's Model — The Options for Incorporation' [1997] EHRLR 313, 325–26.

²² [2005] NZSC 38, [2006] 1 NZLR 289.

²³ *ibid* [90]–[91] (Keith J, for the Court). See Claudia Geiringer, 'The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*' (2008) 6 NZJPIL 59, 77; Claudia Geiringer, 'The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*' in Claudia Geiringer and Dean R Knight (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008) 85.

In *Ministry of Transport v Noort*,²⁴ Cooke P said that the NZBORA ‘is not to be approached as if it did no more than preserve the status quo. That it envisaged change is implicit in the allowance of a 28-day interval before it came into force.’²⁵ The President went on to express the view that s 6 ‘lays down a rule of interpretation comparable in importance to — perhaps of even greater importance than — ... the common law presumption ...’²⁶ Similarly, Fisher J in the High Court opined that

If every aspect of the scope and interpretation of the other enactment were to be determined according to conventional principles of statutory interpretation for the purposes of inconsistency under s 4, there would never be any room left for preferred meanings under s 6.²⁷

However, Gault J, ‘a BORA sceptic’,²⁸ proffered an alternative view in *Simpson v A-G (Baigent’s case)*:²⁹ ‘ss 4–6 probably go little further than the common law presumption ...’³⁰ Although Gault J was in dissent, his view has since been cited with approval³¹ and academic commentary in the early days of the NZBORA³² and more recently³³ supports this approach.

²⁴ *Noort* (n 15).

²⁵ *ibid* 270, repeated, citing *Noort* (n 15), in *Simpson v A-G* [1994] 3 NZLR 667 (NZCA) (*Baigent’s case*) 676 (Cooke P).

²⁶ *Noort* (n 15) 272, citing *Morris v Beardmore* [1981] AC 446 (HL).

²⁷ *Herewini v Ministry of Transport* [1993] 2 NZLR 747 (NZHC) 761–62.

²⁸ Philip A Joseph, ‘Constitutional Law’ [2012] NZL Rev 515, 520.

²⁹ *Baigent’s case* (n 25).

³⁰ *ibid* 712. See Anna Adams, ‘Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal’ [1996] NZL Rev 368, 386–88.

³¹ *Police v Beggs* [1999] 3 NZLR 615 (NZHC) 625–26 (Gendall J, for the Court).

³² DM Paciocco, ‘The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill’ [1990] NZRL Rev 353, 356–57; PT Rishworth, ‘The Potential of the New Zealand Bill of Rights’ [1990] NZLJ 68, 69; Paul Rishworth, ‘Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases’ [1991] NZRL Rev 337, 345; Paul Rishworth, ‘The New Zealand Bill of Rights Act 1990: The First Fifteen Months’ in Paul Rishworth and David M Paciocco, *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation 1992) 24.

³³ Paul Rishworth, ‘Affirming the Fundamental Values of the Nation: How the Bill of Rights and the Human Rights Act Affect New Zealand Law’ in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker’s 1995)

Despite the differences of opinion indicated above, Cooke P, speaking extra-judicially in late 1994, spoke of s 6 as requiring

an approach broad, simple, and (when necessary) new, involving much more than preservation of the status quo.

On the whole I think that this has been the dominant approach, with occasional exceptions stemming essentially from the fact that, in New Zealand as everywhere else, individual judges differ in their casts of mind.³⁴

Contrary to Cooke P's assertion, it is the approach exemplified by Gault J that has become dominant. In *Ngati Apa Ki Te Waipounamu Trust v R*,³⁵ Elias CJ cited *Simms* and *Pierson* and stated that '[t]his principle of legality, recognised by the common law, has been expressly enacted by s 6 of the New Zealand Bill of Rights

101; Andrew S Butler, 'The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 Is a Bad Model for Britain' (1997) 17 OJLS 323, 339; Paul Rishworth, 'Lord Cooke and the Bill of Rights' in Paul Rishworth (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths (NZ) 1997) 318; Michael Hodge, 'Statutory Interpretation and Section 6 of the New Zealand Bill of Rights Act: A Blank Cheque or a Return to the Prevailing Doctrine?' (2000) 9 Auckland UL Rev 1, 13–14; John Burrows, 'Interpretation of Legislation: The Changing Approach to the Interpretation of Statutes' (2002) 33 VUWLR 561, 571; Rishworth and others (n 9) 133; Paul Rishworth, 'Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights' (2004) 15 PLR 103, 113, 119; Paul Rishworth, 'The New Zealand Bill of Rights and the Legislature: Praxis and Pitfalls' (Legislatures and the Protection of Human Rights conference, Melbourne, 21 July 2006) 4 <<http://cccs.law.unimelb.edu.au/download.cfm?DownloadFile=DBCF3890-1422-207C-BA3F28D4A306FD29>> accessed 5 February 2012; Rishworth 'The Rule of International Law?' (n 9) 270; Grant Huscroft and Paul Rishworth, "'You Say You Want a Revolution": Bills of Rights in the Age of Human Rights' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009) 150. cf Lord Lester, 'First Steps Towards a Constitutional Bill of Rights' [1997] EHRLR 124, 127.

³⁴ Robin Cooke, 'Brass Tacks and Bills of Rights' (1995) 25 HKLJ 64, 71.

³⁵ [2000] 2 NZLR 659 (NZCA).

Act 1990 ...³⁶ Then, in *R v Pora*,³⁷ Tipping J joined with Elias CJ in observing that '[b]y s 6 the New Zealand Parliament has adopted a general principle of legality ...'³⁸

Elias CJ has since re-asserted extra-judicially the commonality between s 6 and the principle of legality,³⁹ while other judges have expressed similar views, also outside of the courts. Potter J of the High Court, in a co-authored article, stated that 's 6 is a restatement of the common law method of interpretation ...',⁴⁰ while McGrath J, then of the Court of Appeal, expressed the view that 'Ultimately, s 6 reflects and ratifies the long-standing common law approaches ... and gives statutory legitimacy to those approaches.'⁴¹

The rejection by the Supreme Court in *Hansen* of the broad *Ghaidan* approach supports this position, along with the weight of dicta in earlier cases and remarks by commentators, both academic and judicial. As the leading commentator on the *Hansen* case⁴² has noted, s 6 'has not been seen to represent a significant break from common law method'⁴³ and 'The vision of section 6 that predominates in the New Zealand jurisprudence is that it is a statutory legitimisation of the common law

³⁶ *ibid* [82].

³⁷ [2001] 2 NZLR 37 (NZCA).

³⁸ *ibid* [53] (Elias CJ, for Elias CJ and Tipping J), cf [156]–[158] (Thomas J). But see Andrew Butler, 'Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand' [2001] PL 586, 596. cf Edward Scorgie and Anita Killeen, '*R v Poumako*' [2000] NZLJ 429 (note) 430.

³⁹ Sian Elias, 'Fighting Talk and Rights Talk' [2005] LSJ 70, 71–72.

⁴⁰ Potter and Ekins (n 12) 91.

⁴¹ John McGrath, 'Purpose, *Hansard*, Rights, and Language' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004) 234.

⁴² See JF Burrows and RI Carter, *Statute Law in New Zealand* (4th edn, LexisNexis NZ 2009) 367.

⁴³ Geiringer, 'The Principle of Legality' (NZJPIL) (n 23) 77; Geiringer, 'The Principle of Legality' (Geiringer and Knight) (n 23) 84.

principle of legality.’⁴⁴ It follows that ‘It is difficult, therefore, to conceive of circumstances in which the ... section 6-mandated inquiry would deliver a different result from the ... common law-consistent inquiry.’⁴⁵ One commentator has even argued that certain cases in which s 6 was applied could have been decided along similar lines in reliance on common law techniques.⁴⁶ This is not to say that s 6 has no effect:

I think s 6 is best regarded as Parliament’s message to assist courts in determining the meaning of its enactments and does not contemplate a level of interpretive impact that is different from the conventional approach. On the other hand, the idea of seeking rights-consistency may enliven the conventional approach, and generate interpretive possibilities that would otherwise not be appreciated.⁴⁷

Two commentators have argued that the Court in *Hansen* was incorrect to treat s 6 as so closely linked to the principle of legality. One has said that ‘the Court in *Hansen* did not give enough weight to s 6 [which] heralds a new approach to statutory interpretation’,⁴⁸ arguing that ‘Equating s 6 with the principle of legality does not provide much guidance on, or solve the problem posed by, the provision.’⁴⁹ With respect, this argument seems to ignore the great advantage of being able to rely on the substantial body of case law relating to the common law principle, in terms of

⁴⁴ Geiringer, ‘The Principle of Legality’ (NZJPIL) (n 23) 93; Geiringer, ‘The Principle of Legality’ (Geiringer and Knight) (n 23) 98.

⁴⁵ Geiringer, ‘The Principle of Legality’ (NZJPIL) (n 23) 84; Geiringer, ‘The Principle of Legality’ (Geiringer and Knight) (n 23) 91.

⁴⁶ Dan Meagher, ‘The Scope of Judicial Rights Interpretation under Bills of Rights (and Its Political Consequences)’ (2009) 20 PLR 214, 219–20.

⁴⁷ Rishworth, ‘Human Rights’ (2012) (n 6) 330–31, cf 333. See also Rishworth and others (n 9) 123; EW Thomas, ‘A Bill of Rights: The New Zealand Experience’ in Christine Debono and Tania Colwell (eds), *Comparative Perspectives on Bills of Rights* (National Institute of Social Sciences & Law 2004) 27; Geiringer, ‘The Principle of Legality’ (NZJPIL) (n 23) 89; Geiringer, ‘The Principle of Legality’ (Geiringer and Knight) (n 23) 95; Elliott (n 9) 604.

⁴⁸ Geeti Faramarzi, ‘The Bill of Reasonable Rights: Solving a Conundrum and Strengthening an Enactment’ (2009) 15 *Canta LR* 37, 38.

⁴⁹ *ibid* 50.

assisting courts in drawing the boundaries of permissible interpretation under s 6. The same author also (correctly) draws attention to the requirement that legislative language which infringes rights must be sufficiently clear to be effective. But then she aligns herself with the heterodox doctrine of common law constitutionalism⁵⁰ by asserting that ‘if there is a clear encroachment on the rights of individuals by the legislature the judicial branch of government, invoking the rule of law, may declare the statute invalid’.⁵¹ If one is to rely on this doctrine, why bother trying to define the boundaries of s 6?

Another commentator who has been critical of *Hansen* has said that

The New Zealand Supreme Court perhaps mischaracterized the issue in front of it as one relating to the respective roles of the New Zealand Parliament and the courts, and upheld the primacy of the former. In fact, the correct question is simply one of statutory interpretation, which is clearly a function of the courts.⁵²

One might wonder what difficult questions of statutory interpretation involve, if not ‘the respective roles of ... Parliament and the courts’? As the Chief Justice of Australia has pointed out, ‘Statutory interpretation is the field in which Parliament and the courts and, from time to time, the Executive, interact in the discharge of their respective constitutional functions.’⁵³

⁵⁰ See Chapter Three.

⁵¹ Faramarzi (n 48) 53.

⁵² Kris Gledhill, ‘The Interpretative Obligation: The Duty to Do What Is Possible’ [2008] NZL Rev 283, 328.

⁵³ Robert French, ‘What Were They Thinking? Statutory Interpretation and Parliamentary Intention’ (Sir Frank Kitto Lecture, Armidale, 23 September 2011) 6 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj23sep11.pdf> accessed 14 August 2013. See also Robert French, ‘The Courts and the Parliament’ (Queensland Supreme Court seminar, Brisbane, 4 August 2012) 8 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj04aug12.pdf> accessed 28 April 2013.

On the basis of the discussion above, as well as the weight of authority, we may proceed on the basis that s 6 and the principle of legality coincide in terms of the power that they provide to the courts to achieve rights-consistent interpretations (if not in terms of the rights protected by the different principles⁵⁴). Taking into account the convergence of the common law principles, discussed in Chapter Four, it can therefore be noted that a convergence of three principles has taken place. In *Zaoui (No 2)*, Keith J (for the Court) linked s 6 and the treaty presumption.⁵⁵ In Chapter Four, we saw that in an earlier iteration of the same litigation the Supreme Court had linked the treaty presumption and the principle of legality.⁵⁶ As two New Zealand commentators recently put it, the three principles have been ‘synthesised’⁵⁷ into a single ‘matrix’,⁵⁸ marking

an inexorable progression towards an integrated rights jurisprudence. Twenty years ago when New Zealand adopted the NZBORA, rights were fragmented and largely compartmentalised according to their sources — the common law, the NZBORA and international law (customary and treaty-based). They were viewed very differently according to their source, and lacked the unifying description ‘human rights’ under which they now sit. The Supreme Court decision in *Zaoui* shows how all of that has changed.⁵⁹

⁵⁴ See Chapter Four.

⁵⁵ *Zaoui (No 2)* (n 22) [90]. See also, in the Court below, *Zaoui v A-G* [2005] 1 NZLR 577 (NZCA) [152] (Hammond J, in dissent). See Claudia Geiringer, ‘International Law through the Lens of *Zaoui*: Where Is New Zealand At?’ (2006) 17 PLR 300, 317–18; Claudia Geiringer, ‘*Ding v Minister of Immigration; Ye v Minister of Immigration*’ (2008) New Zealand Centre for Public Law Working Paper VUW-NZCPL-001, 20 <www.victoria.ac.nz/law/centres/nzcpl/publications/working-papers/publications/VUW-NZCPL-001.pdf> accessed 10 September 2013.

⁵⁶ *Zaoui v A-G* [2005] 1 NZLR 577 (NZSC) [44] (Elias CJ, Gault, Keith, Blanchard and Eichelbaum JJ).

⁵⁷ Philip A Joseph and Thomas Joseph, ‘Human Rights in the New Zealand Courts’ (2011) 18 AJ Admin L 80, 98.

⁵⁸ *ibid* 89.

⁵⁹ *ibid* 100. See also Geiringer, ‘The Principle of Legality’ (NZJPIL) (n 23) 77–78; Geiringer, ‘The Principle of Legality’ (Geiringer and Knight) (n 23) 84–85; Dan Meagher, ‘The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)’ [2012] NZL Rev 465, 481–83. cf Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications 2008) 100–01, 108.

Of the jurisdictions under consideration in this thesis, this makes New Zealand unique.

3 The Role of Intention

The theme of this section on the role of intention and purpose is that, as one High Court judge put it, drawing on the language of s 6, ‘The Courts cannot “prefer” against the legislative will’;⁶⁰ ‘unlike the United Kingdom courts, New Zealand courts have declined to accord pre-eminence to rights-consistent interpretations over legislative intent’.⁶¹ The focus in this section is on intention, which, as defined in Chapter Two, is the same thing as purpose identified at a low level of abstraction. Further consideration of the role of purpose generally, with particular reference to s 5(1) of the Interpretation Act 1999 (NZ) will follow in the concluding section of this chapter. However, where judges have referred to s 5(1), or s 5(j) of the Acts Interpretation Act 1924 (NZ), in the context of dealing with intention, it would be artificial to consider these citations separately, and so I include them here; albeit with the proviso that these provisions and their relationship to s 6 of the NZBORA will fall for more sustained consideration later.

The relevance of s 5 of the Interpretation Act 1999 (NZ) makes it worth reminding ourselves of that provision and its predecessor. Section 5 states that ‘The

⁶⁰ *Police v Lawson* [2000] 1 NZLR 465 (NZHC) 468 (McGechan J).

⁶¹ Jeremy Gans and others, *Criminal Process and Human Rights* (Federation Press 2011) 15 (citation omitted).

meaning of an enactment must be ascertained from its text and in the light of its purpose.’ Its predecessor, s 5(j) of the Acts Interpretation Act 1924 (NZ), provided:

Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit[.]

(a) Revising Previous Interpretations

Similarly to the experience in the UK, one aspect of the role of intention arises where courts are asked to depart from pre-NZBORA authorities in applying s 6. It is arguable that revising previous interpretations involves departing from the intent of the original enacting legislature, as identified in the earlier cases. This is a useful starting point for a discussion of intent, and takes us to the first case in the Court of Appeal involving the NZBORA, *Flickinger v Crown Colony of Hong Kong*,⁶² which has been described variously as exhibiting ‘remarkable zeal’,⁶³ ‘the most dramatic illustration of the possible potency of s 6’,⁶⁴ ‘the high water mark in the use of s 6’⁶⁵ and ‘an initial flirtation with a bold approach to the application of the interpretive provision’.⁶⁶

⁶² [1991] 1 NZLR 439 (NZCA). See also *O'Connor v R* (NZCA, 16 November 1990) 2 (Casey J, for the Court); *Callahan v Superintendent of Mt Eden Prison* [1992] 1 NZLR 541 (NZCA) 542 (Cooke P, for the Court).

⁶³ Taggart (PL) (n 2) 282; Taggart (Hart Publishing) (n 2) 94.

⁶⁴ Rishworth, ‘Lord Cooke and the Bill of Rights’ (n 33) 316–17.

⁶⁵ Rishworth and others (n 9) 143. cf Geddis, ‘The Comparative Irrelevance of the NZBORA’ (n 9) 481, fn 84; Geddis, ‘Inter-institutional “Rights Dialogue”’ (n 9) 102, fn 81.

⁶⁶ Gans and others (n 61) 15, citing *Flickinger* (n 62).

Section 66 of the Judicature Act 1908 (NZ) provided for appeals from the High Court to the Court of Appeal. In a line of cases, the most recent of which was the 1985 decision of *R v Clarke*,⁶⁷ it had been held that this provision did not apply to criminal proceedings, on the basis of the broader statutory context and its history, which indicated that civil and criminal appeals were dealt with separately in the legislation. The lead appellant submitted that s 23(1)(c) of the NZBORA, containing the right to habeas corpus, necessitated a change in the interpretation of s 66. Cooke P (for the Court) said that ‘we see force in the argument that, to give full measure to the rights specified in s 23(1)(c), s 66 of the Judicature Act should now receive a wider interpretation than has prevailed hitherto’.⁶⁸ However, the President continued: ‘we need not decide the point and refrain from doing so ...’⁶⁹ Interestingly, Cooke P remarked of the case a few years later that ‘In a Court of Appeal of five judges there may have been some more willing to make the ascent than others; but we were all prepared at least to assume that the right of appeal now exists.’⁷⁰

The obiter comments proved controversial. A number of commentators noted that this approach would have involved a departure from the intent behind s 66.⁷¹

⁶⁷ [1985] 2 NZLR 212 (NZCA).

⁶⁸ *Flickinger* (n 62) 441.

⁶⁹ *ibid.*

⁷⁰ Cooke, ‘Brass Tacks’ (n 34) 71.

⁷¹ Rishworth, ‘Applying the New Zealand Bill of Rights Act’ (n 32) 344–45; Rishworth, ‘The First Fifteen Months’ (n 32) 24; Rishworth, ‘Affirming the Fundamental Values’ (n 33) 96–97; Andrew Butler, ‘The Bill of Rights Debate’ (n 33) 329–31; Rishworth, ‘Lord Cooke and the Bill of Rights’ (n 33) 317; Andrew S Butler, ‘Interface between the Human Rights Act 1998 and Other Enactments: Pointers from New Zealand’ [2000] EHRLR 249, 272–73; Andrew S Butler, ‘Strengthening the Bill of Rights’ (2000) 31 VUWLR 129, 133–34; Jim Evans, ‘Questioning the Dogmas of Realism’ [2001] NZL Rev 145, 163; Jim Evans, ‘Questioning the Dogmas of Realism’ in Rick Bigwood (ed), *Legal Method in New Zealand: Essays and Commentaries* (Butterworths (NZ) 2001) 298; Richard Ekins, ‘A Critique of Radical Approaches to Rights Consistent Statutory Interpretation’ [2003] EHRLR 641, 649; Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ 2005) para 7.14.6.

Arguably the Court of Appeal was more circumspect a few years later in *R v B*,⁷² in which it limited the potential right of appeal to habeas corpus applications rather than all criminal proceedings.⁷³ But *Flickinger* has been followed by the High Court⁷⁴ and statements have been made in support of departing from previous interpretations in that Court⁷⁵ and the Court of Appeal.⁷⁶ The judge who followed it in the High Court in 1993 has stated as a member of the Supreme Court that ‘Little guidance can now be obtained from pre-Bill of Rights cases.’⁷⁷ In that Supreme Court case, the majority overruled a 1967 authority⁷⁸ in reliance on the NZBORA.⁷⁹

While *Flickinger* may not have been a proper departure from earlier authority (had the issue called for decision), the principle that courts must be free to revise pre-NZBORA interpretations still holds. As the former Court of Appeal (and acting Supreme Court) judge, Edmund Thomas, has said of human rights litigation: ‘it would be contrary to the will of Parliament in enacting a bill of rights to crimp the spirit of the proclaimed rights with case law which the legislators presumably thought

⁷² [1995] 2 NZLR 172 (NZCA).

⁷³ *ibid* 179–80 (Cooke P), 181–82 (Richardson J), 186 (Hardie Boys J), 186 (Gault J), 187 (McKay J). The legislative scheme has since been altered significantly: see Habeas Corpus Act 2001 (NZ), s 16.

⁷⁴ *Alwen Industries Ltd v Comptroller of Customs* (1993) 1 HRNZ 574 (NZHC) 585–87 (Blanchard J).

⁷⁵ *Palmer v Superintendent Auckland Maximum Security Prison* [1991] 3 NZLR 315 (NZHC) 322 (Wylie J); *Re M* [1992] 1 NZLR 29 (NZHC) 40 (Gallen J), quoted with approval in *Re S* [1992] 1 NZLR 363 (NZHC) 372 (Barker J).

⁷⁶ *Noort* (n 15) 294 (Gault J, in dissent but not as to this point); *Baigent’s case* (n 25) 693 (Hardie Boys J), citing with approval *Flickinger* (n 62) 440–41.

⁷⁷ *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 [63] (Blanchard J). See also Sian Elias, ‘Fundamentals: A Constitutional Conversation’ (2011) 19 Waikato L Rev 1, 11.

⁷⁸ *Melser v Police* [1967] NZLR 437 (NZCA).

⁷⁹ This had been foreshadowed by the Chief Justice in a speech given earlier in the year in which the Supreme Court case was heard: Elias, ‘Fighting Talk’ (n 39) 70.

inadequate for the protection of those rights'.⁸⁰ The authors of the leading textbook on statutory interpretation in New Zealand have characterized this approach as follows:

This does not appear necessarily to involve that the earlier cases were wrongly decided at the time, but rather that because of the later interposition of the Bill of Rights the Acts in question should now be interpreted differently. ... where the Bill of Rights is concerned interpretation can be affected by things that have no connection with the intention of the original enacting Legislature; rather the court must interpret them in the light of the all-embracing legislative intent of the Bill of Rights Act.⁸¹

If one is to be confined to considering intent, to the exclusion of purpose, this approach is apt. However, this is not the approach of this thesis. On the alternative analysis set out in the previous chapter, the court in *Flickinger* may have rightly viewed the issue as one within its expertise, but the indications in the statutory context would not have allowed it to depart from intent. Had it done so, its decision would have been incorrect in relation to s 6.

(b) The Role of Intention Generally

Despite the desirability of a focus on purpose, the courts have generally relied on the concept of intention. Early dicta in the courts pointed in different directions on this issue. In *Ministry of Transport v Noort*,⁸² Cooke P opined, with a degree of caution, that s 6 'lays down a rule of interpretation comparable in importance to — perhaps of

⁸⁰ EW Thomas, 'So-called "Judicial Activism" and the Ascendancy of Judicial Constraints' (2005) 21 NZULR 685, 699, citing EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP 2005) 46. cf Philip A Joseph, *Constitutional & Administrative Law in New Zealand* (3rd edn, Brookers 2007) 1171.

⁸¹ Burrows and Carter (n 42) 360 (citation omitted). cf *R v Offen* [2001] 1 WLR 253 (CA) [99] (Lord Woolf CJ, for the Court); Rishworth and others (n 9) 147–48, 154–55; Hilary Charlesworth, 'Human Rights and Statutory Interpretation' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press 2005) 106.

⁸² *Noort* (n 15).

even greater importance than — s 5(j) of the Acts Interpretation Act 1924 ...⁸³

Hardie Boys J was significantly less bold: ‘It is plainly Parliament’s intention that the rights and freedoms affirmed by the Act should be upheld unless there is clear legislative intention to the contrary. The direction given by s 6 may not always be sufficient for this purpose.’⁸⁴ Gault J, apparently taking a quite different view from Cooke P, stressed the importance of the purposive provision:

I understand meanings that ‘can be given’ as not authorising departure from true meaning where that is clear and unambiguous. It is no more and no less than an exercise in statutory interpretation assisted where necessary by the objects of the legislation. Section 6 does not repeal s 5(j) of the Acts Interpretation Act 1924.⁸⁵

The approach described by Hardie Boys and Gault JJ was applied in a series of High Court cases dealing with the right to trial by jury.⁸⁶

The first Court of Appeal case in which intention was identified as playing a decisive role was *Quilter v A-G*,⁸⁷ a case which demonstrates the difference in interpretive approach between the UK and New Zealand (and, arguably, Australia as well⁸⁸).⁸⁹ The appellants, three couples in stable long-term lesbian relationships, had

⁸³ *ibid* 272.

⁸⁴ *ibid* 287. See also Rishworth, ‘Potential of the New Zealand Bill of Rights’ (n 32) 69; Rishworth, ‘Applying the New Zealand Bill of Rights Act’ (n 32) 346.

⁸⁵ *Noort* (n 15) 294.

⁸⁶ *Birch v Ministry of Transport* (1992) 9 CRNZ 83 (NZHC) 85 (Fisher J); *Reille v Police* [1993] 1 NZLR 587 (NZHC) 592 (Eichelbaum CJ); *Tapena v Police* (1993) 10 CRNZ 614 (NZHC) 616 (Williams J); *Drelizis v Wellington District Court* [1994] 2 NZLR 198 (NZHC) 201 (Barker ACJ).

⁸⁷ [1998] 1 NZLR 523 (NZCA).

⁸⁸ See Frank Brennan, ‘Involving Civil Society in Constitutional Reform: An Overview of the Australian National Human Rights Consultation and the Proposed National Human Rights Framework’ in Caroline Morris, Jonathan Boston and Petra Butler (eds), *Reconstituting the Constitution* (Springer 2011) 279.

⁸⁹ Alice Rolls, ‘Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* Have Been Any Different If Australia Had a Bill of Rights Like Victoria?’ (2007) 18 PLR 119, 127.

been refused marriage licences under the Marriage Act 1955 (NZ) (the Registrar had also refused to accept notices of intended marriage under the Act) on the basis that the Act did not provide for marriage between persons of the same sex. The appellants submitted that s 19 of the NZBORA, which provides that '[e]veryone has the right to freedom from discrimination ...' was engaged and that s 6 should be applied so that marriage under the Act could involve same-sex partners. The Court split as to the issue of whether there was discrimination, but was unanimous in holding that s 6 could have no application in any event; as one commentator put it, 'The Court firmly kicked the issue to Parliament'⁹⁰ (which legalized same-sex marriage earlier this year⁹¹). Thomas J stated unequivocally that the Court could not 'adopt a meaning which is clearly contrary to Parliament's intent'⁹² and 'Even if a meaning is theoretically possible, it must be rejected if it is clearly contrary to what Parliament intended.'⁹³ Commentators noted this approach with approval;⁹⁴ in particular, the way in which the importance of intent was clear because the language of the statute was not itself controlling.⁹⁵

The two best examples of cases dealing with the role of intention centred on retrospective criminal legislation. They are *R v Poumako*⁹⁶ and *Pora*, of which it has been said rather euphemistically that the judges adopted 'a quite inventive understanding of the relationship between various legislative amendments to avoid the

⁹⁰ Taggart (PL) (n 2) 280; Taggart (Hart Publishing) (n 2) 93.

⁹¹ Marriage (Definition of Marriage) Amendment Act 2013 (NZ). See also Civil Union Act 2004 (NZ).

⁹² *Quilter* (n 87) 541.

⁹³ *ibid* 542.

⁹⁴ Andrew S Butler, 'Same-sex Marriage and Discrimination' [1998] NZLJ 229, 229, 232; Mark Henaghan, 'Same-sex Marriages in the Court of Appeal' [1998] NZLJ 40, 40.

⁹⁵ Ekins, 'A Critique' (n 71) 649.

⁹⁶ [2000] 2 NZLR 695 (NZCA).

potential application of retrospective criminal penalties ...⁹⁷ The author of this description has said that ‘These cases arguably mark the high-water mark of judicial use of the s 6 mandate.’⁹⁸ I shall deal with the decisions in turn.

Poumako has been described as representing ‘[p]erhaps the strongest position on s 6 ...’⁹⁹ The Crimes (Home Invasion) Amendment Act 1999 (NZ), which came into force on 2 July 1999, introduced the concept of home invasion into the Crimes Act 1961 (NZ) and provided for increased maximum sentences for crimes involving a home invasion. Fifteen days later, on 17 July 1999, a companion measure to the home invasion legislation came into force: the Criminal Justice Amendment Act (No 2) 1999 (NZ), which provided for a mandatory non-parole period of 13 years for offences of murder involving home invasion (there was a mandatory life sentence for all offences of murder). The Member of Parliament promoting the latter 1999 Act had stated that ‘the impact of that provision will affect those who are now before the courts on murder charges in the context of home invasion’.¹⁰⁰ The appellant, who under the old legislative regime would have been subject to a minimum non-parole period of 10 years, was caught by the apparently retrospective reach of these new provisions and submitted that this was inconsistent with s 25(g) of the NZBORA, which contains ‘[t]he right if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty ...’

⁹⁷ Geddis, ‘The Comparative Irrelevance of the NZBORA’ (n 9) 481. See also Geddis, ‘Inter-institutional “Rights Dialogue”’ (n 9) 102.

⁹⁸ Geddis, ‘The Comparative Irrelevance of the NZBORA’ (n 9) 481, fn 84; Geddis, ‘Inter-institutional “Rights Dialogue”’ (n 9) 102, fn 81. cf Rishworth and others (n 9) 143.

⁹⁹ Glazebrook (n 10) para 42.

¹⁰⁰ NZ Parl Deb 24 June 1999, vol 578, p 17687.

In the end, the point was not authoritatively decided, as it was held that, even if the statutory minimum were 10 years, it would have been correct to impose a 13-year minimum non-parole period on the appellant as a matter of discretion.¹⁰¹ However, the judges addressed in obiter the retrospectivity submissions. For the three-member majority, an alternative to the broad retrospectivity of the MP's reading existed: it was possible to read the latter 1999 Act as being retrospective only to the date on which the former 1999 Act came into force, as before that date there was no concept of home invasion in the legislative scheme. Gault J (for Richardson P, Gault and Keith JJ) after referring to s 6, stated that '*[i]t is not a matter of what the legislature (or an individual member) might have intended*'. The direction is that wherever a meaning consistent with the Bill of Rights can be given, it is to be preferred. The legislature's intention in this regard is clear.'¹⁰² This is the strongest statement against legislative intent as a controlling factor in interpretation under s 6.

The judges in the minority strongly rejected this approach. Henry J observed that '[Counsel for the Crown's] argument was focused on what he submitted was the clear legislative intent. This was, in my view, the correct approach.'¹⁰³ Thomas J expanded on this:

I am not convinced that s 6 can be invoked to support an interpretation which is clearly not Parliament's intent. ... a purposive approach is adopted in order to give the statutory provision a meaning which will presumably accord with Parliament's intent. In such a case, the Courts should undoubtedly adopt that interpretation which complies with the Bill of Rights. Where, however, Parliament's intention is unequivocal

¹⁰¹ *Poumako* (n 96) [41] (Gault J, for Richardson P, Gault and Keith JJ), [45] (Henry J).

¹⁰² *ibid* [37] (emphasis added).

¹⁰³ *ibid* [54].

and the alternative interpretation is clearly not what Parliament intended, I doubt that s 6 authorises the Court to adopt such a meaning.¹⁰⁴

It is the approach of the minority that has found greater favour with commentators.¹⁰⁵

The second case dealing with the fallout from the 1999 legislation under scrutiny in *Poumako* was *Pora*. The Criminal Justice Amendment Act (No 2) 1999 (NZ), which had amended s 80 of the Criminal Justice Act 1985 (NZ), and which was in issue in *Poumako*, also formed part of the background in *Pora*. The appellant had been convicted in 1992 of a murder which had taken place in the course of a home invasion. Following the quashing of this conviction, he was re-tried and again convicted, being sentenced in 2000. The sentencing judge considered that he was required to impose the mandatory non-parole period of 13 years. Apart from apparently falling foul of the NZBORA, as had been addressed in *Poumako*, the appellant in *Pora* also relied on s 4(2) of the Criminal Justice Act 1985 (NZ) which provided that ‘no Court shall have power to make any order in the nature of a penalty it could not have made against an offender at the time the offence was committed ...’ The appellant submitted, in reliance on the majority’s reasons in *Poumako*, which had tentatively indicated that the retrospective reach of the 1999 Act was only 15 days, that he was entitled to be sentenced on the basis of a 10-year minimum non-parole period. The Crown accepted that the appellant was not caught by the application of the 1999 Act, but on the basis that it extended only as far back as 1993, when the power to impose a minimum period of imprisonment before parole was conferred by s

¹⁰⁴ *ibid* [80].

¹⁰⁵ *Hodge* (n 33) 12; Andrew S Butler, ‘Declaration of Incompatibility or Interpretation Consistent with Human Rights in New Zealand’ [2001] PL 28, 37; Scorgie and Killeen (n 38) 430.

56 of the Criminal Justice Amendment Act 1993 (NZ). Keith J (for Gault, Keith and McGrath JJ, Richardson P agreeing on this point) accepted the Crown's submission.

The minority judges, Elias CJ, Tipping J (who joined in Elias CJ's reasons) and Thomas J, on the other hand, applied s 6 in choosing to favour s 4(2) of the Criminal Justice Act 1985 (NZ) over the 1999 Act. As has been noted of the minority's approach, 'although they acknowledge Parliament can abridge human rights by expressing its intention clearly, ... they decline to apply a law that is clearly intended to abridge a human right'.¹⁰⁶ In this regard, the authors who expressed that view take aim at Thomas J, drawing on a comparison of his reasons in *Poumako* with those in *Pora*: '[i]t would appear that he has changed his mind as to the clarity of Parliament's intention as regards s 2(4)',¹⁰⁷ of the 1999 Act. Certainly, there seems to be at least a degree of inconsistency between what Thomas J said in *Poumako* about the importance of legislative intent and his extra-judicial description of *Poumako* and *Pora* as cases in which 'the Court of Appeal demonstrated that there is more than one way of standing a court on its head in an effort to avoid giving criminal legislation retrospective effect when that effect undeniably represented Parliament's intent'.¹⁰⁸ It should be noted, though, that Thomas J did hasten to add that 'For the most part, however, it cannot be seriously doubted that the courts diligently seek to give effect to Parliament's intention.' The minority's approach has been criticized for 'abrogating a statute',¹⁰⁹ and departing from intent.¹¹⁰ Even Keith J, one of the majority judges,

¹⁰⁶ Anita Killeen, Richard Ekins and John Ip, 'Undermining the Grundnorm?' [2001] NZLJ 299, 301.

¹⁰⁷ *ibid.*

¹⁰⁸ Thomas, 'So-called "Judicial Activism"' (n 80) 694, see also 702.

¹⁰⁹ Evans, 'Questioning the Dogmas of Realism' (NZL Rev) (n 71) 170; Evans, 'Questioning the Dogmas of Realism' (Bigwood) (n 71) 304.

¹¹⁰ Butler and Butler, *The New Zealand Bill of Rights Act* (n 71) para 7.12.37, citing Andrew Butler, 'Implied Repeal' (n 38).

writing extra-judicially in 2003, admitted that '[o]ur lives might have been much easier had we had the power to strike that legislation down ...',¹¹¹ suggesting some awareness on the part of the majority of the extremes to which interpretive method was pushed in the case.

If the courts were to take this approach regularly, it would beg the question: 'what must Parliament say to achieve sufficient clarity to legislate inconsistently with rights under the NZBORA?' As the lead author of one of the two major works on the NZBORA has suggested: 'If one asks how clarity could have been attained one thinks of phrases such as "and this means that it has retrospective effect" or "the principle of legality is hereby abrogated to the extent required".'¹¹²

A former Chief Parliamentary Counsel of New Zealand noted this from a drafter's perspective:

[*Pora*] demonstrates the difficulties a drafter faces in drafting legislation that infringes on individual rights. A legislative statement that the 1999 amendment applied to offences committed before the date of the amendment could not have been clearer. Section 4(2) applied generally. The amendment to s 80 was limited to home invasion offences. The only way in which the drafter might have avoided the issue would have been to amend s 4(2) of the Criminal Justice Act at the same time by saying that it was subject to s 80. One wonders though whether even that would have been enough.¹¹³

¹¹¹ KJ Keith, 'The New Zealand Bill of Rights Experience: Lessons for Australia' (2003) 9 AJHR 119, 125.

¹¹² Rishworth 'The Rule of International Law?' (n 9) 270, fn 13. See also Rishworth, 'Navigation Lights' (n 23) 116.

¹¹³ George Tanner, 'Reflections on the Writing of Statutes' in Jeremy Finn and Stephen Todd (eds), *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (LexisNexis NZ 2008) 83.

He went on to give an example of such an explicit attempt to oust the NZBORA.¹¹⁴

These concerns go to ‘[t]he idea that there are some truly basic human rights which, if at all, Parliament can only override by *unrealistically specific* language ...’,¹¹⁵ perhaps also able to be characterized as ‘defiantly-specific’.¹¹⁶ As noted above, this approach is not objectionable where an issue before the court is within its expertise and where there is room for argument over the meaning of the provision in question. The problem with the extreme approaches taken in *Poumako* and *Pora* is that, although retrospective criminal legislation is an issue firmly within the courts’ expertise, the indications in the legislative context, particularly Hansard, were sufficient to dispose of the matters. However unpalatable broad retrospectivity was,¹¹⁷ the problem needed to be addressed by Parliament, as in fact it was; following the controversy surrounding the relevant legislation, Parliament enacted an anti-retrospectivity provision: Sentencing Act 2002 (NZ), s 6. By s 166 of the same statute, it also repealed s 80(a) of the Criminal Justice Act 1985 (NZ).¹¹⁸

Despite the mountain of criticism of the minority’s approach in *Pora*, it has had its supporters. One leading commentator has taken it to be indicative of a shift in

¹¹⁴ Armed Forces Discipline Act 1971 (NZ), ss 117ZB–117ZD. See Tanner (n 113) 83. See also Prostitution Reform Act 2003 (NZ), s 13(2), on which see Rishworth, ‘Common Law Rights’ (n 33) 118; Geddis, ‘Inter-institutional “Rights Dialogue”’ (n 9) 106, fn 92.

¹¹⁵ Lord Cooke of Thorndon, ‘The Basic Themes’ (2004) 2 NZJPIL 113, 114 (emphasis added). Of course, ‘Clarity, like beauty, always involves questions of degree and is affected by the eye of the beholder’: JJ Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 ALJ 769, 779; James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press 2008) 88.

¹¹⁶ Joseph and Joseph (n 57) 96.

¹¹⁷ For arguments that retrospective legislation can be justified, especially in the context of *Pora*, see James Allan, ‘Oh That I Were Made Judge in the Land’ (2002) 30 FL Rev 561, 571–72.

¹¹⁸ See Keith, ‘The New Zealand Bill of Rights Experience’ (n 111) 125; Petra Butler, ‘Human Rights and Parliamentary Sovereignty’ (n 21) 364.

the constitutional balance away from parliamentary sovereignty.¹¹⁹ Another has unashamedly conceded that it ‘was entirely artificial, and there was no question that any parliamentarian would say “that is what we meant to convey” by enacting the relevant language ...’,¹²⁰ also describing it as ‘a strained and unnatural interpretation of relatively clear parliamentary language in order to avoid a conflict with other language ...’,¹²¹ which puts it at odds with the authorities traversed above.

In 2007, what is now the leading case on s 6 was handed down: *Hansen*, in which the Supreme Court ‘affirmed, clarified and solidified previous Court of Appeal authority on the limits of section 6’.¹²² The case has been described as a ‘judicial refusal to depart from Parliament’s apparent intention’.¹²³ The appellant had been found in possession of a significant quantity of cannabis and had been convicted of possession with intent to supply. Section 6(6) of the Misuse of Drugs Act 1975 (NZ) provided that a person found in possession of more than the specified amounts of various drugs was deemed to possess them for the purpose of supply or sale ‘until the contrary is proved’. This was said to impose a legal or persuasive burden on the accused in relation to the mental element of the offence. The appellant submitted that s 25(c) of the NZBORA, which guarantees ‘[t]he right to be presumed innocent until proved guilty according to law’, mandated an interpretation of s 6(6) under which the burden was merely evidentiary. The same argument had been rejected by the Court of

¹¹⁹ Philip A Joseph, ‘Constitutional Law’ [2001] NZL Rev 449, 451–57.

¹²⁰ Gledhill (n 52) 329.

¹²¹ *ibid* 331.

¹²² Geiringer, ‘The Principle of Legality’ (NZJPIL) (n 23) 70; Geiringer, ‘The Principle of Legality’ (Geiringer and Knight) (n 23) 78.

¹²³ Geddis, ‘The Comparative Irrelevance of the NZBORA’ (n 9) 480; Geddis, ‘Inter-institutional “Rights Dialogue”’ (n 9) 101.

Appeal in the early days of the NZBORA.¹²⁴ The Supreme Court unanimously rejected the submission, holding that s 6 did not permit such an interpretation of the provision.

Elias CJ was critical of the use of the concept of intention:

I have not thought it helpful to refer to legislative intention in considering the meaning of s 6(6). The Law Commission recommended against reference to such ‘intention’. The Interpretation Act as enacted follows instead the Law Commission’s emphasis on meaning, context and purpose. The principle in s 6 of the Interpretation Act that an enactment must apply to circumstances as they arise underscores the self-evident point that statutes must apply in conditions which may not have been foreseen at the time of enactment. The ‘very strong and far reaching’ obligation of interpretation under s 6 of the Bill of Rights Act may also require a meaning to be given to a provision which was not envisaged at the time of its enactment. ...¹²⁵

However, despite dissenting as to the methodological issue of the order in which to apply ss 4, 5 and 6, the Chief Justice joined the other judges in holding that s 6 could not be applied in the way contended for by the appellant (for which she has been criticized for adopting ‘a legalistic interpretation’¹²⁶ of the word ‘proved’). She reflected previous Court of Appeal authority¹²⁷ and s 5(1) of the Interpretation Act 1999 (NZ) in emphasizing that ‘While a meaning consistent with the rights and freedoms contained in the Bill of Rights Act must be preferred if it “can” be given to

¹²⁴ *R v Phillips* [1991] 3 NZLR 175 (NZCA). See WJ Brookbanks, ‘Criminal Law’ [1991] NZRL Rev 385, 401.

¹²⁵ *Hansen* (n 7) [14], citing New Zealand Law Commission, *A New Interpretation Act: To Avoid ‘Prolivity and Tautology’* (NZLC R 17, 1990) para 73; *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264 [28] (Lord Bingham).

¹²⁶ Gledhill (n 52) 317.

¹²⁷ See the following section.

an enactment, it must be a meaning that is tenable on the text and in the light of the purpose of the enactment.¹²⁸

Blanchard J, on the other hand, drew on *R (Wilkinson) v IRC*¹²⁹ in referring to a ‘compound’ intention:

When new situations arise it is necessary to approach [ss 4–6] in a way which is best suited in the circumstances to give effect to what appears to be the overall parliamentary intention. This intention must be taken to be a compound one, involving the specific intention to be discerned from the provision in issue read in light of the general overriding directions in ss 4–6. In situations like the present, where the specific intention relating to an issue plainly within the contemplation of the legislators is clear, it is particularly important for that intention to be respected. Section 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is genuinely open in light of both its text and its purpose.¹³⁰

It has been argued that this approach involves recasting s 6 ‘so that it reads “wherever, consistently with its text and purpose, an enactment can be given a meaning that is consistent with” the rest of the New Zealand Bill of Rights, then the enactment shall be so interpreted ...’¹³¹ This is said to amount to ‘judicial legislation’.¹³² Yet such a reading is in fact a legitimate way of reconciling s 6 with s 5(1) of the Interpretation Act 1999 (NZ). The problem with this argument is that it does not recognize, at least explicitly, that the references to text and purpose are drawn from another Act and that a process of reconciliation must take place.

¹²⁸ *Hansen* (n 7) [25].

¹²⁹ [2005] UKHL 30, [2005] 1 WLR 1718.

¹³⁰ *Hansen* (n 7) [61], citing *Wilkinson* (n 129) [16]–[17] (Lord Hoffmann).

¹³¹ Gledhill (n 52) 318.

¹³² *ibid* 318–19.

Tipping J also described the approach under s 6 as a search for tenable meaning: ‘I must therefore examine the words of s 6(6) ... to see if a meaning different from Parliament’s intended meaning and consistent or less inconsistent with the presumption of innocence can tenably be found in them.’¹³³ Tipping J also referred to the importance of intent: ‘s 6 cannot be used to give a meaning to an enactment which is clearly contrary to the meaning which Parliament understood its words to convey. In such a situation no other meaning “can” be given to the enactment’.¹³⁴

This has been countered by one commentator with an approach similar to Blanchard J’s ‘compound’ intention:

It is not just the intention of the Parliament that actually passed the piece of legislation being construed. The effect of the New Zealand Bill of Rights is that all statute law is a composite of what was intended by the Parliament that actually passed the statute in question and the Parliament that passed the New Zealand Bill of Rights. ... It would have been open to the New Zealand Parliament in 1990 to amend expressly the language of every statute, as well as providing an ongoing interpretative obligation for subsequent statutes. Instead, it has simply imposed an interpretative obligation in relation to all statutes and left it to the courts to work out what the composite effect is of the different pieces of legislation; but if the effect of that legislative tool is not given full weight, the composite intention of the New Zealand Parliament is defeated.¹³⁵

It is not unhelpful to refer to composite or compound intention, but the question is how the respective intentions behind the NZBORA and impugned legislation are to be weighed against each other. It seems wrong to characterize Tipping J’s remarks as

¹³³ *Hansen* (n 7) [149]. See also *Re Application by AMM and KJO to Adopt a Child* [2010] NZFLR 629 (NZHC) [31] (Wild and Simon France JJ). cf Rishworth, ‘Human Rights’ (2012) (n 6) 331.

¹³⁴ *Hansen* (n 7) [156], see also [166].

¹³⁵ Gledhill (n 52) 321–22 (citation omitted). See also Rishworth, ‘Human Rights’ (2012) (n 6) 331–32.

indicating that he gives no weight to the NZBORA. Picking up the point about leaving it ‘to the courts to work out what the composite effect is’, the author gives the following example:

if Parliament wished to reduce all minimum age limits at which permission is given to do things to (say) 15, it could produce a lengthy statute that expressly amends every statute with such a minimum age requirement. But it could also use a clause along the lines of ‘wherever it can be done, every minimum age requirement in an enactment shall now be read as if the age given was reduced to 15’. That would defeat the purpose of every Parliament that had provided a higher minimum age in relation to any other situation, but it would be open to the present Parliament to do that. Section 6 of the New Zealand Bill of Rights is a similar statutory tool.¹³⁶

With respect, this simplistic example is a poor analogy for interpretation under the NZBORA; identifying an age limit and substituting one number for another is much simpler than the process involved in rights-consistent interpretation, which involves greater flexibility and balancing of competing interests.

Returning to Tipping J’s reasons, in drawing on the concept of ‘reasonable possibility’, he distinguished

at least some English discussions on the subject: they seem to adopt a meaning which is *unreasonably* possible from an interpretative point of view. I say that because alternative meanings have been found in England, under the aegis of s 3, despite an acknowledgment that this defeats Parliament’s purpose.¹³⁷

As was noted in the previous chapter on UK law, it is generally possible to characterize the UK cases as being consistent with purpose, assuming that one accounts for relatively high levels of abstraction.

¹³⁶ Gledhill (n 52) 322, fn 138.

¹³⁷ Hansen (n 7) [158].

McGrath J was the only judge who gave adequate attention to s 5 of the Interpretation Act 1999 (NZ) and the importance of the concept of purpose which stems partly from that provision:

Section 6 ... adds to, but does not displace, the primacy of s 5 of the Interpretation Act, which directs the Courts to ascertain meaning from the text of an enactment in light of the purpose, and it does not justify the Court taking up a meaning that is in conflict with s 5. That would be contrary to s 4. Rather s 6 makes New Zealand's commitment to human rights part of the concept of purposive interpretation.¹³⁸

McGrath J's reasons are especially helpful for their focus on purpose rather than intention. In the final section of this chapter, the apparent conflict between the provisions to which he refers will be addressed.

Before moving to the next topic, it is worth commenting on two aspects of the fallout from *Hansen*. The first is that Parliament later expanded the application of the reverse onus provision.¹³⁹ Contrastingly, the second is that the New Zealand Law Commission has recently recommended its repeal.¹⁴⁰

¹³⁸ *ibid* [252] (citation omitted). See also Rishworth, 'Human Rights' (2012) (n 6) 336.

¹³⁹ Andrew Butler and Petra Butler, 'Protecting Rights' in Caroline Morris, Jonathan Boston and Petra Butler (eds), *Reconstituting the Constitution* (Springer 2011) 159, fn 12; Elliott (n 9) 612. See also Geddis, 'The Comparative Irrelevance of the NZBORA' (n 9) 486–87.

¹⁴⁰ New Zealand Law Commission, *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (NZLC R 122, 2011) paras 46–48 (Summary), para 75 (Summary), paras 7.52–7.77, 9.93. See 'Controlling and Regulating Drugs: The Law Commission Reviews the Misuse of Drugs Act 1975' [2011] NZLJ 153; Elliott (n 9) 612, fn 101.

(c) Intention and Legislative Language

As in the UK, one of the factors that will influence courts in deciding whether to depart from intent is legislative language.¹⁴¹ In New Zealand, ‘When the judiciary has been willing to use its interpretive powers to make legislation compatible with rights, it has usually confined interpretations to those plausible in light of the statutory language used to express its legislative goals.’¹⁴² In this regard, New Zealand courts have repeatedly read into s 6 a requirement of reasonableness,¹⁴³ which indicates that legislative language exercises a significant degree of control over the process of s 6 interpretation. This approach was most authoritatively confirmed in *Hansen*.¹⁴⁴ Blanchard J concluded that ‘even in a Bill of Rights environment, it would be *overstretching* the language of a provision [to accept the appellant’s submission]’.¹⁴⁵

Tipping J used the greatest number of expressions to convey what is required, stating that it was not ‘reasonably possible’¹⁴⁶ to construe the crucial provision in the way for which the appellant contended. He referred to one of the two major works on the NZBORA, noting that the authors ‘emphasise that in New Zealand s 6 has been read on the basis that an alternative meaning must be reasonably or properly open. It

¹⁴¹ On the link between the concepts, both generally and in particular cases, see Rishworth, ‘Potential of the New Zealand Bill of Rights’ (n 32) 69; Rishworth, ‘Lord Cooke and the Bill of Rights’ (n 33) 318; Paul Rishworth, ‘Reflections on the Bill of Rights after *Quilter v Attorney-General*’ [1998] NZL Rev 683, 687, fn 15; Paul Rishworth, ‘Human Rights’ [1999] NZL Rev 457, 470.

¹⁴² Janet L Hiebert, ‘Governing Like Judges?’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 47 (citation omitted).

¹⁴³ A former Justice of the High Court of Australia has also, albeit anomalously, identified this as relevant in the context of the ACTHRA and the Charter: Michael McHugh, ‘A Human Rights Act, the Courts and the Constitution’ (2009) 11 CLPR 86, 86.

¹⁴⁴ For a recent application of the principles emanating from *Hansen* in this regard, see *Schubert v Wanganui DC* [2011] NZAR 233 (NZHC) [140]–[142] (Clifford J).

¹⁴⁵ *Hansen* (n 7) [56] (emphasis added).

¹⁴⁶ *ibid* [149].

must be fairly open and tenable.’¹⁴⁷ Interestingly for comparative purposes, Tipping J also referred to Lord Millett’s dissenting speech in *Ghaidan*, in which the latter ‘spoke of an alternative meaning having to be *intellectually defensible*’.¹⁴⁸

McGrath J said that a meaning preferred under s 6 must be ‘tenable’¹⁴⁹ and that ‘To qualify as a meaning that can be given under s 6 what emerges must always be *viable*, in the sense of being a *reasonably available* meaning on that orthodox approach to interpretation.’¹⁵⁰ Anderson J emphasized that ‘the duty of the Courts is to construe, not to reconstruct. In my view no other meaning than that decided in *Phillips* is *reasonably possible*. The meaning suggested on behalf of the appellant is as *strained and unnatural* now as it was found to be then.’¹⁵¹

Elias CJ appeared to take a somewhat bolder approach:

The direction to give an enactment a meaning that accords with the rights and freedoms contained in the Bill of Rights Act where such interpretation ‘can’ be given may as equally entail an interpretation which ‘linguistically may appear strained’, as where such interpretation is ‘possible’.¹⁵²

However, this approval of straining, which goes against the grain of New Zealand authority on this point, was tempered by her concession that a meaning under s 6 ‘must be a meaning that is tenable on the text and in the light of the purpose of the

¹⁴⁷ *ibid* [150] (citation omitted).

¹⁴⁸ *ibid*, citing *Ghaidan* (n 17) [67] (emphasis added). See Chapter Five.

¹⁴⁹ *Hansen* (n 7) [179].

¹⁵⁰ *ibid* [252] (emphasis added), see also [237].

¹⁵¹ *ibid* [290] (emphasis added).

¹⁵² *ibid* [13], referring to NZBORA, s 6; *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 [44] (Lord Steyn); UKHRA, s 3.

enactment’,¹⁵³ (echoing s 5(1) of the Interpretation Act 1999 (NZ)) and the fact that she joined the rest of the Court in concluding that s 6 could not be applied to the reverse onus provision under scrutiny.¹⁵⁴ Furthermore, it is arguable that there is no magic in the word ‘straining’ in this context; as we saw in Chapter Two, ‘straining’ is a term often used in the context of purposive interpretation generally. As one commentator has suggested,

Elias CJ is right to say that strained interpretations may on occasion be warranted to avoid rights-infringing meanings. I believe the other judges would not disagree, but different thresholds probably exist as to what counts as permissible straining as opposed to prohibited amendment.¹⁵⁵

The Court in *Hansen* has been criticized for adhering to the reasonableness requirement:

the New Zealand Bill of Rights does not say, ‘wherever an enactment can reasonably be given’ a rights-consistent meaning, then it shall be given such a meaning — the word ‘reasonably’ is missing ... Any requirement of reasonableness in past jurisprudence is a judicial addition to the language handed down by the New Zealand Parliament, an error that the Supreme Court was able to correct.¹⁵⁶

This point, however, does not seem to be supported by substantial reasoning. If the Supreme Court were going to change tack, it would require strong reasons. After all, the reasonableness requirement is almost certainly an aspect of the courts’ caution in applying the NZBORA in light of its legislative history (dealt with later in this chapter). Simply arguing on the basis of the bare language is to give an acontextual meaning to s 6, which, as Lord Hoffmann has pointed out, amounts to ‘playing games

¹⁵³ *Hansen* (n 7) [25].

¹⁵⁴ *ibid* [39].

¹⁵⁵ Rishworth, ‘Human Rights’ (2012) (n 6) 337.

¹⁵⁶ Gledhill (n 52) 319, see also 322–23, 326.

with words'.¹⁵⁷ Substantial authority in support of the reasonableness requirement is found in a plethora of Court of Appeal cases in which judges adopted various forms of words to express the concept: warning against 'strained',¹⁵⁸ and 'unnatural',¹⁵⁹ interpretations, stating that a proposed interpretation must be 'fairly open',¹⁶⁰ 'reasonably open',¹⁶¹ 'reasonably possible',¹⁶² 'tenable',¹⁶³ or 'properly open'.¹⁶⁴

(d) Two Interpretive Techniques: Reading Down and Reading In

One type of case in which intention has sometimes been seen as playing a less significant role is where courts have read down statutory provisions. This technique of interpretation has had its champions in the context of s 6.¹⁶⁵ While one commentator has said of reading down (and in) that '[t]he courts can ... be understood as supplementing Parliament's intention by ... defining open terms rather carefully',¹⁶⁶

¹⁵⁷ *Wilkinson* (n 129) [17].

¹⁵⁸ *Phillips* (n 124) 177 (Cooke P, for Cooke P, Casey, Thorpe JJ); *Noort* (n 15) 272 (Cooke P); *Police v Smith* [1994] 2 NZLR 306 (NZCA) 313 (Cooke P); *Baigent's case* (n 25) 674 (Cooke P). See also *Bailey v Whangarei District Court* (1995) 2 HRNZ 275 (NZHC) 290 (Cartwright J); *Quilter* (n 87) 542 (Thomas J); Cooke (n 34) 70. cf Lord Cooke of Thorndon, 'The British Embrace of Human Rights' [1999] EHRLR 243, 250.

¹⁵⁹ *Phillips* (n 124) 177 (Cooke P, for Cooke P, Casey, Thorpe JJ).

¹⁶⁰ *Noort* (n 15) 286 (Hardie Boys J).

¹⁶¹ *Smith* (n 158) 313 (Cooke P). cf *Noort* (n 15) 272 (Cooke P).

¹⁶² *Baigent's case* (n 25) 677 (Cooke P).

¹⁶³ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (NZCA) [16] (Tipping J, for the Court). cf, in Victoria, *The Secretary to the Dept of Justice v AB* [2009] VCC 1132 [275] (Ross J).

¹⁶⁴ *Moonen* (n 163) [17] (Tipping J, for the Court). See also *Quilter* (n 87) 581 (Tipping J). cf Rishworth, 'Potential of the New Zealand Bill of Rights' (n 32) 69.

¹⁶⁵ Rishworth, 'Potential of the New Zealand Bill of Rights' (n 32) 69–70; Potter and Ekins (n 12) 91.

¹⁶⁶ Petra Butler, 'Human Rights and Parliamentary Sovereignty' (n 21) 366; Petra Butler, '15 Years of the NZ Bill of Rights: Time to Celebrate, Time to Reflect, Time to Work Harder?' [2006] HRR 1, 20 <www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-4/Butler.pdf> accessed 11 October 2013; P and A Butler, '16 Years of the New Zealand Bill of Rights' (Australian and New Zealand Law Librarians conference, Melbourne, 29 September 2006) 13 <www.alla.asn.au/conference/2006/docs/A_P_Butler_NZ_Bill_of_Rights.pdf> accessed 6 February 2012.

others have raised questions about whether intent is being departed from illegitimately. There are many examples of s 6 cases in which the technique was applied¹⁶⁷ and its application criticized,¹⁶⁸ but here we shall confine ourselves to consideration of two recent instances.

The first is the High Court case of *Hopkinson v Police*.¹⁶⁹ The appellant had been convicted of destroying the New Zealand flag with the intention of dishonouring it, under s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981 (NZ), having burnt a flag in the grounds of the Parliament buildings during a protest. The appellant relied on ss 14 and 16 of the NZBORA, which protect the rights to freedom of expression and freedom of peaceful assembly respectively, in submitting that the term ‘dishonouring’ was susceptible of a broad range of tenable meanings; whereas the judge at first instance appeared to have treated the term as having only one meaning, along the lines of ‘disrespecting’. The appellant submitted that ‘dishonouring’ should be read as ‘defiling’; the Court in the end chose ‘vilifying’ to express what was required and further held that the appellant’s conduct did not involve vilification, leading to his conviction being quashed.

Ellen France J admitted that

¹⁶⁷ *R v Laugalis* (1993) 10 CRNZ 350 (NZCA) 356 (Hardie Boys J, for Hardie Boys, Robertson JJ and Sir Gordon Bisson), quoted with approval in *R v Michalaros* (NZHC, 4 August 2005) [50] (Priestley J); *Baigent’s case* (n 25) 674 (Cooke P); *Beggs* (n 31) 627 (Gendall J, for Gendall and Wild JJ).

¹⁶⁸ JA Smillie, ‘The Allure of “Rights Talk”: *Baigent’s Case* in the Court of Appeal’ (1994) 8 Otago LR 188, 197; JA Smillie, ‘“Fundamental” Rights, Parliamentary Supremacy and the New Zealand Court of Appeal’ (1995) 111 LQR 209, 216; Adams (n 30) 375; Hodge (n 33) 19–23; Jim Evans ‘Reading Down Statutes’ in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004) 144.

¹⁶⁹ [2004] 3 NZLR 704 (NZHC).

Looking at the statutory scheme as a whole, there is some support for the respondent's view that there is just the one tenable meaning ... However, the better view is that the statute does allow of the narrower meaning of 'vilify'. If that meaning is adopted, as s 6 of the Bill of Rights demands that it must, I consider s 11(1)(b) can be read consistently with the Bill of Rights.¹⁷⁰

In opting to treat 'dishonouring' as meaning 'vilifying', France J narrowed the scope of the offence provision considerably, perhaps 'as to render it all but unenforceable'.¹⁷¹ It has been noted that

one may question the particular way that France J applied the s 6 interpretation provision so as to give the relevant legislation a rights consistent meaning — it appears to rewrite the statutory wording in a way the Supreme Court subsequently has indicated is inappropriate ...¹⁷²

It should therefore be noted that there is a possibility that 'the New Zealand Supreme Court in the post-*Hansen* environment would now decide *Hopkinson* differently ...'¹⁷³ Arguably an effect of the decision is that similar conduct is likely to be prosecuted via a different charge of a more general public order offence.¹⁷⁴

¹⁷⁰ *ibid* [81].

¹⁷¹ Huscroft and Rishworth, "You Say You Want a Revolution" (n 33) 131.

¹⁷² Andrew Geddis, 'The State of Freedom of Expression in New Zealand: An Admittedly Eclectic Overview' (2008) 11 Otago LR 657, 671, citing *Hansen* (n 7) [150]–[158] (Tipping J), [236]–[254] (McGrath J), [287]–[290] (Anderson J). See also John Ip, 'What a Difference a Bill of Rights Makes? The Case of the Right to Protest in New Zealand' (2010) 24 NZULR 239, 248. cf Paul Rishworth, 'Human Rights' [2005] NZL Rev 87, 100. Indeed, the case has been characterized as an instance of reading in 'by adding the "intention to vilify" to the offence': Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths Australia 2008) para 3.59.

¹⁷³ Meagher, 'The Scope of Judicial Rights Interpretation' (n 46) 220.

¹⁷⁴ See *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1; Ip (n 172) 257.

The second example of reading down to be dealt with here is the only one from the Supreme Court: *Brooker v Police*.¹⁷⁵ The appellant had been convicted of disorderly behaviour following his solo protest against police conduct outside the home of a constable, in the course of which he had displayed a placard and sung. He relied on s 14 of the NZBORA, which guarantees freedom of expression, in submitting that his conduct was not disorderly within the meaning of s 4(1)(a) of the Summary Offences Act 1981 (NZ), under which he had been convicted. A majority of the Court accepted this submission, narrowing the scope of the offence provision, partly on the basis of s 14 of the NZBORA. Elias CJ set out that

Under s 6 of the New Zealand Bill of Rights Act, s 4(1)(a) of the Summary Offences Act must be given a meaning consistent with the right to freedom of expression in s 14 of the New Zealand Bill of Rights Act, if it can be given such a meaning. The right to ‘impart information and opinions of any kind in any form’, affirmed in s 14, is not however unqualified. By art 19(3) [of the ICCPR, art 19 being the provision on which s 14 is based], it is subject to reasonable restrictions prescribed by law which are necessary to protect other important interests, including public order and the rights and reputations of others. Section 4(1)(a) is such a restriction. Its scope depends on its meaning and purpose.¹⁷⁶

In the end, she concluded that ‘The culpability provided for would not be comparable [to the ‘effects of alarm or apprehension of threat’ which provided ‘some measure for what behaviour is disorderly’] if the effect produced by disorderly behaviour is simply annoyance or embarrassment.’¹⁷⁷ Blanchard J took a similar approach without referring to s 6.¹⁷⁸ Tipping J drew on ss 5 and 6 in holding that

¹⁷⁵ *Brooker* (n 77). The departure from earlier authority which the majority decision in *Brooker* involved was anticipated by Elias CJ in a speech given in 2005: Elias (n 39) 70.

¹⁷⁶ *Brooker* (n 77) [4].

¹⁷⁷ *ibid* [46].

¹⁷⁸ See *ibid* [51]–[70].

Where, as here, the behaviour concerned involves a genuine exercise of the right to freedom of expression, the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case. This may be necessary to prevent an unjustified limitation of the freedom and is consistent with the purpose of s 6 of the Bill of Rights.¹⁷⁹

Tipping J came to the view that ‘when the freedom of expression dimension is factored in, it cannot be said, beyond reasonable doubt, that Mr Brooker’s behaviour was disorderly in terms of the legal test I have posited’.¹⁸⁰ McGrath and Thomas JJ in separate dissenting reasons did not refer to s 6, as they found that the offence provision was a reasonable limitation under s 5 of the NZBORA.

Having considered two examples which give an idea as to the effects that reading down has in practice, it remains to note that reading down has particular relevance to delegated legislation.¹⁸¹ In *Cropp v Judicial Committee*,¹⁸² Blanchard J (for the Court) stated that

Subordinate legislation involving a relevant guaranteed right or freedom will be invalid when the empowering provision, read in accordance with s 6 of the Bill of Rights Act, does not authorise its making. Where the Bill of Rights Act is a relevant consideration, and obviously it will then be an important consideration, the court gives the generally expressed empowering provision a tenable meaning that is consistent with the right or freedom. ‘In accordance with s 6, that meaning is to be preferred to any other meaning.’¹⁸³

¹⁷⁹ *ibid* [92].

¹⁸⁰ *ibid* [94].

¹⁸¹ See, eg, *Drew v A-G* [2002] 1 NZLR 58 (NZCA); *Collector of Customs v Kilburn Car Sales Ltd* [2004] NZAR 500 (NZHC); *Zaoui (No 2)* (n 22) [91] (Keith J, for the Court). cf Charter, s 32(3).

¹⁸² [2008] NZSC 46, [2008] 3 NZLR 774.

¹⁸³ *ibid* [25], citing *Drew* (n 181) [68] (Blanchard J, for Richardson P, Keith, Blanchard and Tipping JJ).

Having dealt with reading down, it is necessary to say something about the related technique of reading in. It is more difficult to identify this type of case among the New Zealand authorities, as (while it has its supporters¹⁸⁴) reading in tends to be more controversial than reading down (it also has detractors¹⁸⁵), the latter being such a longstanding technique of interpretation.¹⁸⁶ One example is *Television NZ Ltd v AG*,¹⁸⁷ in which the appellant held video tapes which were the subject of a search warrant cast in very broad terms. Fisher J, at first instance, had formulated various criteria which should be taken into account in issuing warrants in relation to media organizations.¹⁸⁸

The Court of Appeal took issue with the detailed nature of these criteria, in a similar way to that in which the House of Lords would later criticize the Court of Appeal's approach in *Re S*.¹⁸⁹ Cooke P (for the Court), noted that

Having considered the authorities and also the police general instructions, Fisher J formulated regarding the issuing of media search warrants a sequence of suggested criteria, lettered (a) to (g). He went on to give suggested outlines of standard conditions to be inserted in such warrants, lettered (a) to (e). Although the Judge acknowledged that it was not his function to legislate for other cases, we must accept the submissions for the respondent in this Court to the effect that he went too far in that direction. Both the grant and the execution of a warrant are discretionary. It is possible to state as follows some general principles or guidelines to be borne in mind when the reasonableness of granting a warrant or executing a search is under consideration; but in our respectful view the judgment under appeal cannot safely be

¹⁸⁴ Potter and Ekins (n 12) 91; Rishworth and others (n 9) 165–66.

¹⁸⁵ See, eg, Richard A Edwards, 'Reading Down Legislation under the Human Rights Act' (2000) 20 LS 353, 366–67.

¹⁸⁶ JJ Spigelman, 'The Poet's Rich Resource: Issues in Statutory Interpretation' (2001) 21 Aust Bar Rev 224, 232.

¹⁸⁷ [1995] 2 NZLR 641 (NZCA).

¹⁸⁸ *Television NZ Ltd v Police* [1995] 2 NZLR 541 (NZHC) 553, see also 557.

¹⁸⁹ *Re S (minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291.

affirmed or acted on in so far as it purports to set out what might be seen as close to a detailed code of rules.¹⁹⁰

The Court then proceeded to set out five guidelines to be followed,¹⁹¹ and in so doing seems to have approved of reading in to some extent.

4 New Zealand Going Its Own Way

Based on what has been dealt with to this point in this chapter, we may conclude with certainty that the New Zealand courts have not gone as far as UK courts in applying their interpretive provision. Intention is given greater emphasis in New Zealand cases, as is legislative language (through the reasonableness requirement). Why should this be so? From the New Zealand perspective, there are two reasons, both of which are products of the dominance of an orthodox view of parliamentary sovereignty in New Zealand in the 1980s¹⁹² (which still prevails¹⁹³): first, s 4 of the NZBORA,¹⁹⁴ which is ‘on its face, ... as strongly deferential to Parliament as is imaginable in a Bill of Rights’;¹⁹⁵ and, secondly, and relatedly, the legislative history of the NZBORA. I now discuss these in turn.

¹⁹⁰ *Television NZ* (n 188) 647.

¹⁹¹ *ibid* 647–48.

¹⁹² Erdos, ‘Aversive Constitutionalism’ (n 8) 367–68; Erdos, *Delegating Rights Protection* (n 8) 100–01.

¹⁹³ See Chapter Three.

¹⁹⁴ See generally Janet McLean, ‘Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights’ [2001] NZL Rev 421.

¹⁹⁵ James Allan and Richard Cullen, ‘A Bill of Rights Odyssey for Australia: The Sirens Are Calling’ (1997) 19 UQLJ 171, 186, fn 73.

The authors of one of the two major works on the NZBORA have noted that the ‘use of s 4 of BORA has been significant’.¹⁹⁶ They list nearly 20 cases as examples.¹⁹⁷ However, it is not clear that all of those cases actually turned on s 4. As the lead author of the other major work has pointed out,

Courts have tended, wrongly, to regard cases where a statutory meaning is plain and unavoidable as cases involving s 4. The true explanation of these cases, however, is that the plain and unavoidable meaning is simply adopted *whether or not* it is inconsistent with the Bill of Rights.¹⁹⁸

The examples cited in support date from before 2000, when the Court of Appeal in *Moonen v Film and Literature Board of Review*¹⁹⁹ set out a five-step approach to the application of ss 4, 5 and 6,²⁰⁰ so it is probably fair to say that, since then, courts have been more alive to the proper role of s 4 than in the first decade of the operation of the NZBORA.

In *Hansen*, all of the judges relied on s 4,²⁰¹ though McGrath J was the only one to explain its role at any length:

Section 4 ... reaffirms the primacy of the legislature and makes clear that the Courts’ role in applying the Bill of Rights in ascertaining the meaning of legislation remains one of interpretation within the limits of the legislative directions specified in that Act. Section 4 is, however, only a default provision because whenever the Court can identify a

¹⁹⁶ Butler and Butler, *The New Zealand Bill of Rights Act* (n 71) para 7.18.2. See also Andrew Butler, ‘Interface between the Human Rights Act’ (n 71) 278; Andrew S Butler, ‘Judicial Review, Human Rights and Democracy’ in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 57–59.

¹⁹⁷ Butler and Butler, *The New Zealand Bill of Rights Act* (n 71) para 7.18.1.

¹⁹⁸ Rishworth and others (n 9) 156.

¹⁹⁹ *Moonen* (n 163).

²⁰⁰ *ibid* [17]–[19] (Tipping J, for the Court).

²⁰¹ *Hansen* (n 7) [8] (Elias CJ), [60] (Blanchard J), [167] (Tipping J), [179] (McGrath J), [290] (Anderson J).

tenable meaning of an enactment that is consistent with a protected right, the Court is required by s 6 to prefer that meaning and s 4 has no application.²⁰²

McGrath J's reference to the 'primacy of the legislature' echoed what Thomas J had said about s 4 in *Poumako*. Having referred to the possibility of relying on s 6 to justify departures from legislative intent, Thomas J had held that

such an approach is inconsistent with s 4. Section 4, as evidenced by the legislative history of the Bill of Rights, is designed to confirm Parliament's legislative sovereignty. To attribute to a statutory provision which is neither equivocal nor malleable in its terms a meaning which is admittedly contrary to Parliament's discernible intent is to effectively challenge Parliament's primacy.²⁰³

But what of the legislative history to which Thomas J referred? This brings us to the second of the two reasons why New Zealand has gone its own way on the issue of rights-consistent interpretation.

In 1984, a Labour Government was elected. Among its policies was the introduction of a Bill of Rights for New Zealand.²⁰⁴ A White Paper was prepared in 1985 in support of the enactment of a Bill of Rights that would be 'supreme law, and accordingly legislation enacted by Parliament which was inconsistent with it would be of no effect'.²⁰⁵ The White Paper was tabled in Parliament and referred to the Justice and Law Reform Committee. A long process then ensued, whereby public opinion on the proposed Bill was gauged. During this time, the Legal Research Foundation

²⁰² *ibid* [179].

²⁰³ *Poumako* (n 96) [81], cf [57] (Henry J).

²⁰⁴ Paul Rishworth, 'The Birth and Rebirth of the Bill of Rights' in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's 1995) 11.

²⁰⁵ *A Bill of Rights for New Zealand: A White Paper* (1985 AJHR A.6) para 3.11, see further paras 6.2–6.7.

conducted a seminar on the proposal,²⁰⁶ a commentary on the proposed Bill was published as a book²⁰⁷ and various articles on the issues appeared in journals and books within the fields of law²⁰⁸ and politics²⁰⁹ (though those in the latter field were authored by lawyers).

Meanwhile, the Committee produced a lengthy interim report in 1986,²¹⁰ which was followed by its final report in 1988.²¹¹ The majority of the Committee (the Opposition members opposed the Committee's recommendation²¹²) referred to potential entrenchment of rights and noted that a 'large majority of the submissions did not favour this type of approach at all'.²¹³ It concluded:

²⁰⁶ See the contributions to Legal Research Foundation, *A Bill of Rights for New Zealand* (Legal Research Foundation 1985); 'Bill of Rights Auckland Seminar Commentaries' [1986] NZLJ 230. See also KJ Keith, 'A Bill of Rights for New Zealand? Judicial Review versus Democracy' (1985) 11 NZULR 307.

²⁰⁷ Jerome B Elkind and Antony Shaw, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (OUP 1986). See Robin Cooke, 'A Standard for Justice' [1986] NZLJ 149.

²⁰⁸ Guy Brougham Chapman, 'A Bill of Wrongs: The Argument against the Proposed Bill of Rights' [1985] NZLJ 226; Ken Keith, 'The Bill of Rights: Reply to a Criticism' [1985] NZLJ 270; JA Smillie, 'The Draft Bill of Rights: Meaningful Safeguards or Mere Window-dressing?' [1985] NZLJ 276; DF Dugdale, 'Common Sense about the Bill of Rights: A Criticism of Geoffrey Palmer's Super-law' [1986] NZLJ 127; Jerome B Elkind, 'International Obligations and the Bill of Rights' [1986] NZLJ 205; Philip Joseph, 'The Challenge of a Bill of Rights: A Commentary' [1986] NZLJ 416; J Elkind, 'Response by Dr J Elkind' [1986] NZLJ 423; Jane Kelsey, 'Judges and the Bill of Rights' (1986) 3 *Canta LR* 155; DL Mathieson, 'Interpreting the Proposed Bill of Rights (I)' [1986] NZLJ 129; DL Mathieson, 'Interpreting the Proposed Bill of Rights (II)' [1986] NZLJ 160; JA Smillie, 'A Bill of Rights for New Zealand? An Alternative Proposal' (1986) 6 *Otago LR* 175; KJ Keith, 'Professor Smillie's Alternative Bill of Rights: A Comment' (1986) 6 *Otago LR* 208; Geoffrey Palmer, *Unbridled Power? An Interpretation of New Zealand's Constitution & Government* (2nd edn, OUP 1987) ch 13; Mr Justice Jeffries, 'The Bill of Rights' [1988] NZLJ 97.

²⁰⁹ Jerome B Elkind, 'The Bill of Rights' in Jonathan Boston and Martin Holland (eds), *The Fourth Labour Government: Radical Politics in New Zealand* (1st edn, OUP 1987); Jeff Berryman, 'A Bill of Rights for New Zealand' (1988) 40 *Pol Sci* 39; Geoffrey Palmer, 'Human Rights: The Proposed New Zealand Bill of Rights' (1988) 69 *Parl* 10.

²¹⁰ Justice and Law Reform Select Committee, *Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper—A Bill of Rights for New Zealand* (1986 AJHR I.8A).

²¹¹ Justice and Law Reform Committee, *Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* (1988 AJHR I.8C).

²¹² *ibid* 4.

²¹³ *ibid* 2.

the Committee considers that it is necessary to adopt a fairly cautious approach. **The Committee accordingly recommends the introduction of a bill of rights which is an ordinary statute, that is, not a supreme law and not entrenched. ...**

It has to be acknowledged that an ordinary statute will be less powerful than the draft bill set out in the White Paper. ... It would ... meet the principal argument made against the White Paper draft, that is, that it involves an unwarranted transfer of power from Parliament to the judiciary.²¹⁴

Crucially for our purposes, the Committee majority mentioned the possibility that '[t]he bill could include a provision along the lines of Article 23 of the White Paper draft ...',²¹⁵ which was headed 'Interpretation of legislation' and stated: 'The interpretation of an enactment that will result in the meaning of the enactment being consistent with this Bill of Rights shall be preferred to any other interpretation.'²¹⁶

The Government responded to the Committee's report by bringing forward in late 1989 a Bill — 'a shadow of what was originally proposed'²¹⁷ — which would eventually become the NZBORA. It is at this point that the link between s 4 and legislative history, noted by Thomas J in *Poumako*, becomes apparent. As one MP made clear during the first reading debate, referring to the future s 4,

The committee felt that it was important to include that measure in the Bill as reported back in order to allay fears still expressed by some that the Bill would be in the nature of overriding legislation rather than legislation in equal standing *pari passu* with legislation that the House is in the habit of passing regularly.²¹⁸

²¹⁴ *ibid* 3.

²¹⁵ *ibid* 10.

²¹⁶ *White Paper* (n 205) 15.

²¹⁷ Joseph and Joseph (n 57) 93.

²¹⁸ NZ Parl Deb 17 July 1990, vol 509, p 2799 (Bill Dillon).

It was necessary for the provision to be included in the Bill, in part as an attempt to meet the Opposition's concerns over the scope of the interpretive power,²¹⁹ hence its description as 'the specially-inserted-to-enable-passage section 4'.²²⁰

The increased importance of the interpretive provision in the context of the Bill of Rights, now shorn of its judicial power of invalidation of legislation, led to it being referred to several times in the course of the parliamentary debates on the Bill. In introducing the Bill to the House, the Prime Minister noted that

That interpretive role is quite different from the power that the courts would have had under the white paper draft. Under this Bill the courts have no option but to give effect to legislation that plainly overrides one of the stated rights. ... However, the interpretive role can ... be important if the law being considered is not clear or is ambiguous.

Clause 25 restates the basic principle of non-retrospectivity of criminal law. Under the white paper draft a law that did create retrospective criminal liability would have been of no effect unless it was justified under the limitations provision. Under this Bill the retrospective provision would be effective unless it could be interpreted in a narrow way to avoid that result. The interpretive role of the courts is not a legislative one. The legislative meaning must be given effect to, but in some cases the interpretive presumption may give the provision a particular, narrower application. The interpretive nature of the Bill means that it does not impliedly repeal existing legislation, and, as is the case for future legislation, if existing legislation is inconsistent with the Bill the particular legislation prevails.²²¹

Two noteworthy aspects of that passage are the focus on non-retrospectivity, which would become such a crucial issue in *Poumako* and *Pora*, and the reference to reading

²¹⁹ NZ Parl Deb 10 October 1989, vol 502, p 13045 (James Bolger, Leader of the Opposition); NZ Parl Deb 17 July 1990, vol 509, p 2807 (Warren Kyd). See also NZ Parl Deb 14 August 1990, vol 509, p 3454 (Warren Kyd). cf NZ Parl Deb 21 August 1990, vol 509, p 3763 (Richard Northey).

²²⁰ James Allan, 'Paying For the Comfort of Dogma' (2003) 25 Syd LR 63, 69, fn 22. See also James Allan, 'Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990' (2000) 9 Otago LR 613, 616; James Allan, 'The Effect of a Statutory Bill of Rights Where Parliament Is Sovereign: The Lesson from New Zealand' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 377–78.

²²¹ NZ Parl Deb 10 October 1989, vol 502, pp 13039–40 (Geoffrey Palmer, Prime Minister).

down implicit in the use of the words ‘particular, narrower application’. Another Government MP played down the effect of s 6²²² and drew an important link between the interpretive rule and the common law principles in stating that ‘[p]rovision is made for an interpretive role that the courts *already have* ...’²²³

Apart from one illuminating and prescient article which appeared in 1990,²²⁴ there was little academic commentary on the 1989 Bill. In contrast to the significant debate about the White Paper proposal, the enactment of the NZBORA attracted scant attention outside Parliament. What commentary there was, supported the view that s 6 was not designed to bring about a significant change; one political scientist described the provision as ‘a particularly weak protective measure’,²²⁵ in line with the extracts above from the 1988 Committee report and the parliamentary debates. Given that the courts could be expected to approach s 6 in light of the context of its enactment, this assessment was correct.

5 Reconciling Rights-consistent Interpretation with Purposive Interpretation

As in the concluding section of the previous chapter on the UK, we may now tie together various strands which have emerged over the course of the present chapter. I shall do so through addressing the relationship between s 6 of the NZBORA and s

²²² NZ Parl Deb 21 August 1990, vol 509, pp 3763–64 (Richard Northey).

²²³ *ibid* p 3764 (emphasis added).

²²⁴ Rishworth, ‘Potential of the New Zealand Bill of Rights’ (n 32).

²²⁵ Therese Arseneau, ‘A Bill of Rights’ in Martin Holland and Jonathan Boston (eds), *The Fourth Labour Government: Politics and Policy in New Zealand* (2nd edn, OUP 1990) 33, cf 35.

5(1) of the Interpretation Act 1999 (NZ), or, put broadly, rights-consistent interpretation and purposive interpretation.

It is noteworthy in this context that in a previous proposal for a Bill of Rights in New Zealand in 1963, it was provided that its interpretive rule was subject to s 5(j) of the Acts Interpretation Act 1924 (NZ).²²⁶ Of course, the NZBORA includes no such clarification. Thus, the question arises as to how s 6 and s 5(1) should be reconciled, as had been expressly anticipated by the New Zealand Law Commission when recommending the enactment of s 5(1).²²⁷

Leading commentators in the fields of constitutional law, human rights and statutory interpretation have put forward possible approaches. The author of the leading New Zealand constitutional law textbook sets out the issue thus:

There are two ways of reconciling these interpretation sections. The first approach promotes the primacy of s 6 over s 5(1). Section 6 expresses no qualification for statutory context but applies to all potentially infringing statutes. Section 5(1), on the other hand, is expressed to apply ‘unless ... the context of the enactment requires a different interpretation’. The ‘context’ may include the Bill of Rights (including its interpretation section) where a statute that is capable of more than one meaning threatens to encroach on a protected right. The context would displace s 5(1).

The alternative approach promotes the primacy of s 5(1). Under this approach, s 6 applies only where a meaning that is consistent with the Bill of Rights would not subvert Parliament’s original purpose. To jettison an established meaning by reason of the Bill of Rights would involve an admission that the Act *pro tanto* overrides earlier legislation, contrary to s 4 and the primacy of inconsistent legislation.

²²⁶ Burrows and Carter (n 42) 366, fn 237. See generally Rishworth, ‘Birth and Rebirth’ (n 173) 7–9; Philip A Joseph, ‘The New Zealand Bill of Rights’ (1996) 7 PLR 162, 163; Butler and Butler, *The New Zealand Bill of Rights Act* (n 71) paras 2.4.1–2.4.32. The Bill and the submissions concerning it are helpfully reproduced in L Cleveland and AD Robinson (eds), *Readings in New Zealand Government* (Reed Education 1972) 189–219.

²²⁷ New Zealand Law Commission, *A New Interpretation Act* (n 125) para 58.

Under this approach, s 5(1) would prevail where the s 6 (Bill of Rights-consistent) interpretation bears no relation to the original parliamentary purpose.²²⁸

He then refers to *Hansen*, concluding that ‘the Supreme Court endorsed the primacy of s 5(1)’ and says of *Quilter* that, in it, ‘the Court of Appeal also expressed a preference for orthodox statutory interpretation. This decision checked the potential of s 6 to revisit established meanings.’²²⁹

The leading commentator on *Hansen* takes a different approach. Her thesis in a nutshell is as follows: s 6 and the principle of legality coincide; under the principle of legality, courts have adopted interpretations contrary to statutory purpose;²³⁰ therefore, courts may adopt interpretations contrary to statutory purpose under s 6.²³¹ It follows that any assertion that s 5(1) has primacy over s 6 is incorrect. While such an assertion may be an oversimplification, the alternative argument is not entirely convincing either.

A key problem here is that there is disagreement over the roles of intention and purpose. Both commentators have apparently equated the two: ‘[s]ection 5(1) requires courts to interpret an enactment “in the light of its purpose”: that is,

²²⁸ Joseph, *Constitutional & Administrative Law* (n 80) 1171, citing Interpretation Act 1999 (NZ), s 4(1)(b); *Flickinger* (n 62). See also Jan Stemplewitz, ‘Section 6 of the Bill of Rights Act 1990: A Case for Parliamentary Responsibility for Human Rights and Freedoms’ (2002) 33 VUWLR 409, 420; Nathanael Starrenburg, ‘Interpretive Theories in New Zealand Bill of Rights Jurisprudence’ (2004) 10 Auckland UL Rev 115, 125. cf, on the now repealed s 5(j), Philip A Joseph, ‘The New Zealand Bill of Rights Experience’ in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (OUP 1999) 311–12.

²²⁹ Joseph, *Constitutional & Administrative Law* (n 80) 1171.

²³⁰ cf Kenneth Keith, ‘Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness’ in Rick Bigwood (ed), *Legal Method in New Zealand: Essays and Commentaries* (Butterworths (NZ) 2001) 96.

²³¹ Geiringer, ‘The Principle of Legality’ (NZJPIL) (n 23) 86–91; Geiringer, ‘The Principle of Legality’ (Geiringer and Knight) (n 23) 92–96. cf Geddis and Fenton (n 8) 746–49.

according to what Parliament *intended*²³² and ‘the search for “Parliamentary intention” is in a sense, nothing more nor less than the search for statutory purpose’,²³³ although the latter has more recently dismissed the notion of intention altogether in favour of the ‘less opaque’²³⁴ statutory purpose: ‘the use of the term legislative “intention” in ... cases [prior to *Hansen*] tended to obscure the issue. Parliament, not being sentient, is not capable of forming an intention and accordingly, it is not always clear precisely what is meant by references to it doing so’.²³⁵ However, in one of those cases, Thomas J sagely pointed out that ‘the judicial task of interpreting the text of a statute has little point unless it is associated with the objective of ascertaining Parliament’s intention’.²³⁶ It will be remembered that the conclusions in Chapter Two dealing with the concepts of intention and purpose were that both concepts are useful and that the former is an aspect of the latter, that is, intention is the same thing as purpose identified at a low level of abstraction.

The authors of the leading textbook on statutory interpretation in New Zealand focus in their analysis of s 6 and s 5(1) on purpose rather than intention:

Perhaps the sections are not inconsistent and neither need prevail. Both refer to meaning. The meaning that can be given must be ascertained from text and *in the light of* (so not always to promote) purpose. Text and purpose can conflict but mainly work together. Both are presumed to be intended to be rights-consistent. ...

²³² Joseph, *Constitutional & Administrative Law* (n 80) 1171. cf Joseph, ‘The New Zealand Bill of Rights Experience’ (n 228) 311–12.

²³³ Claudia Geiringer, ‘It’s Interpretation, Jim, but Not As We Know It: *Ghaidan v Mendoza*, the House of Lords and Rights-consistent Interpretation’ [2005] HRR 6, 13 <www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-3/Geiringer.pdf> accessed 9 October 2013.

²³⁴ Geiringer, ‘The Principle of Legality’ (NZJPIL) (n 23) 72; Geiringer, ‘The Principle of Legality’ (Geiringer and Knight) (n 23) 80.

²³⁵ Geiringer, ‘The Principle of Legality’ (NZJPIL) (n 23) 71–72 (citation omitted); Geiringer, ‘The Principle of Legality’ (Geiringer and Knight) (n 23) 80 (citation omitted).

²³⁶ *Poumako* (n 96) [82].

It is quite clear that in cases before the enactment of the Bill of Rights Act, the interpretations adopted by courts to protect fundamental values sometimes cut across the purpose of an enactment: that was clearly so as we have seen, in respect of privative clauses, and in other situations where the liberty of the subject was at stake. In such cases the courts were astute to *limit*, rather than *advance*, the parliamentary purpose. It is possible also to find cases (some of them relatively recent) where different judges reached different conclusions depending on whether they emphasised the *purpose* of the Act in question or *fundamental rights*. It would be surprising if it were different in cases involving the Bill of Rights Act, which was, after all, meant to enhance and preserve citizens' fundamental rights. If the Bill of Rights Act is to operate as an effective control on Parliament, one might expect this attitude to continue in appropriate cases.²³⁷

Again 'purpose' seems to be used as a synonym for intention in all cases.

The impoverished notions of intention and its relationship to purpose on which these proposed approaches rely make them deficient. While the conclusion that the principle of legality and s 6 coincide is correct (subject to the qualification that not all of the rights protected coincide), it is not necessary to conclude that courts have ignored legislative purpose in certain cases. This is in part because, as seen in the previous chapter, purpose can be identified at a high level of abstraction so that purpose need not be seen as standing in the way of an interpretation which is consistent with rights.²³⁸ One New Zealand commentator has described a similar approach.²³⁹

²³⁷ Burrows and Carter (n 42) 367–68 (citations omitted). cf Burrows (n 33) 572–75; Rishworth and others (n 9) 152–53; Jeffrey Goldsworthy, 'Parliamentary Sovereignty and Statutory Interpretation' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004) 201, fn 53.

²³⁸ See Jan van Zyl Smit, 'The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*' (2007) 70 MLR 294, 300. It is not even necessarily true that, in cases dealing with privative clauses, 'cutting across' or 'limiting' are appropriate descriptions as to purpose, even when identified at a low level of abstraction equivalent to intention: TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 211–12.

²³⁹ Rishworth and others (n 9) 153.

The difference between s 6 of the NZBORA and s 3 of the UKHRA lies in the greater willingness of judges in the UK to identify purpose at a high level of abstraction in the context of rights-consistent interpretation. This willingness is a product of the markedly different legislative histories of the relevant pieces of legislation, and of the ECHR context in which UK courts operate.²⁴⁰

As in the UK, an important aspect of this approach is that where rights deal with subject matter falling within the traditional domain or expertise of the courts, for example, fair trial rights, the courts will be more likely to identify purpose at a higher level of abstraction to allow flexibility to apply rights-consistent interpretations,²⁴¹ eg *Flickinger*, *Poumako* and *Pora* (dealing with criminal law/procedure). Where issues of social policy are in play, the courts are more cautious about applying rights-consistent interpretations,²⁴² eg *Quilter*. This approach under the NZBORA represents a continuation of common law practice.²⁴³ Cases involving reverse onus provisions, such as *Phillips* and *Hansen*, as examples of cases dealing with matters within the courts' expertise in which rights-consistent interpretations were not adopted, point to the fact that sometimes legislative language will be so clear as to militate against identifying purpose at a high level of abstraction. As mentioned in the Introduction to

²⁴⁰ See Chapter Five.

²⁴¹ Thomas, 'A Bill of Rights' (n 47) 29.

²⁴² Nigel Christie, 'The New Zealand Same-sex Marriage Case: From Aotearoa to the United Nations' in Robert Wintemute and Mads Andenæs (eds), *Legal Recognition of Same-sex Partnerships: A Study of National, European and International Law* (Hart Publishing 2001) 326; David Erdos, 'Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand' (2009) 34 L & Soc Inquiry 95, 114–15. See also Claudia Geiringer, 'Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case' in Rick Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ 2006) 182–84.

²⁴³ McGrath (n 41) 234; Paul Rishworth, 'Human Rights and the Reconstruction of the Moral High Ground' in Rick Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ 2006) 117.

this chapter, the difference of approach in *Lambert* in the UK is explicable with reference to the different context in which that country's courts operate.

Having noted the applicability of an approach which focuses on purpose, s 6 (like s 3 of the UKHRA) can be linked to ACTHRA, s 30 and Charter, s 32(1), with their express references to purpose. I am not the first to note this similarity.²⁴⁴ With this in mind, we may now turn to consider the Australian interpretive provisions.

²⁴⁴ Hanna Wilberg, 'The Bill of Rights and Other Enactments' [2007] NZLJ 112, 116.

CHAPTER SEVEN

LEGISLATIVE RIGHTS-CONSISTENT

INTERPRETATION IN AUSTRALIA

1 Introduction

Of the various jurisdictions in Australia — Commonwealth (federal),¹ State² and Territory — only two have human rights legislation in the same mould as the UKHRA and NZBORA: the ACT, with the ACTHRA, and the State of Victoria, with the Charter.³ The ACT is small — it has been dubbed in this context ‘a glorified city council’⁴ — leading to the claim that ‘the volume and complexity of litigation in that jurisdiction is likely to be far less than the volume and complexity of litigation that

¹ On recent developments at the Commonwealth level, see Bryan Horrigan, ‘Commonalities, Intersections, and Challenges for the Scrutiny and Interpretation of Legislation in Trans-Tasman Jurisdictions and Beyond’ (2012) 27 Aust Parl Rev 4, 19–22; Bryan Horrigan, *Reforming Rights-based Scrutiny and Interpretation of Legislation* (2012) 37 Alt LJ 228, 228–29; David Kinley and Christine Ernst, ‘Exile on Main Street: Australia’s Legislative Agenda for Human Rights’ [2012] EHRLR 58; James Stellios and Michael Palfrey, ‘A New Federal Scheme for the Protection of Human Rights’ (2012) 69 AIALF 13; George Williams and Lisa Burton, ‘Australia’s Exclusive Parliamentary Model of Rights Protection’ (2013) 34 Stat LR 58, 70–88, and sources cited at 60, fn 6.

² On the history of proposals for bills of rights and similar legislation in other States, see Brian Galligan and Emma Larking, ‘Rights Protection: The Bill of Rights Debate and Rights Protection in Australia’s States & Territories’ (2007) 28 Adel L Rev 177, 184–95; Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths Australia 2009) 148–52; David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (3rd edn, LexisNexis Butterworths Australia 2010) 337–41; Jeremy Gans and others, *Criminal Process and Human Rights* (Federation Press 2011) 62–63. On rights measures at the local government level in Victoria and New South Wales, see George Williams, *A Charter of Rights for Australia* (UNSW Press 2007) 72.

³ On relatively recent developments in other States, see Bailey (n 2) 205–06; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press 2009) 141–44.

⁴ James Allan, ‘You Don’t Always Get What You Pay for: No Bill of Rights for Australia’ (2010) 24 NZULR 179, 187, fn 25. See also Thomas Poole, ‘Bills of Rights in Australia’ (2004) 4 OUCJLJ 197, 197; James Allan, ‘Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-first Century’ (2006) 17 KCLJ 1, 6, fn 28. cf Trent Glover, ‘The Devil in the Detail: Lessons from the ACT Human Rights Act’ in Julian Leaser and Ryan Haddrick (eds), *Don’t Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre 2009) 304.

will fall for decision in Victoria'.⁵ While this is true — the case law in the early years of the ACTHRA was unremarkable⁶ — there is now enough significant case law for it to warrant consideration.⁷ Views differ as to whether the ACT and Victoria should be considered separately. There will be some influence on each jurisdiction by the other,⁸ mostly from the larger State on the smaller Territory.⁹ However, there has been somewhat of a divergence between the jurisdictions¹⁰ and even a statement by one Victorian judge that 'the legislation in the Australian Capital Territory has a different history to our 32(1). This distinguishes the provision in that jurisdiction from those in our own.'¹¹ While any distinctions are minor, I shall deal with the jurisdictions separately for the sake of clarity of analysis.

⁵ Gerard Brennan, "'Introduction to Human Rights Law": Seminar — Part II' (2007) 81 ALJ 248, 250. See also Leighton McDonald, 'New Directions in the Australian Bill of Rights Debate' [2004] PL 22, 27, fn 134, 30; Allan, 'Portia, Bassanio or Dick the Butcher?' (n 4) 6, fn 28; Hilary Charlesworth, 'Australia's First Bill of Rights: The Australian Capital Territory's *Human Rights Act*' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate 2006) 298, 301; Hilary Charlesworth and Gabrielle McKinnon, *Australia's First Bill of Rights: The Australian Capital Territory's Human Rights Act* (Federation Press 2006) 14, 22–23; Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-making' (2007) 33 Mon LR 9, 12, fn 13; Byrnes, Charlesworth and McKinnon (n 3) 105; Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 UNSWLJ 136, 137.

⁶ Byrnes, Charlesworth and McKinnon (n 3) 66.

⁷ See especially *Re Application for Bail by Islam* [2010] ACTSC 147, (2010) 4 ACTLR 235. See also *Casey v Alcock* [2009] ACTCA 1, (2009) 3 ACTLR 1; *R v Fearnside* [2009] ACTCA 3, (2009) 3 ACTLR 25.

⁸ Damien J Cremean, 'Editorial: Meaningless Reference — The Last Word' (2010) 17 AJ Admin L 115, 116. cf Will Bateman and James Stellios, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 MULR 1, 29.

⁹ Watchirs and McKinnon (n 5) 150; Horrigan, 'Commonalities, Intersections' (n 1) 14; Tim Vines and Thomas Faunce, 'A Bad Trip for Health-related Human Rights: Implications of *Momcilovic v The Queen* (2011) 85 ALJR 957' (2012) 19 JLM 685, 687, 689.

¹⁰ Stephen Tully, '*Kracke v Mental Health Review Board & Ors* [2009] VCAT 646' (2009) 16 Aust ILJ 293 (note); Jason L Pierce, 'Rights Protection and Constitutional Justice: Some Comparative Reflections' (2010) 22 Bond LR 212, 223; Watchirs and McKinnon (n 5) 137.

¹¹ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [103] (Bell J, President). cf *Raytheon Australia Pty Ltd & ACT Human Rights Commission* [2008] ACTAAT 19 [79]–[80] (Mr MH Peedom, President).

Before setting out the relevant provisions, it is necessary, because of their references to the concept of purpose, to remind ourselves of the statutory provisions that mandate the purposive approach in the ACT and Victoria respectively. In the ACT, s 139(1) of the Legislation Act 2001 (ACT) states: ‘In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.’ In Victoria, s 35(a) of the Interpretation of Legislation Act 1984 (Vic) provides:

In the interpretation of a provision of an Act or subordinate instrument—
(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object[.]

With these provisions in mind, we may turn to the human rights interpretive provisions, ‘potentially the most powerful legally enforceable provisions in the Australian human rights Acts’.¹² As originally enacted in 2004, s 30 of the ACTHRA, variously described as a ‘far reaching and important provision’,¹³ an ‘opaque injunction’¹⁴ and ‘[a]t the heart of the Human Rights Act’¹⁵ was as follows:

30 Interpretation of laws and human rights

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

¹² Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths Australia 2008) para 3.70.

¹³ Simeon Beckett, ‘Interpreting Legislation Consistently with Human Rights’ (2008) 58 AIALF 43, 43.

¹⁴ McDonald (n 5) 30.

¹⁵ Elizabeth Kelly, ‘Human Rights Act 2004: A New Dawn for Rights Protection?’ (2004) 41 AIALF 30, 30; Charlesworth, ‘Australia’s First Bill of Rights’ (n 5) 293; Charlesworth and McKinnon, *Australia’s First Bill of Rights* (n 5) 7.

- (a) resolving an ambiguous or obscure provision of the law; or
- (b) confirming or displacing the apparent meaning of the law; or
- (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
- (d) finding the meaning of the law in any other case.

Section 32(2) and (3) are also relevant:

32 Declaration of incompatibility

...

(2) If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right (the ***declaration of incompatibility***).

(3) The declaration of incompatibility does not affect—

- (a) the validity, operation or enforcement of the law; or
- (b) the rights or obligations of anyone.

In 2006, the Charter was passed by the Victorian Parliament. Section 32(1), variously described as a ‘new and potentially far-reaching rule of statutory construction’,¹⁶ a ‘powerful interpretative tool’¹⁷ and ‘the most potent provision in the entire *Victorian Charter*’,¹⁸ provides:

32 Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Section 36(2) is as follows:

36 Declaration of inconsistent interpretation

...

¹⁶ Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Lawbook Co 2008) para 4710.

¹⁷ Andy Gargett, Paula Gerber and Melissa Castan, ‘A Right to Birth Registration in the Victorian Charter? Seek and You Shall Not Find!’ (2010) 36 Mon LR 1, 31.

¹⁸ James Allan, ‘The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism’ (2006) 30 MULR 906, 908, see further 908–09. See also James Allan, ‘The Victorian Charter of Human Rights and Responsibilities’ [2008] NZLJ 173, 173.

(2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

The override declaration, provided for by s 31, will be mentioned later in this chapter.¹⁹ Section 36(5) provides:

A declaration of inconsistent interpretation does not—
(a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
(b) create in any person any legal right or give rise to any civil cause of action.

This subsection gives rise to the situation where, as was explained in Chapter Five in relation to UKHRA, ss 3 and 4, ‘any recognition that a declaration of inconsistent interpretation is one valid and potentially contestable viewpoint on the interpretation of a Charter right among many must also recognise the accompanying potential cost to the remedial capacity of the VCHR’.²⁰ The role of the remedial potential of the interpretive provisions will feature in the concluding section of this chapter. It should be noted that the apparent discrepancy between compatibility and consistency in the terms of ss 32 and 36 has provoked comment²¹ but ultimately is unlikely to have practical effect.²²

¹⁹ See text to n 119.

²⁰ Roger Masterman, ‘Interpretations, Declarations and Dialogue: Rights Protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities’ [2009] PL 112, 124, see further 121–25. See also Priyanga Hettiarachi, ‘*Some Things Borrowed, Some Things New: An Overview of Judicial [sic] Review of Legislation under the Charter of Human Rights and Responsibilities*’ (2007) 7 OUCIJ 61, 89–90.

²¹ Gerard Brennan, “‘Introduction to Human Rights Law’” (n 5) 252; Debeljak, ‘Parliamentary Sovereignty’ (n 5) 50, 55; Hettiarachi (n 20) 87, fn 114; Jeremy Gans, ‘Evidence Law under Victoria’s Charter: Responsibilities and Remedies — Part II’ (2008) 19 PLR 285, 301, fn 113; Gans and others (n 2) 86–87.

²² Pound and Evans (n 16) para 4950. cf George Williams, ‘The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope’ (2006) 30 MULR 880, 902–03.

Returning to the ACT, the original form of s 30 attracted criticism, including that it was ‘poorly drafted and ambiguous’,²³ and it was amended in 2008²⁴ to mirror the Victorian provision. The new ACTHRA, s 30 is as follows:

30 Interpretation of laws and human rights

So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

Each of ACTHRA, s 30²⁵ and Charter, s 32(1)²⁶ has been characterized as creating a ‘rebuttable presumption in favour of rights-consistent interpretations’, as has s 3 of the UKHRA.²⁷ A former Chief Justice of Australia has said of the Victorian legislation:

To the extent that statutes can be interpreted ‘in a way that is compatible with human rights’, the purpose of the Charter is to amend all prior statutory provisions and to provide an additional canon of statutory construction to govern the interpretation of future provisions.²⁸

²³ Carolyn Evans, ‘Responsibility for Rights: The ACT *Human Rights Act*’ (2004) 32 FL Rev 291, 305. See also *Fearnside* (n 7) [88] (Besanko J, Gray P and Penfold J agreeing); Hilary Charlesworth, ‘Human Rights and Statutory Interpretation’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press 2005) 117; Carolyn Evans, ‘*Human Rights Act* and Administrative Law’ (Assessing the First Year of the ACT Human Rights Act conference, Canberra, 29 June 2005) 6 <http://acthra.anu.edu.au/documents/afyhra_conf_2005/EvansC_The_Human_Rights_Act_and_Administrative_Law.pdf> accessed 1 June 2013; Bailey (n 2) 198. On the original s 30 generally, see Charlesworth, ‘Australia’s First Bill of Rights’ (n 5) 294–96; Charlesworth and McKinnon, *Australia’s First Bill of Rights* (n 5) 7–9.

²⁴ Human Rights Amendment Act 2008 (ACT), s 5. See Bailey (n 2) 198; Byrnes, Charlesworth and McKinnon (n 3) 83–84.

²⁵ Julie Debeljak, ‘The Human Rights Act 2004 (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights’ (2004) 15 PLR 169, 172.

²⁶ Debeljak, ‘Parliamentary Sovereignty’ (n 5) 13.

²⁷ cf Evans and Evans, *Australian Bills of Rights* (n 12) para 3.37.

²⁸ Gerard Brennan, “‘Introduction to Human Rights Law’” (n 5) 251. See also Beckett (n 13) 48.

This is of particular note in light of the discussion in Chapter Five. Similarly to the discussion in that context, a more subtle, and more accurate, characterization of the role of purpose under the Australian interpretive provisions can be identified:

There is a clear indication there of the sweeping nature of the legislation and the purpose of the Parliament is impliedly a revision of all legislation. In the same way as the House of Lords considered itself constrained by the essential principle or scope of the legislation both the ACT and Victoria may consider themselves bound by the purpose of the legislation. However, that purpose is not the pre-human rights statute purpose but rather that original purpose *as amended* by the interpretation obligation.²⁹

The relevance of authorities from the UK and New Zealand to the ACT³⁰ and Victoria³¹ has been noted. Like the NZBORA, both pieces of Australian human rights legislation are linked to the ICCPR, in terms of the rights which they seek to protect.³² As in New Zealand, the relationship between this treaty and the domestic legislation is rather different from that between the ECHR and the UKHRA, due to ‘the non-enforceability of international merits assessments within the Australian jurisdiction’.³³ Indeed, Australia has a history of being the subject of individual complaints to the

²⁹ Beckett (n 13) 50. cf Gerard Brennan, ‘The Constitution, Good Government and Human Rights’ (2008) 16 ALL 83, 94.

³⁰ Evans, ‘Responsibility for Rights’ (n 23) 292; Beckett (n 13) 44.

³¹ Williams, ‘Origins and Scope’ (n 22) 881–82; Alice Rolls, ‘Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb Have Been Any Different If Australia Had a Bill of Rights Like Victoria?’ (2007) 18 PLR 119, 124; Beckett (n 13) 44.

³² The International Covenant on Economic, Social and Cultural Rights is also now relevant to the ACTHRA, since the addition to the Act of a right to education: ACTHRA, s 27A, inserted by Human Rights Amendment Act 2012 (ACT), s 6.

³³ Debeljak, ‘Parliamentary Sovereignty’ (n 5) 33 (citation omitted). See also Christopher Caleo, ‘Implications of Australia’s Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights’ (1993) 4 PLR 175, 187; Christof Heyns and Frans Viljoen, *The Impact of United Nations Treaties on the Domestic Level* (Kluwer Law International 2002) 82. cf Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*’ (2008) 32 MULR 422, 433; Bailey (n 2) 181; Byrnes, Charlesworth and McKinnon (n 3) 37; Masterman (n 20) 117. cf Megan Davis and George Williams, ‘A Statutory Bill of Rights for Australia? Lessons from the United Kingdom’ (2002) 22 UQLJ 1, 17–18; Gans and others (n 2) 22–23.

Human Rights Committee³⁴ and rejecting or ignoring adverse findings against it,³⁵ which has been expressly contrasted with the UK's position under the ECHR.³⁶ As one Australian commentator has memorably noted, 'We have no such regional arrangement in Australia. Suva ain't Strasbourg!'³⁷ Interestingly, Lord Bingham said that 'it must be very doubtful whether the UK's experience of reverses in the Human Rights Committee would have impelled it to give domestic effect to the rights in the ICCPR'.³⁸ But is the contextual difference such as to warrant adopting the New Zealand approach to interpretive provisions in preference to the UK approach?³⁹ Or is there another approach altogether which might be appropriate?

³⁴ See Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications 2008) 59.

³⁵ Kate Eastman and Chris Ronalds, 'Using Human Rights Laws in Litigation' in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press 1998) 340–41; Elizabeth Evatt, 'The Impact of International Human Rights on Domestic Law' in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 293; Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alt LJ* 297, cf 298, 300; Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd edn, Federation Press 2004) 189–93; Evans and Evans, *Australian Bills of Rights* (n 12) para 6.45; Lacey, *Implementing Human Rights Norms* (n 34) 60–62; Alexander Reilly and others, *Australian Public Law* (OUP 2011) 267–68; Williams and Burton (n 1) 73–74. See also Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (UNSW Press 2002) 61–62. On treaties' influence generally in Australia, see Heyns and Viljoen (n 33) ch 1, esp at 82–86 re individual complaints.

³⁶ David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (OUP 2010) 134.

³⁷ Frank Brennan, 'Involving Civil Society in Constitutional Reform: An Overview of the Australian National Human Rights Consultation and the Proposed National Human Rights Framework' in Caroline Morris, Jonathan Boston and Petra Butler (eds), *Reconstituting the Constitution* (Springer 2011) 277. See also Kinley and Ernst (n 1) 59; Michael Kirby, 'Human Rights Protection in Australia: The Commonwealth's Odd One Out?' in Nicholas Kang-Riou, Jo Milner and Surya Nayak (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge 2012) 79.

³⁸ Lord Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (2009) 34 *Alt LJ* 74, 76.

³⁹ See generally James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press 2008) 70–85.

Despite the occasional argument to the contrary,⁴⁰ the New Zealand approach has been expressly favoured⁴¹ by two members of the High Court in the leading Australian case and the UK approach was rejected.⁴² Indeed, one New Zealand commentator noted that

no judge was in favour of the robust United Kingdom approach to interpretation exemplified in *Ghaidan v Godin-Mendoza* and *R v Lambert*. This was essentially for the same reasons given by our Supreme Court in *Hansen*. Meanings must be reasonably available.⁴³

Early in the life of the UKHRA, one Australian judge predicted that ‘Within a decade it is quite likely that in substantial areas of the law, British cases will be ... incomprehensible to Australian lawyers.’⁴⁴ Despite the subsequent enactment of

⁴⁰ Hettiarachi (n 20) 82; Julie Debeljak, ‘Who Is Sovereign Now? The Momcilovic Court Hands Back Power over Human Rights That Parliament Intended It to Have’ (2011) 22 PLR 15, 29, see also 18.

⁴¹ *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 [161] (Gummow J, Hayne J agreeing on this point), cf [146(i)]. See also Julie Debeljak, ‘*Momcilovic v The Queen and Ors*: From Definite Pessimism to Cautious Optimism in 273 Pages!’ (Centre for International and Public Law, Australian National University, Public Law Weekend — 10 Years on from September 11: The Impact on Public Law, Canberra, 10 September 2011) 15, cf 12 <www.law.monash.edu.au/castancentre/projects/momcilovic_v_queen_debeljak_public_law_weekend.pdf> accessed 23 April 2013.

⁴² See Robert French, ‘The Judicial Function in an Age of Statutes’ (2011 Goldring Memorial Lecture, Wollongong, 18 November 2011) 21 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18nov11.pdf> accessed 26 April 2013; Ronald Sackville, ‘Bills of Rights: Chapter III of the Constitution and State Charters’ (2011) 18 AJ Admin L 67, 70–71; James Douglas, ‘England as a Source of Australian Law: For How Long?’ (2012) 86 ALJ 333, 346; Robert French, ‘The Courts and the Parliament’ (Queensland Supreme Court seminar, Brisbane, 4 August 2012) 18 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj04aug12.pdf> accessed 28 April 2013; RS French, ‘Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons’ (Address to Anglo-Australasian Lawyers Society, and Constitutional and Administrative Law Bar Association, London, 5 July 2012) 26 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf> accessed 27 April 2013; Anthony Gray, ‘Constitutionally Protecting the Presumption of Innocence’ (2012) 31 U Tas LR 132, 151, fn 100; Vines and Faunce (n 9) 692. cf Hettiarachi (n 20) 84, fn 100; Debeljak, ‘Who Is Sovereign Now?’ (n 40) 39–41; Debeljak, ‘From Definite Pessimism’ (n 41) 2–3, 14.

⁴³ Paul Rishworth, ‘Human Rights’ [2012] NZL Rev 321, 346–47.

⁴⁴ JJ Spigelman, ‘Rule of Law — Human Rights Protection’ (1999) 18 Aust Bar Rev 29, 32. See also JJ Spigelman, ‘Access to Justice and Human Rights Treaties’ (2000) 22 Syd LR 141, 150. cf JJ Spigelman, ‘The Truth Can Cost Too Much: The Principle of a Fair Trial’ (2004) 78 ALJ 29, 47–48; JJ Spigelman, ‘Blackstone, Burke, Bentham and the Human Rights Act 2004’ (2005) 26 Aust Bar Rev 1, 1; JJ Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 ALJ 769, 782.

human rights legislation in Australia, Australian law has generally not mirrored developments in the UK.

One reason for this is the express reference to purpose which appears in each of the Australian interpretive provisions. This has been characterized as ‘a *codification* of the British jurisprudence’⁴⁵ and one commentator has posed the question: ‘Does anyone really think, hand to heart, that these four words [‘consistently with their purpose’] would have made the crucial difference to a *Steyn* or *Hoffmann* or *Cooke*?’⁴⁶ The codification characterization has occasionally been followed expressly⁴⁷ and perhaps implicitly⁴⁸ by Australian courts. But it has not gained general acceptance⁴⁹ and has since been clearly rejected by the High Court.⁵⁰ An important reason for the Court doing so was the different context provided in the UK by the ECHR.⁵¹

⁴⁵ Debeljak, ‘Parliamentary Sovereignty’ (n 5) 50. See also Gargett, Gerber and Castan (n 17) 20; Debeljak, ‘Who Is Sovereign Now?’ (n 40) 35–36.

⁴⁶ James Allan, ‘Siren Songs and Myths in the Bill of Rights Debate’ in Kay Walsh (ed), *Constitutional Politics and Other Lectures in the Senate Occasional Lecture Series, 2008* (Department of the Senate 2008) 32.

⁴⁷ *Re Kracke and Mental Health Review Board* [2009] VCAT 646, (2009) 29 VAR 1 [214] (Bell J, President). cf *The Secretary to the Dept of Justice v AB* [2009] VCC 1132 [274] (Ross J).

⁴⁸ *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, (2005) 195 FLR 151. See Charlesworth and McKinnon, *Australia’s First Bill of Rights* (n 5) 13; Gabrielle McKinnon, ‘An Opportunity Missed? Comment on *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125’ (2006) 9 Canb LR 21, 28; Bailey (n 2) 200–01.

⁴⁹ Gerard Brennan, “‘Introduction to Human Rights Law’” (n 5) 253, 254–55; Jeremy Gans, ‘Evidence Law under Victoria’s Charter: Rights and Goals — Part I’ (2008) 19 PLR 197, 214; Michael McHugh, ‘A Human Rights Act, the Courts and the Constitution’ (2009) 11 CLPR 86, 89, 91. cf Hettiarachi (n 20) 84, fn 100; Debeljak, ‘Who Is Sovereign Now?’ (n 40) 30–31.

⁵⁰ *Momcilovic* (HCA) (n 41) [19]–[20], [47], [49] (French CJ), [146(i)], [151], [155]–[158], [160] (Gummow J, Hayne J agreeing on this point), [544], [546] (Crennan and Kiefel JJ). cf Heydon J, in dissent, boldly asserting (at [451]) that ‘the inclusion of a reference to “purpose” in s 32(1) suggests that it is even wider than s 3(1) of the *Human Rights Act 1998* (UK) ...’

⁵¹ *Momcilovic* (HCA) (n 41) [49] (French CJ), cf [546] (Crennan and Kiefel JJ). Gummow J (Hayne J agreeing on this point) can be taken to have referred implicitly to the ECHR in his warning (at [155]) that ‘In particular, in considering decisions made by the House of Lords about the UK Act ... there are important differences of ... context ... that must not be ignored.’

2 The Relationship of the Interpretive Provision to the Common Law Interpretive Principles

In Chapters Five and Six on the UK and New Zealand respectively, we considered whether ambiguity must be found in impugned legislation before an interpretive provision can be applied. In both cases, the answer was ‘no’. The same question arises in the Australian jurisdictions and can be answered to the same effect: ‘The interpretation provisions apply to unambiguous laws: ambiguity is not a prerequisite.’⁵²

While the issue of whether ambiguity is required is important in ascertaining how the interpretive provisions relate to the common law principles (especially the treaty presumption), it is necessary to consider this relationship more broadly. While other pre-existing human rights-protecting rules have been invoked alongside the Australian human rights legislation,⁵³ we may put these to one side.

In remarks reminiscent of Lord Hoffmann’s speech in *Simms*, at around the same time, the then Chief Justice of New South Wales speculated that

Section 3 of the British Act which requires the court to construe legislation in a manner which is compatible with Convention rights — the New Zealand *Bill of Rights Act* 1990 contains a similar provision — may already be reflected in the Australian law of statutory interpretation. ... In the light of the broader concept of ‘ambiguity’ developed in Australia, it is likely that the jurisprudence in England and New Zealand, under their statutory provisions,

⁵² Evans and Evans, *Australian Bills of Rights* (n 12) para 3.26.

⁵³ On the relationship of the right to a fair trial in the ACTHRA and under the Magna Carta, see *SI bhmf CC* (n 48) [72] (Higgins CJ). See McKinnon, ‘An Opportunity Missed?’ (n 48) 27; Evans and Evans, *Australian Bills of Rights* (n 12) para 3.7; Watchirs and McKinnon (n 5) 160.

will also guide the application of the common law of statutory interpretation in Australia.⁵⁴

However, just as Lord Hoffmann's linking of UKHRA, s 3 to the principle of legality proved to be an understatement of that provision's force,⁵⁵ the prediction that s 3 might be mirrored in the Australian common law has turned out to be inaccurate. Rather, the ACTHRA and Charter are better characterized as 'legislative attempts to give some definition to the principle of legality'.⁵⁶

Despite, as we shall see, the more cautious approach of Australian courts to the Australian interpretive provisions (compared with their UK counterparts),⁵⁷ there are three ways in which the ACTHRA and Charter represent advances on the common law principles. First, the ambiguity requirement under the treaty presumption is overcome in relation to the treaty rights which are included in the legislation.⁵⁸ Some commentators seem to assume that ambiguity is also a requirement under the principle of legality, and see the interpretive provisions as advances on this basis.⁵⁹ Secondly, the range of rights protected is greater than that protected by the principle of legality.⁶⁰ Of course, the principle of legality will remain relevant, as 'the common

⁵⁴ Spigelman, 'Access to Justice' (n 44) 149–50.

⁵⁵ See Chapter Five.

⁵⁶ Steven Rares, 'Legality, Rights and Statutory Interpretation' (2013 AGS Administrative Law conference, Canberra, 20 June 2013) para 76 <www.fedcourt.gov.au/__data/assets/word_doc/0020/23078/Rares-J-20130620.doc> accessed 18 September 2013.

⁵⁷ cf DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th edn, LexisNexis Butterworths Australia 2011) para 5.44.

⁵⁸ Reilly and others (n 35) 249. See also Lacey, *Implementing Human Rights Norms* (n 34) 100–01, see also 84; Gans and others (n 2) 30, 64.

⁵⁹ Kelly (n 15) 30; Stefanie Wilkins, 'Constitutional Limits on Bills of Rights Introduced by a State or Territory' (2007) 35 FL Rev 431, 434–35; Gerard Brennan, 'The Constitution' (n 29) 95; Evans and Evans, *Australian Bills of Rights* (n 12) para 3.17; Pound and Evans (n 16) para 4750.

⁶⁰ Evans and Evans, *Australian Bills of Rights* (n 12) paras 3.13, 3.17; Bailey (n 2) 176; Reilly and others (n 35) 250; Pearce and Geddes (n 57) para 5.44.

law presumption may protect certain rights not present in the Australian human rights Acts'.⁶¹

Thirdly, in common with New Zealand,⁶² it has been argued that

The express statutory requirement to interpret the words of other legislation so as to comply with an express statutory right is ... more likely to be given effect than a judge-made principle derived only from Parliament's presumed intention. The words of the statute will be assessed by Parliament's express intention.

One does not have to go as far as the English judiciary has gone to give force and effect to an expression of Parliamentary will in a statute entitled to be treated as quasi-constitutional. The inhibition that any judge will feel, albeit to varying degrees, before trespassing into what may appear to some to be the province of the Parliament, must be allayed to some degree by such an express Parliamentary mandate.⁶³

Similarly, it has been noted that

The common law rule operates 'negatively'; that is, the courts assume no purpose or intention to infringe rights unless that intention is made clear. The HRA formula invites the courts to read in rights positively with reference to an extrinsic statutory list. Evidence from other jurisdictions suggests that the shift from 'negative' common law protection to 'positive' statutory supplementation occurs when courts are required to interpret laws against a superstatutory list of rights.⁶⁴

⁶¹ Evans and Evans, *Australian Bills of Rights* (n 12) para 3.13. See also Gans and others (n 2) 33; Pearce and Geddes (n 57) para 5.44.

⁶² Cf, in the UK context: Philip Sales, 'Three Challenges to the Rule of Law in the Modern English Legal System' in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011) 203.

⁶³ Spigelman, *Statutory Interpretation and Human Rights* (n 39) 96. cf Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 MULR 449, 469.

⁶⁴ Helen Irving, 'The Dilemmas in Dialogue: A Constitutional [sic] Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 UNSWLJ 60, 79, citing James Allan, 'Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990' (2000) 9 Otago LR 613.

A former Chief Justice of Australia, referring to the Charter, suggested that it ‘will heighten judicial sensitivity to circumstances in which human rights are possibly at risk’.⁶⁵ This is perhaps a result of the ‘democratic ... mandate’⁶⁶ which human rights legislation adds to rights-consistent interpretation. An important aspect is that ‘With regard to whether or not the interpretive principles are applied, any discretion on the part of the judge is removed.’⁶⁷ Although, while

there remains no discretion with regard to the *application* of the interpretive principles, yet judges still retain some choice with respect to the practical *effects* of their application. ... the cultural effects of a Bill of Rights upon the judiciary tend to lead to a relaxation surrounding any requirements attaching to the interpretive principles, coupled with a greater judicial willingness to apply them.⁶⁸

(a) ACT

In the ACT, s 30 as originally enacted set out in subsection 3 the circumstances in which it would apply (see above),⁶⁹ leading to the conclusion that ‘a human rights consistent interpretation of a law must be found *even if* there is no apparent or manifest ambiguity, uncertainty, obscurity or absurdity on the face of the law’.⁷⁰ Although, insofar as ambiguity was one of the circumstances listed, it was not ‘clear

⁶⁵ Gerard Brennan, ‘The Constitution’ (n 29) 95.

⁶⁶ *A v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 2 AC 68 [42] (Lord Bingham). See also *International Transport Roth GmbH v Secretary of State for the Home Dept* [2002] EWCA Civ 158, [2003] QB 728 [71] (Laws LJ, in dissent); Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 71, 103, 109, 112–13.

⁶⁷ Lacey, *Implementing Human Rights Norms* (n 34) 84, see also 100. See also Gans and others (n 2) 35.

⁶⁸ Lacey, *Implementing Human Rights Norms* (n 34) 108.

⁶⁹ See Spigelman, ‘Blackstone, Burke, Bentham’ (n 44) 5–6.

⁷⁰ Andrew S Butler, ‘The ACT Human Rights Act: A New Zealander’s View’ (2004) 194 *Ethos* 16, 17. See also Beckett (n 13) 48.

what degree of ambiguity, if any, [was] required before the interpretative provisions in the other two subsections operate'.⁷¹

Despite s 30(3) and reference thereto in the Supreme Court of the ACT,⁷² the ACTAAT and the Supreme Court on occasion appeared to require ambiguity⁷³ or uncertainty⁷⁴ as preconditions in decisions⁷⁵ which were criticized on this basis.⁷⁶ In one instance, the Tribunal, echoing the comment above about the 'degree of ambiguity', held that there was 'insufficient ambiguity to invoke the HRA'.⁷⁷ More promisingly, in a more recent case post-dating the amendment of s 30, the Member stated that 'In my view, section 30 of the *Human Rights Act 2004 (ACT)* does not require an ambiguity in ACT legislation to be located before it is activated.'⁷⁸ This statement best reflects the position under the provision, and is consistent with the approach to this question in the UK, New Zealand and, as we shall shortly see, Victoria.

⁷¹ Evans, 'Responsibility for Rights' (n 23) 306.

⁷² *R v YL* [2004] ACTSC 115, (2004) 187 FLR 84 [31] (Crispin J); *Pappas v Noble* [2006] ACTSC 39, (2006) 199 FLR 116 [16] (Master Harper).

⁷³ *Merritt & Comr for Housing* [2004] ACTAAT 37 [53] (Dr DF McMichael, Member); *IF v ACT Comr for Housing* [2005] ACTSC 80 [59] (Crispin J); *Pappas* (n 72) [16] (Master Harper).

⁷⁴ *IF* (n 73) [59] (Crispin J); *Bragon Traders Pty Ltd & ACT Gambling & Racing Commission* [2006] ACTAAT 3 [39] (Mr MH Peedom, President).

⁷⁵ See generally Evans and Evans, *Australian Bills of Rights* (n 12) para 3.8; Byrnes, Charlesworth and McKinnon (n 3) 99–100.

⁷⁶ Evans, 'Human Rights Act and Administrative Law' (n 23) 6; Charlesworth, 'Australia's First Bill of Rights' (n 5) 296–97; Charlesworth and McKinnon, *Australia's First Bill of Rights* (n 5) 11; Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 PLR 264, 279; McKinnon, 'An Opportunity Missed?' (n 48) 28; Gabrielle McKinnon, 'Home Truths: Housing under the Human Rights Act' (2008) 21 Parity 23, 24.

⁷⁷ *Z & Comr for Housing* [2007] ACTAAT 12 [65] (Ms S Tongue, Senior Member), overruled in *The Comr for Housing in the ACT v Y* [2007] ACTSC 84 [52] (Higgins CJ). See Bailey (n 2) 202–03; Byrnes, Charlesworth and McKinnon (n 3) 100.

⁷⁸ *Veness & Medical Board of Australia (Occupational Discipline)* [2011] ACAT 55 [33] (Assoc Prof T Faunce, Member).

Moving from ambiguity to the broader relationship between s 30 of the ACTHRA and the common law principles, it can be noted that in criminal law cases in the ACT, ‘in practice the *HR Act* has generally been applied conservatively ... and has tended to reinforce important common law principles, rather than significantly expanding them’.⁷⁹ In the only ACT case in which a declaration of incompatibility has been made,⁸⁰ Penfold J, echoing the second point in the introduction to this section, held that

s 30 fits within the ‘ordinary’ principles of statutory interpretation, being common law principles supplemented by certain statutory principles that preserve the common law focus on text, context and purpose. The significant effect of s 30 is to draw into those principles the articulation in statutory form of many of the fundamental rights and freedoms assumed by the common law ..., as well as some that may not have been fully recognised by the common law. To that extent s 30 may enable the recognition of some extra rights and freedoms, but it does not permit anything more to be done about those rights and freedoms in interpreting legislation than could in any case have been done with them under the ordinary principles of statutory interpretation.⁸¹

In a recent case in the ACAT, it was said that ‘the conventional interpretation is bolstered by an interpretation that complies with s 30 ...’⁸²

(b) Victoria

Before the full entry into force of the Charter, several commentators asserted that the application of s 32(1) was not conditional upon ambiguity.⁸³ The case law has

⁷⁹ Watchirs and McKinnon (n 5) 146 (citations omitted).

⁸⁰ cf *Pappas* (n 72) [17] (Master Harper).

⁸¹ *Islam* (n 7) [126], citing *Plaintiff S157/2002 v The Commonwealth of Australia* [2003] HCA 2, (2003) 211 CLR 476 [30] (Gleeson CJ). See also Evans, ‘*Human Rights Act and Administrative Law*’ (n 23) 4.

⁸² *Allatt & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67 [67] (Prof P Spender, Presidential Member, and Mr P Sutherland, Senior Member). cf McDonald (n 5) 30.

generally borne this out.⁸⁴ It would be unwise to attribute much weight to the occasional exceptions in the VCAT⁸⁵ due to the nature of this body (though quasi-judicial, it is not a court); similar reasoning applies in relation to the AAT decisions in the ACT. The Chief Justice of Australia has made clear that ambiguity *per se* is not determinative under s 32(1), which ‘operates upon constructional choices which the language of the statutory provision permits. Constructional choice subsumes the concept of ambiguity but lacks its negative connotation.’⁸⁶

Leaving the issue of ambiguity, the overlap more broadly between Charter, s 32(1) and common law principles was also identified early.⁸⁷ However, Victoria saw a few statements to the effect that s 32(1) went further than the common law.⁸⁸ In doing so, one Supreme Court judge, Bell J, sitting as President of the VCAT, colourfully said that ‘The principle of legality flows in the river of principle running underneath the [UKHRA] and the Charter.’⁸⁹ One might ask ‘exactly what is a “river of principle” and how does it run “underneath” the Charter?’!⁹⁰

⁸³ Evans and Evans, ‘Legal Redress’ (n 76) 267; Debeljak, ‘Parliamentary Sovereignty’ (n 5) 13; Rolls (n 31) 131.

⁸⁴ *In the Review of P* [2008] VMHRB 1, 6 (J Lesser, Dr M Lush and P Harper); *Kracke* (n 47) [230] (Bell J, President); *Lifestyle Communities* (n 11) [94] (Bell J, President); *PJB v Melbourne Health (Patrick’s case)* [2011] VSC 327 [224(4)] (Bell J).

⁸⁵ *Conroy v Yooralla Society of Victoria (Residential Tenancies)* [2009] VCAT 1873 [18] (Senior Member H Lambrick); *Aitken v The State of Victoria — Dept of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547 [121] (Judge Ginnane, Vice President).

⁸⁶ *Momcilovic* (HCA) (n 41) [50] (French CJ).

⁸⁷ Evans and Evans, ‘Legal Redress’ (n 76) 267.

⁸⁸ *Kracke* (n 47) [51] (Bell J, President); *Lifestyle Communities* (n 11) [94] (Bell J, President); Kevin Bell, ‘Enhancing Australian Democracy with a Federal Charter of Rights and Responsibilities’ (2009) 60 AIALF 1, 7; Alistair Pound, ‘The Victorian Charter of Rights and Responsibilities So Far: A Lawyer’s Perspective’ (2009 Annual Castan Centre conference: The Changing Human Rights Landscape, Melbourne, 17 July 2009) para 51 <www.law.monash.edu.au/castancentre/events/2009/conf-09-pound-paper.pdf> accessed 5 March 2013.

⁸⁹ *Kracke* (n 47) [45].

⁹⁰ Damien J Cremean, ‘Editorial: Categories of Illusory (Meaningless) Reference’ (2010) 17 AJ Admin L 63, 64.

The statements referred to in the previous paragraph have subsequently been shown to be incorrect. Around the same time as they were made, the President of the Victorian Court of Appeal noted that

The common law of Australia has a rich tradition, mostly inherited from England but in part developed domestically, of recognising and protecting human rights. ...

... the task which the Charter has conferred on courts and tribunals, of considering the scope of human rights and of interpreting legislation compatibly with human rights, is as old as the common law itself.⁹¹

He also stated that ‘there is nothing new, or radical, about s 32 of the Charter ...’⁹²

The quotation above was relied on by the Chief Justice of Victoria later that year:

In many instances, it may be possible to reach an appropriate conclusion without reference to the Charter. This reflects the view that the character of human rights adjudication in the Charter mirrors the already well-developed human rights jurisprudence at common law.⁹³

This approach was confirmed in the first Victorian case in which a declaration of inconsistent interpretation was made (albeit that the decision was overturned on other grounds, with no declaration being made on appeal). The Victorian Court of Appeal, with Maxwell P presiding, held that

⁹¹ Justice Maxwell, ‘The Victorian Charter of Human Rights and Responsibilities So Far: A Judge’s Perspective’ (2009 Annual Castan Centre conference, Melbourne, 17 July 2009) 2 <www.law.monash.edu.au/castancentre/events/2009/conf-09-justice-maxwell-paper.pdf> accessed 28 February 2013. See also Chris Maxwell, ‘Judges and Human Rights’ (Address to Queen’s Inn Dinner, Melbourne, 4 May 2012) 3 <www.supremecourt.vic.gov.au/resources/6448e662-cb1e-458a-85a4-b00c66716d33/address%2Bto%2Bqueen's%2Binn%2Bdinner.pdf> accessed 23 April 2013.

⁹² Maxwell, ‘A Judge’s Perspective’ (n 91) 6. See also Maxwell, ‘Judges and Human Rights’ (n 91) 5.

⁹³ *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, (2009) 24 VR 415 [51] (Warren CJ) (citation omitted).

What is significant about s 32(1), in our view, is that Parliament has embraced and affirmed [‘the presumption against interference with rights’], in emphatic terms. It is no longer merely a creature of the common law but is now an expression of the ‘collective will’ of the legislature. Moreover, the rights which the interpretive rule is to promote are those which Parliament itself has declared, in the Charter.⁹⁴

The Court then proceeded to approve the comments of one New Zealand commentator,⁹⁵ discussed in the previous chapter. This supports the third (and perhaps also the second) point set out in the introduction to this section.

While one commentator has attacked this view,⁹⁶ the passage has since been quoted (including by Bell J)⁹⁷ and cited⁹⁸ shortly thereafter in the Supreme Court of Victoria. The Chief Justice of Australia even linked the principle of legality and s 32(1) in *Hogan v Hinch*.⁹⁹ This slightly pre-dated the appeal to the High Court in *Momcilovic*, in which the ‘[t]he principle of legality was a horse ... run ragged by French CJ ...’.¹⁰⁰

Section 32(1) does what Lord Hoffmann and the other Law Lords in *Wilkinson* said s 3 of the HRA does. It requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed

⁹⁴ *R v Momcilovic* [2010] VSCA 50, (2010) 25 VR 436 [104] (Maxwell P, Ashley and Neave JJA).

⁹⁵ Claudia Geiringer, ‘The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*’ (2008) 6 NZJPIL 59, 89; Claudia Geiringer, ‘The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*’ in Claudia Geiringer and Dean R Knight (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008) 95.

⁹⁶ Debeljak, ‘Who Is Sovereign Now?’ (n 40) 28, 30, fn 117, 35, 47–50.

⁹⁷ *Director of Public Transport v XFJ* [2010] VSC 319 [64] (Ross J); *Patrick’s case* (n 84) [239] (Bell J), see also [224(3)], [228], [273]. See also *WBM v Chief Comr of Police* [2012] VSCA 159 [203] (Bell AJA).

⁹⁸ *DPP v Ali (No 2)* [2010] VSC 503 [25(3)] (Hargrave J).

⁹⁹ [2011] HCA 4, (2011) 243 CLR 506 [29] (French CJ), cf [70] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹⁰⁰ Steven Churches, ‘An Activist Court or a Court Scrupulous to Common Law Standards?’ (2011) 19 AJ Admin L 13, 15.

against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application. The Court of Appeal was essentially correct in its treatment of s 32(1).¹⁰¹

The Chief Justice's comments have become the most oft-quoted on this point.¹⁰²

French CJ has since asserted extra-judicially that '[t]he approach taken to the interpretive principle by the majority was broadly equivalent to the interpretive approach reflected in the principle of legality',¹⁰³ however the other majority reasons differed somewhat from his, at least in emphasis.¹⁰⁴

Crennan and Kiefel JJ took a similar approach without referring expressly to the Court of Appeal's decision, or even the principle of legality:¹⁰⁵

Section 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes. ... The direction is not, strictly speaking, necessary. In the ordinary course of construction regard

¹⁰¹ *Momcilovic* (HCA) (n 41) [51] (French CJ). See also Robert French, 'What Were They Thinking? Statutory Interpretation and Parliamentary Intention' (Sir Frank Kitto Lecture, Armidale, 23 September 2011) 23 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj23sep11.pdf> accessed 14 August 2013; French, 'The Judicial Function' (n 42) 21; RS French, 'Unelected Judges in a Representative Democracy' (Speech to St Thomas More Society, Sydney, 22 June 2012) 13 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22jun12.pdf> accessed 15 August 2013; French, 'Human Rights Protection' (n 42) 26. cf Debeljak, 'From Definite Pessimism' (n 41) 10.

¹⁰² *Slaveski v Smith* [2012] VSCA 25 [23] (Warren CJ, Nettle and Redlich JJA), in turn quoted in *Magee v Delaney* [2012] VSC 407 [168] (Kyrour J) and *Aitken* (n 85) [93] (Judge Ginnane, Vice President) and *A v Children's Court of Victoria* [2012] VSC 589 [103] (Garde J); *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91 [139] (Nettle JA).

¹⁰³ French, 'The Courts and the Parliament' (n 42) 18. See also Phil Lynch, 'High Court Affirms Importance and Validity of Victorian Charter' (2011) 36 *Alt LJ* 285, 285; Bateman and Stellios (n 8) 12, 15–16; Vines and Faunce (n 9) 692; Suzanne Zhou, '*Momcilovic v The Queen*: Implications for a Federal Human Rights Charter' (2012) 5 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128005> accessed 15 April 2013.

¹⁰⁴ cf Bateman and Stellios (n 8) 16, fn 60; Rosalind Dixon, 'A New (Inter)National Human Rights Experiment for Australia' (2012) 23 *PLR* 69, 77–78; Gray (n 42) 147; Horrigan, 'Commonalities, Intersections' (n 1) 15; Zhou (n 103) 6.

¹⁰⁵ See Debeljak, 'From Definite Pessimism' (n 41) 11.

should be had to other existing laws. The Charter forms part of the context in which a statute is to be construed. It will be recalled that Lord Hoffmann viewed the Convention in a similar way in *Wilkinson*. The process of construction commences with an essential examination of the context of the provisions being construed.¹⁰⁶

Heydon J, in dissent, was the only Justice to take a contrary approach, holding that ‘s 32(1) goes well beyond the common law’ on the basis that the provision ‘commands the courts not to apply statutory provisions but to remake them ...’¹⁰⁷ However, this conclusion was based on an assumption that s 32(1) was designed to have the same effect as s 3 of the UKHRA,¹⁰⁸ an assumption that this Chapter will prove to be false.¹⁰⁹

The two points which the Court of Appeal made, and which have since been widely endorsed, about s 32(1) making the principle of legality ‘an expression of the “collective will” of the legislature’ and the range of rights covered have commonly been identified as results of the Charter’s enactment. As mentioned in the introduction to this section, to the former¹¹⁰ and the latter¹¹¹ can be added the removal of the ambiguity requirement that exists under the treaty presumption in Australia.¹¹² It is for

¹⁰⁶ *Momcilovic* (HCA) (n 41) [565] (citations omitted).

¹⁰⁷ *ibid* [450], cf [387], [411]. See Debeljak, ‘From Definite Pessimism’ (n 41) 14; Bateman and Stellios (n 8) 14–15.

¹⁰⁸ *Momcilovic* (HCA) (n 41) [447]–[449].

¹⁰⁹ See Section 4.

¹¹⁰ *Ali* (n 98) [25(3)] (Hargrave J); *Taha v Broadmeadows Magistrates’ Court* [2011] VSC 642 [59] (Emerton J); Evans and Evans, ‘Legal Redress’ (n 76) 267; John W Perry, ‘International Human Rights and Domestic Law and Advocacy’ (Speech to Human Rights Law Resource Centre seminar, Melbourne, 7 August 2006) 19 <www.hrlrc.org.au/files/96S542RKAI/Justice%20Perry%20Paper.doc> accessed 10 September 2013; Anthony Mason, ‘Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power’ (2011) 9 NZJPIL 1, 8, 9; Reilly and others (n 35) 286.

¹¹¹ *Slaveski* (n 102) [45] (Warren CJ, Nettle and Redlich JJA); *Noone* (n 102) [139] (Nettle JA), in turn quoted in *Aitken* (n 85) [95] (Judge Ginnane, Vice President); Evans and Evans, ‘Legal Redress’ (n 76) 267; Gerard Brennan, “‘Introduction to Human Rights Law’” (n 5) 253; Pound (n 88) para 37; Mason (n 110) 8.

¹¹² Gerard Brennan, “‘Introduction to Human Rights Law’” (n 5) 253; Rolls (n 31) 124.

these reasons that it can be argued that s 32(1) has strengthened¹¹³ or ‘buttressed’¹¹⁴ the common law principles and is therefore not otiose. Thus we can answer the question: ‘[w]hy introduce s 32(1) in the context of the Charter ... if all that was intended was the codification of a common law presumption of legality’?¹¹⁵ As Bell J has put it extra-judicially,

Before the Charter, ... The principal [*sic*] of legality was (and is) growing in importance in addressing the issues of interpretation which arise when legislation impinges on fundamental human rights. ... The Charter has done nothing to depress and everything to stimulate this ongoing process.¹¹⁶

Before leaving this topic, it is worthwhile noting that Charter, s 5¹¹⁷ provides:

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

This provision has been described as ‘helpful, particularly in respect of rights not included in the Charter (eg rights set out in other international treaties which Australia has ratified) or for statutory interpretation in circumstances where the Charter was “overridden” pursuant to s 31’.¹¹⁸ Section 31(1)¹¹⁹ states that

¹¹³ *Aitken* (n 85) [540] (Judge Ginnane, Vice President); Julie Taylor, ‘Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy’ (2004) 32 FL Rev 57, 73; Mason (n 110) 9.

¹¹⁴ Dan Meagher, ‘The Scope of Judicial Rights Interpretation under Bills of Rights (and Its Political Consequences)’ (2009) 20 PLR 214, 219.

¹¹⁵ Vines and Faunce (n 9) 693.

¹¹⁶ Kevin Bell, ‘Victoria’s Human Rights Charter’ (Keynote Address to Law Institute of Victoria Human Rights and Administrative Law conference, Melbourne, 28 October 2011) 2 <www.supremecourt.vic.gov.au/resources/cac53adf-50fc-4861-8f2d-a01505958f3a/keynote_address_to_liv_human_rights_conference_oct_2011.pdf> accessed 23 April 2013.

¹¹⁷ See Pound and Evans (n 16) paras 660–80. cf ACTHRA, s 7.

¹¹⁸ Hettiarachi (n 20) 77, fn 79.

Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.

Section 31(6) sets out that ‘If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.’ The prospect of the common law principles being applied to circumvent the effect of a declaration is fascinating but is unlikely to materialize; s 31 has never been used and the Government has indicated an intention to repeal it.¹²⁰

3 The Role of Intention

(a) Revising Previous Interpretations

It is clear that in both Australian jurisdictions, ‘interpreters may have to revisit previously settled interpretations in light of their Charter or ACT HRA obligations’.¹²¹

¹¹⁹ See on s 31 generally, Williams, ‘Origins and Scope’ (n 22) 899–900; Debeljak, ‘Balancing Rights’ (n 33) 436–58; Evans and Evans, *Australian Bills of Rights* (n 12) paras 2.59–2.62; Pound and Evans (n 16) paras 4620–80.

¹²⁰ Victorian Government Response (14 March 2012) to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2009) para 2.24 <www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20120314_sarc.govtresp.charterreview.pdf> accessed 24 September 2013.

¹²¹ Evans and Evans, *Australian Bills of Rights* (n 12) para 3.28. See also Gans and others (n 2) 74.

(i) ACT

In the ACT, despite one aberrant case in the ACTAAT,¹²² this was recognized early¹²³ and was confirmed by Penfold J in the Supreme Court:

s 30 of the *Human Rights Act* requires the *Bail Act* to be interpreted in a way that is compatible with human rights. ... That exercise might in fact produce interpretations of particular provisions of the *Bail Act* that differ from pre-*Human Rights Act* interpretations, but there is no basis for assuming that the *Human Rights Act* will necessarily require a new and different interpretation of any or all provisions of the *Bail Act*. ... the suggestion that pre-*Human Rights Act* interpretations must be abandoned in favour of new ones would need to be made out, case by case, by substantive arguments demonstrating that those earlier interpretations are incompatible with human rights and cannot be ‘demonstrably justified in a free and democratic society’.¹²⁴

(ii) Victoria

Likewise, in Victoria the point was noted even before,¹²⁵ and shortly after,¹²⁶ the Charter came into force. One judge in the Court of Appeal applied this approach,¹²⁷ though the effect of the overruling of the earlier authority in that case was subsequently undone by legislation.¹²⁸ The point has been addressed in detail in the VCAT:

¹²² *Merritt* (n 73) [53] (Dr DF McMichael, Member). See Evans, ‘*Human Rights Act* and Administrative Law’ (n 23) 6; Evans and Evans, *Australian Bills of Rights* (n 12) para 3.28; McKinnon, ‘Home Truths’ (n 76) 24.

¹²³ McKinnon, ‘An Opportunity Missed?’ (n 48) 30.

¹²⁴ *Re an Application for Bail by Massey (No 2)* [2009] ACTSC 70 [36].

¹²⁵ Evans and Evans, ‘Legal Redress’ (n 76) 267–68.

¹²⁶ *Guss v Aldy Corp Pty Ltd (Civil Claims)* [2008] VCAT 912 [42] (Senior Member A Vassie), on which see Pound and Evans (n 16) para 4720; Byrnes, Charlesworth and McKinnon (n 3) 136–37.

¹²⁷ *RJE v Secretary to the Dept of Justice* [2008] VSCA 265, (2008) 21 VR 256 [106] (Nettle JA), cited with approval in *Kracke* (n 47) [230] (Bell J, President).

¹²⁸ Serious Sex Offenders Monitoring Amendment Act 2009 (Vic). See Pound (n 88) para 2; Debeljak, ‘Who Is Sovereign Now?’ (n 40) 24, fn 65.

An initial question that arises with respect to a provision which pre-dated the Charter is whether the alteration of Section 32 can have the effect that the same provision say a subsection of an ordinary statute could mean one thing in 2004 before the Charter and have a different meaning in 2010 by the operation of Section 32 of the Charter. Mr Young, on behalf of the Commission, contended that if a statutory provision had acquired a fixed meaning by authoritative judicial decision before the Charter came into force, that meaning would remain even after the Charter despite the application of Section 32. If no fixed meaning had authoritatively been ascribed to a provision before the Charter came into force, the provision was to be construed in light of the Charter leaving open the possibility that a different result as to its true meaning will be reached post-Charter than would have been reached had the matter been adjudicated pre-Charter.

I find no support in the Charter or elsewhere for this type of distinction. By enacting Section 32 Parliament has necessarily added a new factor to the equation in interpreting Victorian legislation. There must be a substantial possibility, perhaps even a likelihood, that the introduction of a new factor into the interpretational equation will necessarily modify the ultimate result. I see no reason why the existing authoritative determination by a court pre-Charter can have the effect of ‘freezing’ the operation that Section 32 would otherwise have with respect to the relevant provisions.¹²⁹

One of the Justices in the High Court in *Momcilovic* confirmed that ‘Provisions enacted before the Charter may yield different, human rights compatible, meanings in consequence of s 32(1).’¹³⁰

(b) The Role of Intention Generally

In Chapter Two, we saw that intention and purpose are often treated interchangeably by Australian courts. This also happens not infrequently in case law¹³¹ and

¹²⁹ *Dawson v Transport Accident Commission (General)* [2010] VCAT 644 [72]–[73] (MF Macnamara, Deputy President), in turn quoted in *Valentine v Emergency Services Superannuation Board (General)* [2010] VCAT 2130 [92] (MF Macnamara, Deputy President).

¹³⁰ *Momcilovic* (HCA) (n 41) [684] (Bell J).

¹³¹ *ibid* [170] (Gummow J, Hayne J agreeing on this point), [684] (Bell J); *Darragh v Business Licensing Authority (Occupational and Business Regulation)* [2012] VCAT 1360 [32] (Senior Member

commentary¹³² on the Australian interpretive provisions, where purpose is likely to be treated as intention, ie purpose identified at a low level of abstraction. Partly because of this, I shall deal with most of the references to purpose in the sources in this section on intention. ‘Purpose’ is obviously a recurring theme in Australian sources, due to the references thereto in the interpretive provisions; in the Victorian context, a former Chief Justice of Australia noted this as a ‘significant difference’.¹³³ The main point to note about purpose in the Australian context is the way in which it is treated as a constraint on the powers under the interpretive provisions,¹³⁴ which has been acknowledged as a point of distinction between Australia and the UK.¹³⁵

R Davis); *WBM* (n 97) [97] (Warren CJ, Hansen JA agreeing). See Churches (n 100) 14; Bateman and Stellios (n 8) 15.

¹³² Kelly (n 15) 30; Charlesworth, ‘Australia’s First Bill of Rights’ (n 5) 294–96; Charlesworth and McKinnon, *Australia’s First Bill of Rights* (n 5) 7–8; Debeljak, ‘Parliamentary Sovereignty’ (n 5) 51; Hettiarachi (n 20) 78; Meagher, ‘The Scope of Judicial Rights Interpretation’ (n 114) 225; Elise Parham, *Behind the Moral Curtain: The Politics of a Charter of Rights* (Centre for Independent Studies 2010) 14–15; Edward Santow, ‘The Act That Dares Not Speak Its Name: The National Human Rights Consultation Report’s Parallel Roads to Human Rights Reform’ (2010) 33 UNSWLJ 8, 21–22; Debeljak, ‘From Definite Pessimism’ (n 41) 3; Debeljak, ‘Who Is Sovereign Now?’ (n 40) 19; Gans and others (n 2) 15, 58; Reilly and others (n 35) 286. See also Julie Debeljak, ‘Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights’ (2002) 26 MULR 285, 309.

¹³³ Mason (n 110) 2.

¹³⁴ Denise Meyerson, ‘Why Courts Should Not Balance Rights against the Public Interest’ (2007) 31 MULR 873, 892, fn 117; Beckett (n 13) 47–48; Evans and Evans, *Australian Bills of Rights* (n 12) para 3.32; Richard McHugh, ‘Implications of the Proposed *Human Rights Act* for the Rule of Law as Manifested in Australian Courts’ (Is the Rule of Law under Challenge in Australia? conference, Sydney, 20 November 2009) 13 <www.ruleoflaw.org.au/wp-content/uploads/2012/08/Media-3-12-09-Implications-of-the-proposed-Human-Rights-Act-for-the-rule-of-law-as-manifested-in-Australian-courts-Richard-McHugh.pdf> accessed 5 September 2013; Gans and others (n 2) 58, 74, 76.

¹³⁵ Evans and Evans, *Australian Bills of Rights* (n 12) para 3.32.

(i) ACT

It is instructive to note that the reference to purpose in ACTHRA, s 30 is often characterized in case law¹³⁶ and commentary¹³⁷ as a constraint on the ability of interpreters (most commonly courts) to reach human rights-consistent interpretations (although obviously this is not true where the impugned legislation ‘has a human rights purpose’¹³⁸). An important example is found in the reasons of Besanko J (Gray P and Penfold J agreeing) in the ACT Court of Appeal case of *R v Fearnside*.¹³⁹

In its present form, s 30 appears to give the court a broader power to adopt an interpretation of a Territory law which is consistent with a relevant human right. I am conscious of the fact that discussing the matter in the abstract is of limited assistance. Nevertheless, I think s 30 would enable a Court to adopt an interpretation of a legislative provision compatible with human rights which did not necessarily best achieve the purpose of that provision or promote that purpose, providing the interpretation was consistent with that purpose. On the other hand, I do not think s 30 authorises and requires the Court to take the type of approach taken by the House of Lords in *Ghaidan*. There is no reference to purpose in s 3(1) of the United Kingdom Act and the primary constraint in that subsection is stated in terms of what is or is not possible. By contrast, under s 30 in the HRA the purpose or purposes of the legislative provision must be ascertained through well-established methods, and the interpretation adopted by the Court must be consistent with that purpose or those purposes.¹⁴⁰

It has been observed that ‘This rules out the core feature of the United Kingdom approach: treating the interpretation mandate as itself supplying a rights compatibility

¹³⁶ *Bragon Traders* (n 74) [39]–[40] (Mr MH Peedom, President); *Raytheon Australia* (ACTAAT) (n 11) [78]–[79] (Mr MH Peedom, President) (leave to appeal refused: *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55 (Master Harper)); *Casey* (n 7) [108] (Besanko J, Refshauge J agreeing); *Fearnside* (n 7) [89] (Besanko J, Gray P and Penfold J agreeing). cf *Kracke* (n 47) [217] (Bell J, President); *Lifestyle Communities* (n 11) [103] (Bell J, President); *Hettiarachi* (n 20) 83, fn 96.

¹³⁷ Evans, ‘Responsibility for Rights’ (n 23) 308; Spigelman, ‘Blackstone, Burke, Bentham’ (n 44) 9.

¹³⁸ Simon Rice, ‘Staring Down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law’ (2011) 10 Canb LR 97, 107.

¹³⁹ *Fearnside* (n 7).

¹⁴⁰ *ibid* [89]. cf Pound (n 88) para 50.

purpose for all statutory provisions that trumps other statutory purposes.’¹⁴¹ This is not quite accurate; it is not a question of purposes trumping each other if different levels of abstraction of purpose are applied. Though what Besanko J set out has been described as a ‘perhaps somewhat restricted approach to s 30’,¹⁴² it is the leading statement on this point in the ACT, as demonstrated by its frequent citation and application.¹⁴³ The ACAT has on separate occasions approved¹⁴⁴ the similar approach taken by the Victorian Court of Appeal and followed¹⁴⁵ that of the High Court in *Momcilovic*, to the jurisdiction of which we may now turn.

(ii) *Victoria*

As in the ACT, though with the occasional exception,¹⁴⁶ Victoria has seen numerous references to purpose as a constraint on rights-consistent interpretation, both in case law¹⁴⁷ and commentary.¹⁴⁸ A former Chief Justice of Australia has even said that ‘s

¹⁴¹ Gans and others (n 2) 76.

¹⁴² *Travini v Starczewski* [2009] ACTSC 123, (2009) 169 ACTR 1 [62] (Refshauge J).

¹⁴³ *Thomson v ACT Planning and Land Authority (Administrative Review)* [2009] ACAT 38 [37] (Prof P Spender, Presidential Member and Dr D McMichael, Senior Member); *Tran v ACT Planning and Land Authority (Administrative Review)* [2009] ACAT 46 [22] (Prof P Spender, Presidential Member); *Gardner v ACT Planning and Land Authority (Administrative Review)* [2010] ACAT 64 [44], [46] (Prof P Spender, Presidential Member); *R v AM* [2010] ACTSC 149, (2010) 5 ACTLR 170 [57] (Refshauge J). See *Islam* (n 7) [134] (Penfold J).

¹⁴⁴ *Veness* (n 78) [32] (Assoc Prof T Faunce, Member).

¹⁴⁵ *Allatt* (n 82) [71]–[72] (Prof P Spender, Presidential Member, and Mr P Sutherland, Senior Member).

¹⁴⁶ Allan, ‘Exegesis and Criticism’ (n 18) 912; Hettiarachi (n 20) 78, fn 83, cf 86; Allan, ‘Siren Songs’ (n 46) 30–32; Allan, ‘The Victorian Charter’ (n 18) 174; Meagher, ‘The Scope of Judicial Rights Interpretation’ (n 114) 225.

¹⁴⁷ *Momcilovic* (HCA) (n 41) [684] (Bell J).

¹⁴⁸ Williams, ‘Origins and Scope’ (n 22) 902; Hettiarachi (n 20) 86, cf 78, fn 83, 83; Gans, ‘Rights and Goals’ (n 49) 212, 213, 214; Murray Gleeson, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (2009) 20 PLR 26, 35; Masterman (n 20) 119, 121; Jim South, ‘Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)’ (2009) 28

32(1) seems to take the Interpretation Act purpose of a statutory provision as the *linchpin* of its interpretation ...’,¹⁴⁹ in stark contrast to Laws LJ’s remarks made in the context of the UKHRA, dealt with in Chapter Five. An alternative approach has been to view the purpose requirement as importing the *Ghaidan* limitations into s 32(1),¹⁵⁰ which is largely consistent with the overall argument of this thesis in terms of methodology, although this is not to say that the results of the *Ghaidan* approach in the UK should follow in Australia — a point which will be further elaborated on in the penultimate section of this chapter.

Purpose may be the more obvious term to focus on in the Australian context,¹⁵¹ but such is the power of the concept of intention that it has continued to be referred to where purpose might be used¹⁵² and, as we shall see, has sometimes been dealt with at length. Section 32(1) has been characterized, in reliance on the English case of *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,¹⁵³ as having ‘changed’ the intention behind impugned legislation.¹⁵⁴ An approach similar to that of Lord Hoffmann in *R (Wilkinson) v IRC*¹⁵⁵ has also been adopted.¹⁵⁶

UQLJ 143, 148–49, 157; Pamela Tate, ‘A National Charter on Human Rights in Australia? Views from Victoria’ (2009) 18 Com Lawyer 27, 33.

¹⁴⁹ Gerard Brennan, “‘Introduction to Human Rights Law’” (n 5) 252 (emphasis added).

¹⁵⁰ Hettiarachi (n 20) 82–83; Pound and Evans (n 16) para 4760; Mason (n 110) 3. cf Gans and others (n 2) 15.

¹⁵¹ cf Mason (n 110) 3.

¹⁵² See, eg, *Director of Housing v Sudi* [2011] VSCA 266 [103] (Maxwell P), cf [45] (Warren CJ).

¹⁵³ [2001] EWCA Civ 595, [2002] QB 48.

¹⁵⁴ *RJE* (n 127) [114] (Nettle JA). See also *Application under the Major Crime (Investigative Powers) Act 2004* (n 93) [174] (Warren CJ); *Momcilovic* (VSCA) (n 94) [38] (Maxwell P, Ashley and Neave JJA).

¹⁵⁵ [2005] UKHL 30, [2005] 1 WLR 1718.

¹⁵⁶ *Kracke* (n 47) [219] (Bell J, President).

The Victorian Court of Appeal in its ‘groundbreaking judgment’¹⁵⁷ in *Momcilovic* opined that ‘the inclusion of the purpose requirement made it unambiguously clear that nothing in s 32(1) justified, let alone required, an interpretation of a statutory provision which overrode the intention of the enacting Parliament’.¹⁵⁸ The Court’s decision has been followed and applied.¹⁵⁹

When the appeal from that decision reached the High Court,¹⁶⁰ the Justices in their ‘landmark decision’¹⁶¹ ‘reinforced the importance of the intent of Parliament in giving meaning to a provision’,¹⁶² albeit in different ways. French CJ emphasized the centrality of intention:

Section 32(1) takes its place in a milieu of principles and rules, statutory and non-statutory, relating to the interpretation of statutes. It also takes its place in a constitutional tradition inherited from the United Kingdom in which ‘it has been recognised since the seventeenth century that it is the task of the judiciary in interpreting an Act to seek to interpret it “according to the intent of them that made it”’.¹⁶³

While the Chief Justice proceeded to focus on purpose,¹⁶⁴ Gummow J (Hayne J agreeing on this point) equated the concepts: ‘the reference to “purpose” in such a

¹⁵⁷ Phil Lynch, ‘Court of Appeal Makes Declaration of Incompatibility’ (2010) 35 Alt LJ 124, 124.

¹⁵⁸ *Momcilovic* (VSCA) (n 94) [74] (Maxwell P, Ashley and Neave JJA). See Sackville (n 42) 79. cf Sharon Rodrick, ‘Open Justice, the Media and Reporting on Preventive Supervision and Detention Orders Imposed on Serious Sex Offenders in Victoria’ (2010) 36 Mon LR 136, 169; Watchirs and McKinnon (n 5) 154.

¹⁵⁹ *Dawson* (n 129) [71] (MF Macnamara, Deputy President); *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission (Anti-Discrimination)* [2011] VCAT 796 [21] (Senior Member C McKenzie).

¹⁶⁰ Gummow J noted (at [114]) that ‘This appeal ... raises a plethora of complex issues.’ Many points not common to the UK and New Zealand will be omitted from the discussion here.

¹⁶¹ Lynch, ‘High Court Affirms Importance’ (n 103) 285.

¹⁶² Gray (n 42) 151, fn 100.

¹⁶³ *Momcilovic* (HCA) (n 41) [37] (French CJ), citing *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 (HL) 234 (Viscount Dilhorne), in turn quoting 4 Co Inst 330.

¹⁶⁴ See, eg, *Momcilovic* (HCA) (n 41) [62].

provision as s 32(1) is to the legislative “intention” revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation’.¹⁶⁵ He also referred to the reference to interpretation in s 32(1) and noted that ‘The ordinary understanding of “interpret” when applied to statute law is to ascertain the “intention” of the legislature.’¹⁶⁶

Crennan and Kiefel JJ made the same point, and their citation of *Zheng*, dealt with in Chapter Two, implies a focus on intention:

[Section 32(1)] simply requires that, so far as it is possible to do so consistently with their purpose, all statutory provisions ‘must be *interpreted*’ in a way which is compatible with Charter rights. ... The reference to interpretation must be taken to be a reference to that process of construction as understood and ordinarily applied by courts, a process which is to be taken as accepted by the other arms of government in a system of representative democracy.¹⁶⁷

Bell J, similarly to Gummow J, equated purpose with intention: ‘the requirement of consistency with purpose ... directs attention to the intention, objectively ascertained, of the enacting Parliament’.¹⁶⁸

Of the six majority Justices in *Momcilovic*, the approach supported by Gummow, Hayne and Bell JJ of equating purpose and intention is problematic, as it ignores the possibility that purpose can be a much broader concept. Gummow, Hayne, Crennan and Kiefel JJ’s reliance on ‘interpretation’ as an indicator of the relevance of

¹⁶⁵ *ibid* [170].

¹⁶⁶ *ibid* [146(v)]. cf Rodrick (n 158) 170, fn 199.

¹⁶⁷ *Momcilovic* (HCA) (n 41) [545], citing *Zheng v Cai* [2009] HCA 52, (2009) 239 CLR 446 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

¹⁶⁸ *Momcilovic* (HCA) (n 41) [684].

intention does not elucidate the *roles* of the concepts under s 32(1). Only French CJ appeared to distinguish the concepts reasonably clearly and to apply purpose.

Momcilovic involved two reverse onus provisions,¹⁶⁹ similarly to *Lambert*¹⁷⁰ in the UK (as predicted by one Australian commentator¹⁷¹), and *Phillips*¹⁷² and *Hansen*¹⁷³ in New Zealand. French CJ held that

The interpretive principle in s 32(1) does not require or authorise the interpretation of [one of the relevant provisions] in such a way as to transform the legal burden of proof, which it imposes in clear terms, into an evidential burden. The interpretation mandated under s 32(1) must be consistent with the purpose of the statutory provision being interpreted. The purpose of [the relevant provision] is apparent from its text. It is to require the accused to negative possession of a substance otherwise deemed to be in his or her possession by operation of the section.¹⁷⁴

While the confusion between purpose and intention complicates the ratio of *Momcilovic*, the Victorian Court of Appeal's summary appears to be accurate and has been quoted¹⁷⁵ and cited¹⁷⁶ with approval:

So far as s 32(1) was concerned, French CJ, Crennan and Kiefel JJ and Gummow J, Hayne J and Bell J each held in separate judgments that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision in

¹⁶⁹ For an argument that such reverse onus provisions are actually unconstitutional in Australia, see Gray (n 42).

¹⁷⁰ *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545.

¹⁷¹ Hettiarachi (n 20) 85.

¹⁷² *R v Phillips* [1991] 3 NZLR 175 (NZCA).

¹⁷³ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

¹⁷⁴ *Momcilovic* (HCA) (n 41) [62], cf [73], see also [612] (Crennan and Kiefel JJ).

¹⁷⁵ *Magee* (n 102) [168] (Kyrou J); *Aitken* (n 85) [93] (Judge Ginnane, Vice President); *A* (n 102) [103] (Garde J).

¹⁷⁶ *Biddle v Allan* [2012] VSC 538 [25] (Randall AsJ).

question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*.¹⁷⁷

Both purpose¹⁷⁸ and intention¹⁷⁹ have been referred to in the Court of Appeal in recent cases. As has been argued above in relation to the UK and New Zealand, it would help to clarify the application of s 32(1) — and ACTHRA, s 30 — if purpose and intention were distinguished. A methodology reliant on the identification and application of purpose at different levels of abstraction, as discussed in relation to the UK and New Zealand, could then be adopted. Otherwise, the scope of the interpretive provisions might be unduly limited. This will be explored further in the concluding section of this chapter.

(c) Intention and Legislative Language

Linked to the role of purpose under the interpretive provisions is the role of legislative language thereunder.¹⁸⁰ One Australian commentator has argued that ‘the purpose of the statutory provision itself may tolerate or permit going beyond the ordinary or settled meaning of the words’,¹⁸¹ but also conceded that, while s 32(1) ‘involves

¹⁷⁷ *Slaveski* (n 102) [20] (Warren CJ, Nettle and Redlich JJA), citing *Momcilovic* (HCA) (n 41) [18], [51] (French CJ), [544], [565], [566] (Crennan and Kiefel JJ), [170] (Gummow J), [280] (Hayne J), [684] (Bell J) and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355.

¹⁷⁸ *Noone* (n 102) [16] (Warren CJ and Cavanough AJA).

¹⁷⁹ *WBM* (n 97) [97] (Warren CJ, Hansen JA agreeing). See also *Darragh* (n 131) [32] (Senior Member R Davis).

¹⁸⁰ See Evans and Evans, ‘Legal Redress’ (n 76) 269, in turn quoted with apparent approval in *Masterman* (n 20) 120.

¹⁸¹ *Hettiarachi* (n 20) 78.

stretching the meaning of words’,¹⁸² ‘the ordinary words used in a statute cannot be ignored; they too are capable of operating as a boundary’.¹⁸³

(i) *ACT*

In the only ACT case in which a declaration of incompatibility has been made, Penfold J dealt with the role of legislative language in this way:

it may be ... that modern legislative drafting leaves relatively little scope for substantively different interpretations of most legislative provisions (as distinct from interpretations that differ as a result of giving different content to discretionary terms such as ‘special and exceptional’ or ‘reasonable’). That latter possibility gains some support from the court’s conclusion in *Momcilovic* at [113] that ‘the purpose of [the challenged provision] is unambiguously clear from the statutory language’ and the fact that in none of the cases I have been referred to in this application was a court that considered itself bound by statutory language and legislative purpose able to find a useful variety of meanings for a challenged provision.¹⁸⁴

Perhaps it is Penfold J’s background as a former Commonwealth First Parliamentary Counsel¹⁸⁵ that explains her optimism as to the clarity of legislation,¹⁸⁶ but her dictum reinforces that the force of legislative language is still strong under ACTHRA, s 30.

¹⁸² *ibid* 86, citing *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [32] (Lord Nicholls).

¹⁸³ Hettiarachi (n 20) 86, citing *Ghaidan* (n 182) [110] (Lord Rodger), [71] (Lord Millett).

¹⁸⁴ *Islam* (n 7) [388].

¹⁸⁵ *Who’s Who in Australia 2012* (48th edn, Crown Content 2012) 1770.

¹⁸⁶ *cf Momcilovic* (HCA) (n 41) [50] (French CJ).

(ii) *Victoria*

Language has been invoked together with purpose on multiple occasions in Victoria.¹⁸⁷ One particular issue relating to the former is whether to follow the *Ghaidan* approach, an issue from which the courts in the years after the entry into force of the Charter shied away.¹⁸⁸ Expressing a view either way was left to commentators: some in support¹⁸⁹ of *Ghaidan v Godin-Mendoza*;¹⁹⁰ some against.¹⁹¹ However, as we saw above, the High Court in *Momcilovic* rejected the *Ghaidan* approach generally. This was reflected in some of the Justices' dicta relating to legislative language. French CJ relied on a classic English case,¹⁹² in holding that 'if the words of a statute are clear, so too is the task of the Court in interpreting the statute with fidelity to the Court's constitutional function. The meaning given to the words must be a meaning which they can bear'.¹⁹³

The Chief Justice has re-asserted this extra-judicially¹⁹⁴ as well as adding that an interpretation under s 32(1) must be 'open on the language of the statute'.¹⁹⁵ The President of the Victorian Court of Appeal, also extra-judicially, has adopted a similar

¹⁸⁷ *Director of Housing v IF (Residential Tenancies)* [2008] VCAT 2413 [34] (G Nihill, Member); *AB* (n 47) [275] (Ross J).

¹⁸⁸ *RJE* (n 127) [119] (Nettle JA); *Application under the Major Crime (Investigative Powers) Act 2004* (n 93) [175] (Warren CJ), cf Allan, 'You Don't Always Get' (n 4) 190.

¹⁸⁹ Tate (n 148) 33.

¹⁹⁰ *Ghaidan* (n 182).

¹⁹¹ Taylor (n 113) 57.

¹⁹² *Jones v DPP* [1962] AC 635 (HL) 662 (Lord Reid).

¹⁹³ *Momcilovic* (HCA) (n 41) [39].

¹⁹⁴ French, 'The Judicial Function' (n 42) 21.

¹⁹⁵ French, 'What Were They Thinking?' (n 101) 23; French, 'The Judicial Function' (n 42) 21; French, 'Unelected Judges' (n 101) 13; French, 'Human Rights Protection' (n 42) 25. cf Conor Gearty, 'The Human Rights Act — An Academic Sceptic Changes His Mind but Not His Heart' [2010] EHRLR 582, 583; French, 'The Courts and the Parliament' (n 42) 19.

formulation using the term ‘open’.¹⁹⁶ This echoes the New Zealand approach, a link that has been reinforced by a leading New Zealand commentator:

no judge was in favour of the robust United Kingdom approach to interpretation exemplified in *Ghaidan v Godin-Mendoza* and *R v Lambert*. This was essentially for the same reasons given by our [New Zealand] Supreme Court in *Hansen*. Meanings must be *reasonably* available.¹⁹⁷

Returning to French CJ’s reasons in *Momcilovic*, he further noted that

[Section 32(1)] operates upon constructional choices which the language of the statutory provision permits. ... It reflects the plasticity and shades of meaning and nuance that are the natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting.¹⁹⁸

Echoing the remarks of one commentator quoted in the introductory paragraph to this section,¹⁹⁹ Heydon J, in dissent, quoted from a seminal article by Fuller: ‘In effect s 32(1) permits the court to “disregard the express language of a statute when something not contained in the statute itself, called its ‘purpose’, can be employed to justify the result the court considers proper”.’²⁰⁰ Another commentator has noted, citing the Commonwealth purposive provision,²⁰¹ that ‘His Honour regarded “purpose” as too elastic a concept to be left near judges of lesser mettle than he.

¹⁹⁶ Maxwell, ‘Judges and Human Rights’ (n 91) 2.

¹⁹⁷ Paul Rishworth, ‘Human Rights’ [2012] NZL Rev 321, 346–47 (emphasis added).

¹⁹⁸ *Momcilovic* (HCA) (n 41) [50], in turn quoted with approval in *Aitken* (n 85) [92] (Judge Ginnane, Vice President).

¹⁹⁹ Hettiarachi (n 20) 78.

²⁰⁰ *Momcilovic* (HCA) (n 41) [450], citing Lon L Fuller, ‘The Case of the Speluncean Explorers’ (1949) 62 Harv L Rev 616, 633.

²⁰¹ Acts Interpretation Act 1901 (Cth), s 15AA.

Someone needs to summon the courage to tell his Honour that he is 30 years too late for this “Reconquista” ...²⁰²

Crennan and Kiefel JJ went too far in rejecting the straining of legislative language:²⁰³

Where it is possible, consistently with a statute’s purpose, s 32(1) requires that all statutory provisions are to be read conformably with Charter rights. Section 32(3)(a) acknowledges that this may not be possible in all cases, by providing that s 32(1) does not affect the validity of an Act or a provision of an Act which is incompatible with a human right. It cannot therefore be said that s 32(1) requires the language of a section to be strained to effect consistency with the Charter.²⁰⁴

As was noted in Chapter Two, straining has always been part and parcel of statutory interpretation;²⁰⁵ its apparent rejection in the context of human rights legislation is better seen as emphasizing the ongoing importance of legislative language rather than as a blanket ban on straining as an available technique. This view is supported by the recent unanimous Court of Appeal decision of *Slaveski v Smith*:²⁰⁶

if the words of a statute [*sic*] are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the

²⁰² Churches (n 100) 15.

²⁰³ cf the New Zealand authorities on ‘straining’ in Chapter Six.

²⁰⁴ *Momcilovic* (HCA) (n 41) [566], cited with approval in *BAE Systems Australia Ltd (Anti-Discrimination Exemption)* [2012] VCAT 349 [61] (Member A Dea); *Cornish College (Anti-Discrimination Exemption)* [2012] VCAT 889 [21] (Member A Dea). See also *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384 [14] (Member A Dea).

²⁰⁵ See also Spigelman, *Statutory Interpretation and Human Rights* (n 39) 118–23.

²⁰⁶ *Slaveski* (n 102).

human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.²⁰⁷

This passage has been quoted with approval in the Supreme Court²⁰⁸ and the VCAT.²⁰⁹ However, the ability to strain legislative language on occasion does not detract from the importance of attention to text, which continues to be emphasized.²¹⁰

(d) Two Interpretive Techniques: Reading Down and Reading In

One issue on which the Court of Appeal in *Slaveski* fell into error is that of reading down. The Court asserted that ‘Although [s 32] may serve as a guide as to which of two possible constructions is to be preferred, it does not allow ... the reading down of words so far as to change the true meaning of a provision.’²¹¹ This is incorrect. Similarly to the straining of legislative language, reading down has long been a part of statutory interpretation;²¹² in particular, the principle of legality, as noted by French CJ in *Momcilovic*.²¹³ A former Chief Justice of New South Wales has pointed out that ‘The operation of the principles of statutory interpretation ... under the heading “Common Law Bill of Rights” ... have often been applied in this way. So will the rights-compliant interpretation provisions ...’²¹⁴

²⁰⁷ *ibid* [24] (Warren CJ, Nettle and Redlich JJA), citing *Momcilovic* (HCA) (n 41) [40]–[50] (French CJ). See Horrigan, ‘Reforming Rights-based Scrutiny’ (n 1) 232.

²⁰⁸ *Magee* (n 102) [168] (Kyrrou J); *A* (n 102) [103] (Garde J).

²⁰⁹ *Aitken* (n 85) [93] (Judge Ginnane, Vice President).

²¹⁰ *Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472 [79], [91] (Senior Member B Steele).

²¹¹ *Slaveski* (n 102) [45] (Warren CJ, Nettle and Redlich JJA).

²¹² JJ Spigelman, ‘The Poet’s Rich Resource: Issues in Statutory Interpretation’ (2001) 21 *Aust Bar Rev* 224, 232.

²¹³ *Momcilovic* (HCA) (n 41) [43].

²¹⁴ Spigelman, *Statutory Interpretation and Human Rights* (n 39) 128 (citation omitted).

The more controversial technique of reading in is less likely in Australia. In a comment on the Court of Appeal's decision in *Momcilovic*, it was said that Victorian (evidence) law 'will be largely unchanged by its human rights statute and, in particular, will not be subject to having words read in or out of it ...'²¹⁵ In this respect, the Court of Appeal in *Slaveski* was correct: s 32 'does not allow the reading in of words which are not explicit or implicit in a provision ...'²¹⁶

4 The Modesty of Australia's Human Rights Legislation

The history of proposals for bills of rights and similar legislation in Australia is long and mostly fruitless;²¹⁷ it has been argued that there is an 'Australian reluctance about rights'.²¹⁸ This background makes it likely that courts will be cautious when approaching the ACTHRA and the Charter. Furthermore, there are constitutional considerations affecting the scope of the interpretive provisions which are unique to Australia (particularly the separation of powers, which is more rigid than in the UK and New Zealand), and which militate against overly expansive uses of such

²¹⁵ Jeremy Gans, 'A Reverse Onus Reviled and Retained — R v Momcilovic' (2010) 14 E & P 253, 258. See also Evans and Evans, *Australian Bills of Rights* (n 12) para 3.58; Spigelman, *Statutory Interpretation and Human Rights* (n 39) 141. cf Kelly (n 15) 30; Evans and Evans, *Australian Bills of Rights* (n 12) paras 3.59–3.60.

²¹⁶ *Slaveski* (n 102) [45] (Warren CJ, Nettle and Redlich JJA).

²¹⁷ See Galligan and Larking (n 2) 182–84; Williams, *A Charter* (n 2) 57–66; Bailey (n 2) 143–48; Byrnes, Charlesworth and McKinnon (n 3) 26–34.

²¹⁸ Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 Osgoode Hall LJ 195; Hilary Charlesworth, 'The Australian Reluctance about Rights' in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law/Human Rights and Equal Opportunity Commission 1994); Charlesworth, *Writing in Rights* (n 35) 35–39. See also Brian Galligan, 'Australia's Rejection of a Bill of Rights' (1990) 28 J Commonw & Comp Pol 344; Brian Galligan and Ian McAllister, 'Citizen and Elite Attitudes Towards an Australian Bill of Rights' in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (Federation Press 1997); Williams, 'Origins and Scope' (n 22) 883–85; Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (CUP 2009) 20–24.

provisions.²¹⁹ The most striking feature, however, of the legislative history and context of the Australian interpretive provisions is the importance of their express references to purpose, and the fact that they were clearly designed to distinguish what is often seen as an extreme approach taken by UK courts.²²⁰

(a) ACT

The enactment of the ACTHRA followed the publication of a report by the ACT Bill of Rights Consultative Committee, recommending the adoption of a bill of rights.²²¹ The Committee recommended that an interpretive provision in this form be enacted: ‘A court or tribunal must interpret a law of the Territory to be compatible with human rights and must ensure that the law is given effect to in a way that is compatible with human rights, as far as it is possible to do so.’²²² There is no reference to purpose in this suggested provision and, indeed, it is strikingly similar to s 3 of the UKHRA. However, the Committee should not be taken to have sanctioned an expansive approach such as that under s 3. The Committee’s report was published prior to the House of Lords delivering judgment in *Ghaidan*. It therefore had to set out what it saw as the competing approaches — that of Lord Steyn and that of Lord Hope — in *R*

²¹⁹ See Michael McHugh (n 49) 91–94, cf Meagher, ‘The Scope of Judicial Rights Interpretation’ (n 114) 229–30; Richard McHugh (n 134) 13; South (n 148) 149, see also 149–52, 159–64; Tate (n 148) 32–33; Irving (n 64) 77–80; Wendy Lacey, ‘Beyond the Legalese and Rhetoric: Improving Human Rights Protection in Australia’ (2012) 16 AJHR 1, 10–18. For brief overviews, see Bateman and Stellios (n 8) 11–17; David Erdos, ‘The Rudd Government’s Rejection of an Australian Bill of Rights: A Stunted Case of Aversive Constitutionalism?’ (2012) 65 Parl Aff 359, 372–74. Certain constitutional doctrines are also increasingly protecting rights: Sackville (n 42).

²²⁰ *Raytheon Australia* (ACTAAT) (n 11) [77] (Mr MH Peedom, President) (leave to appeal refused: *Raytheon Australia* (ACTSC) (n 136); *Islam* (n 7) [107] (Penfold J); Evans and Evans, *Australian Bills of Rights* (n 12) para 3.32; Spigelman, *Statutory Interpretation and Human Rights* (n 39) 84–85; Byrnes, Charlesworth and McKinnon (n 3) 60–61.

²²¹ ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (Publishing Services 2003) 5.

²²² *ibid* app 4, 4.

v A (No 2),²²³ as discussed in Chapter Five. The Committee concluded that what it saw as the more conservative approach of Lord Hope appeared to be ‘the most influential in decisions under the *Human Rights Act*’.²²⁴ Nothing can therefore be drawn from the Committee’s omission of a reference to purpose in its recommended provision. As the Committee saw the state of UK jurisprudence as not representing as expansive an approach as *Ghaidan* stands for, there was no need to include such a reference.

In any event, the Committee’s recommendation was not implemented in these terms.²²⁵ Instead, when the Human Rights Bill 2003 (ACT) was presented in the Legislative Assembly,²²⁶ the draft interpretive provision was in the following terms:

30 Interpretation of laws and human rights

- (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is to be preferred to any other interpretation.
- (2) If applying subsection (1) and Legislation Act, section 139 to a Territory law would achieve a different result, only section 139 is to be applied.
- (3) In this section:
working out the meaning of a Territory law means—
 - (a) resolving an ambiguous or obscure provision of the law; or
 - (b) confirming or displacing the apparent meaning of the law; or
 - (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
 - (d) finding the meaning of the law in any other case.

The crucial subclause was (2). No similar provision had appeared in the Committee’s draft Bill. The Government, which presented the Bill through the then Attorney-General,²²⁷ clearly decided that the purposive approach was to remain supreme.

²²³ [2001] UKHL 25, [2002] 1 AC 45.

²²⁴ ACT Bill of Rights Consultative Committee (n 221) 50, citing as examples *Matthews v Ministry of Defence* [2002] EWCA Civ 773, [2002] 1 WLR 2621; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247.

²²⁵ Evans, ‘Responsibility for Rights’ (n 23) 294.

²²⁶ Hansard LA (ACT) 2003, 4244 (Jon Stanhope, Attorney-General).

The Attorney-General referred to cl 30 in his second reading speech, highlighting that legislative intention was to play a key role:

the bill requires that all ACT statutes and statutory instruments must be interpreted and applied so far as possible in a way that is consistent with the human rights protected in the act. Unless the law is *intended* to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail.²²⁸

During the detail stage of the debate, the Attorney-General proposed amendments to the clause, such that sub-ss (1) and (2) would be omitted and substituted by the following:

- (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.
- (2) Subsection (1) is subject to the Legislation Act, section 139.

The Attorney-General stated that

The purpose of these amendments is to make clause 30 easier to read and understand. It is to make it as clear as possible that, while we expect the judiciary to read rights into statutory provisions, they may not override the clear intention of the Assembly to legislate inconsistently with human rights. The amendment to clause 31 [*sic*] includes the words ‘is as far as possible’. This picks up the language used in the United Kingdom Human Rights Act and provides some nuance to the existing clause.

The amendment to clause 2 is a simplification of the language. As ordinary legislation, the Human Rights Act is subject to the Legislation Act 2001 and the rules of interpretation in chapter 14 of that act. Section 139 of the Legislation Act requires that where there is a choice to be made, the

²²⁷ Attorneys-General play a different, more political, role in Australia than in the United Kingdom: LJ King, ‘The Attorney-General, Politics and the Judiciary’ (2000) 74 ALJ 444; LJ King, ‘The Attorney-General, Politics and the Judiciary’ (2000) 29 UWAL Rev 155.

²²⁸ Hansard LA (ACT) 2003, 4247 (Jon Stanhope, Attorney-General) (emphasis added). See also Meagher, ‘The Scope of Judicial Rights Interpretation’ (n 114) 224–25.

interpretation at [sic] best achieves the purpose of the legislation of [sic] the one to be adopted. This means that, where a human rights consistent interpretation is in conflict with interpretation that achieves legislative purpose, the latter will prevail.²²⁹

The amendment was agreed to as proposed, and the clause was agreed to as amended.

The Explanatory Statement was less clear than the statements made in the Assembly:

Clause 30(1) is subject to the purposive rule of construction set out in subclause [sic] 139(1) of the *Legislation Act 2001*. Subclause [sic] 139(1) requires that Territory laws must be interpreted in a way that best achieves the purpose of the Act. Consequently, the interpretation most beneficial to human rights will best achieve the purpose of the Bill.²³⁰

One ACT judge said of this: ‘I am not convinced that the explanation ... given in ... the Explanatory Statement ... was either coherent or correct.’²³¹ This is fair; the Statement provides no assistance.

However, from the Committee’s report and the parliamentary materials, it is clear that s 30(2) was designed to preserve the purpose or intention behind legislation impugned under the ACTHRA, albeit that its language was tempered by the amendment, which ensured that the Act would not have an unduly restricted operation. Of course, this is clear from the language used, but, as noted above, this language is no longer found in the Act.

²²⁹ Hansard LA (ACT) 2004, 571–72 (Jon Stanhope, Attorney-General).

²³⁰ Explanatory Statement to the Human Rights Bill 2003 (ACT) 5.

²³¹ *Islam* (n 7) [89] (Penfold J), see further [92].

The 2008 amendment brought the ACT provision into line with the Victorian provision. The amendment was made in response to a recommendation of the government department with responsibility for the Act in a report that it published on the operation of the Act during its first 12 months in force. The Department recommended that the provision be amended ‘to clarify that a human rights consistent interpretation must prevail unless this would defeat the purpose of the legislation’.²³² The clause passed the Assembly without amendment.²³³

The amendment has been described as ‘strengthening’ the Act,²³⁴ and particularly ‘the requirement for consistency with human rights’.²³⁵ In his second reading speech, the Attorney-General stated that the Bill would ‘clarify the operation of the interpretive provision, to better promote a human rights consistent interpretation of our statute book’.²³⁶

The Explanatory Statement explained the effect of the amended s 30 as follows:

It clarifies the interaction between the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation is to be taken to all provisions in Territory laws. This means that unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is

²³² Australian Capital Territory Department of Justice and Community Safety, *Human Rights Act 2004 — Twelve-month Review — Report* (Department of Justice and Community Safety 2006) 33 (Recommendation 5).

²³³ Hansard LA (ACT) 2008, 394.

²³⁴ Gabrielle McKinnon, ‘Strengthening Human Rights: Amendments to the Human Rights Act 2004 (ACT)’ (2008) 19 PLR 179.

²³⁵ *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority (ACT)* [2008] ACTCA 9, (2008) 2 ACTLR 44 [39] (Refshauge J). cf *Islam* (n 7) [98] (Penfold J) (merely ‘change’).

²³⁶ Hansard LA (ACT) 2007, 4028 (Simon Corbell, Attorney-General). See also *Islam* (n 7) [121] (Penfold J).

consistent with the Victorian approach contained in subsection [sic] 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*. It also draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 cited recently by the ACT Supreme Court in *Kingsley's Chicken Pty Limited v Queensland Investment Corporation and Canberra Centre Investments Pty Limited* [2006] ACTCA 9.²³⁷

The reference to *Kingsley's Chicken Pty Ltd v Queensland Investment Corp*²³⁸ does not assist in ascertaining the meaning and effect of s 30²³⁹ because of the cursory nature of the citation in that case of *Ghaidan*. Indeed, one ACT judge referred to the phrase in the Explanatory Statement 'intended to operate in a way that is inconsistent with the right in question' and noted that 'This seems to be directly in conflict with the *Ghaidan* view that it may be possible to "depart from the intention of the Parliament which enacted the legislation" in order to achieve consistency with human rights.'²⁴⁰

Overall, it seems that the 2008 amendment was designed to allow s 30 to play a greater role in statutory interpretation, but the reference to purpose is still important.

²³⁷ Explanatory Statement to the Human Rights Amendment Bill 2007 (ACT) 3 (unnumbered).

²³⁸ [2006] ACTCA 9.

²³⁹ *Fearnside* (n 7) [86]–[87] (Besanko J, Gray P and Penfold J agreeing). See also *Casey* (n 7) [108] (Besanko J, Refshauge J agreeing); *Islam* (n 7) [119] (Penfold J); Spigelman, *Statutory Interpretation and Human Rights* (n 39) 85. cf *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* [2006] ACTSC 122, (2006) 206 FLR 328 [22] (Gray J); *Devenport v Comr for Housing in the ACT* [2007] ACTSC 30, (2007) 210 FLR 325 [20] (Higgins CJ, Gray and Connolly JJ); Hettiarachi (n 20) 83, fn 96; Rolls (n 31) 129.

²⁴⁰ *Islam* (n 7) [110] (Penfold J). cf *Momcilovic* (HCA) (n 41) [449] (Heydon J, in dissent); Evans and Evans, *Australian Bills of Rights* (n 12) para 3.9; Parham (n 132) 15; Zhou (n 103) 11–12. See Luke Beck, 'The Interpretation Provisions of Statutory Bills of Rights: A Little Bit Humpty Dumpty?' (2011) 22 PLR 97, 110.

(b) Victoria

In 2005, the Victorian Human Rights Consultation Committee published a report in which it recommended the enactment of a ‘Charter of Human Rights and Responsibilities’.²⁴¹ The Committee referred to *Ghaidan* and this reference has sometimes been taken as authority for s 32 being a codification of the *Ghaidan* principles.²⁴² However, the passages quoted by the Committee did not speak of the ‘unusual and far-reaching character’²⁴³ of the interpretive obligation under s 3 of the UKHRA or of s 3 requiring a court ‘to depart from the unambiguous meaning the legislation would otherwise bear’.²⁴⁴ Rather, the Committee quoted passages in which two of the Law Lords described limitations on the process of interpretation under s 3. I set out the passages which the Committee quoted.

Lord Nicholls, quoting from Lord Rodger’s speech (in the second sentence of the quotation), held that ‘The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must ... “go with the grain of the legislation”.’²⁴⁵ Lord Rodger held that ‘it does not allow the courts to change the substance of a provision completely, to change

²⁴¹ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (Department of Justice 2005) vi.

²⁴² Debeljak, ‘Parliamentary Sovereignty’ (n 5) 50–51; Hettiarachi (n 20) 82–83, fn 96; Gargett, Gerber and Castan (n 17) 18. See also *Kracke* (n 47) [215] (Bell J, President); *Lifestyle Communities* (n 11) [91] (Bell J, President); *Momcilovic* (HCA) (n 41) [447] (Heydon J, in dissent). cf *South* (n 148) 148.

²⁴³ *Ghaidan* (n 182) [30] (Lord Nicholls).

²⁴⁴ *ibid.*

²⁴⁵ *ibid* [33].

a provision from one where Parliament says that x is to happen into one saying that x is not to happen’.²⁴⁶

In light of these passages themselves not lending support to an especially expansive approach to the interpretive power, I submit that the Committee’s reference to *Ghaidan* does not provide support for such an approach.

As well as the Committee’s reference to UK authority, some advocates of an expansive approach²⁴⁷ have relied on its statement that the reference to purpose would 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’.²⁴⁸ I would characterize this as a rephrasing of s 32 which sheds no light on the meaning of the provision. Indeed, the Victorian Court of Appeal in *Momcilovic* quoted a longer passage from the Committee’s report, including this statement, and came to the conclusion that s 32 should be given a narrow operation.²⁴⁹

A similarly ambiguously bland statement appears in the Explanatory Memorandum: ‘The object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to give effect to human rights.’²⁵⁰ While it has been argued that this supports an expansive approach,²⁵¹ I submit that it is of no real assistance in ascertaining the meaning and effect of s 32. Indeed, it illustrates the point — not

²⁴⁶ *ibid* [110].

²⁴⁷ *Kracke* (n 47) [215] (Bell J, President); Debeljak, ‘Parliamentary Sovereignty’ (n 5) 50.

²⁴⁸ Victorian Human Rights Consultation Committee (n 241) 82–83.

²⁴⁹ *Momcilovic* (VSCA) (n 94) [73]–[74] (Maxwell P, Ashley and Neave JJA). See also *XFJ* (n 97) [62], fn 59 (Ross J). cf Debeljak, ‘Who Is Sovereign Now?’ (n 40) 26.

²⁵⁰ Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

²⁵¹ Debeljak, ‘Parliamentary Sovereignty’ (n 5) 54.

always true, but apt in this case — made by the Chief Justice of the ACT when he referred to an explanatory memorandum and described ‘the apparent purpose of such documents of explaining as little as possible’.²⁵² The Explanatory Memorandum continues:

The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.²⁵³

The Court of Appeal in *Momcilovic* distinguished this from the position under UKHRA, s 3(1).²⁵⁴

The most instructive part of the legislative history of s 32 is the parliamentary debates. The Attorney-General was the Minister promoting the Bill in the Legislative Assembly (the Lower House). In his second reading speech, he referred to s 32 and said that it ‘recognises the *traditional role* for the courts in interpreting legislation passed by Parliament’.²⁵⁵ The Court of Appeal in *Momcilovic*, correctly in my view, made the point that ‘Had it been the Government’s intention that Victorian courts be given a role under the Charter which was “fundamentally different [from] their role under the standard principles of interpretation”, the Minister would have been obliged to say so.’²⁵⁶ While the Court should not be taken to be referring to a *legal* obligation

²⁵² *SI bhnf CC* (n 48) [82] (Higgins CJ).

²⁵³ Explanatory Memorandum to the Charter (n 250) 23.

²⁵⁴ *Momcilovic* (VSCA) (n 94) [85] (Maxwell P, Ashley and Neave JJA). cf Debeljak, ‘Who Is Sovereign Now?’ (n 40) 34–36.

²⁵⁵ Hansard LA (Vic) 2006, 1293 (Rob Hulls, Attorney-General) (emphasis added). See also Hansard LC (Vic) 2006, 2556 (Justin Madden, Minister for Sport and Recreation).

²⁵⁶ *Momcilovic* (VSCA) (n 94) [83] (Maxwell P, Ashley and Neave JJA), citing *Kracke* (n 47) [218], cf [99]–[100]. cf Debeljak, ‘Who Is Sovereign Now?’ (n 40) 32–33.

on the Minister, there is a *political*, and perhaps *moral*, obligation. The fact is that one would expect the Minister to draw attention to a major shift in the courts' role if this were intended.

Indeed, far from being 'Delphic',²⁵⁷ the Minister's statement is particularly instructive when compared²⁵⁸ with Lord Woolf CJ's observations on s 3 of the UKHRA:

When the court interprets legislation usually its primary task is to identify the intention of Parliament. Now, when section 3 applies, the courts have to *adjust their traditional role* in relation to interpretation so as to give effect to the direction contained in section 3.²⁵⁹

As the present Chief Justice of Australia has said, 'The strong interpretive approach undertaken by the House of Lords in *Ghaidan* might be seen in the Australian context as altering the constitutional relationship between the court interpreting a statute and the parliament which enacted it.'²⁶⁰

5 Reconciling Rights-consistent Interpretation with Purposive Interpretation

The emphasis on purpose in the preceding section must be qualified. As was noted in the section on the role of intention, courts and commentators in Australia often equate purpose and intention. The references to purpose in the preceding section should be

²⁵⁷ *Momcilovic* (HCA) (n 41) [445] (Heydon J, in dissent).

²⁵⁸ *Momcilovic* (VSCA) (n 94) [83] (Maxwell P, Ashley and Neave JJA).

²⁵⁹ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48 [75] (emphasis added).

²⁶⁰ French, 'Human Rights Protection' (n 42) 26.

understood as references to purpose as identified at a low level of abstraction, that is, intention. Of course, as was shown in the UK and New Zealand chapters, purpose can be a broader concept, being identified at a higher level of abstraction and therefore allowing greater scope to apply interpretive provisions to achieve rights-consistency. This has been acknowledged by several Australian commentators.²⁶¹

Likewise, one Australian commentator has captured the point that, on some occasions, indications in the legislative language and/or history will militate against the application of purpose at a high level of abstraction:

Although the courts have power to re-interpret legislation to make it compatible with human rights, there must be a threshold at which the legislative intent is so clear that the court cannot override this unequivocal meaning to substitute its own provisions, and should instead issue a declaration of incompatibility.²⁶²

Finally, the importance of context — especially the subject matter of impugned legislation — has also been recognized,²⁶³ continuing the common law approach in this regard. As a former Chief Justice of New South Wales has noted, if a legislature wishes to interfere with rights, ‘the degree of [linguistic] clarity required may vary from right to right and, with respect to any particular right, may vary from time to time’.²⁶⁴

²⁶¹ Evans and Evans, ‘Legal Redress’ (n 76) 268; McKinnon, ‘An Opportunity Missed?’ (n 48) 29; Debeljak, ‘Parliamentary Sovereignty’ (n 5) 54–55; Hettiarachi (n 20) 78; Evans and Evans, *Australian Bills of Rights* (n 12) para 3.33; Pound and Evans (n 16) para 4760; Meagher, ‘The Scope of Judicial Rights Interpretation’ (n 114) 225–26; Debeljak, ‘Who Is Sovereign Now?’ (n 40) 28. cf Richard McHugh (n 134) 15.

²⁶² McKinnon, ‘An Opportunity Missed?’ (n 48) 29.

²⁶³ Evans and Evans, *Australian Bills of Rights* (n 12) paras 3.54–3.57; Meagher, ‘The Scope of Judicial Rights Interpretation’ (n 114) 228; Meagher, ‘The Common Law Principle of Legality’ (n 63) 471–72.

²⁶⁴ Spigelman, *Statutory Interpretation and Human Rights* (n 39) 88.

There is no need to go into further detail on these points, as they have already received attention in earlier chapters. However, a brief consideration of how different levels of abstraction of purpose have been approached in cases in the respective Australian jurisdictions is worthwhile.

(a) ACT

The only case under the ACTHRA in which the flexibility of the concept of purpose was addressed in any detail²⁶⁵ is also the only case in which a declaration of incompatibility was made: *Re Application for Bail by Islam*.²⁶⁶ In that case, Penfold J said that she did not

consider that the s 30 mention of the purpose of the law concerned, in the context of the ACT statute book's focus on legislative purpose as set out in s 139 of the *Legislation Act*, can reasonably be read as a reference only to the scheme, scope, essential principles or 'grain' of the legislation, to the extent that those words as used in *Ghaidan* refer to characteristics of the legislation that can be distinguished from legislative purpose but, apparently, need not or possibly cannot be discerned from either the text or that legislative purpose.²⁶⁷

But, as alluded to above, this was on the basis of equating purpose and intention: 'I do not consider that "the intention of the enacting Parliament" has any sensible meaning

²⁶⁵ *Islam* (n 7) [33]–[35], [37]–[41], [45]–[52] (Penfold J). See also, extending the principle to *Legislation Act 2001* (ACT), s 139 generally, *JH v Director-General, Community Services Directorate* [2012] ACTSC 30, (2012) 260 FLR 21 [56] (Penfold J).

²⁶⁶ *Islam* (n 7). The issue in the case, surrounding the *Bail Act 1992* (ACT), was anticipated in Simon Bronitt, 'The *Human Rights Act 2004* (ACT) — A "Claytons Bill Of Rights" or New Magna Carta?' (2004) 28 Crim LJ 325, 328. On the Government's response to the case, see Jodie O'Leary, 'Inspiring or Undermining Confidence? Amendments to the Right to Judge Alone Trials in the ACT' (2011) 10 Canb LR 30, 47.

²⁶⁷ *Islam* (n 7) [109], see also [113].

that differs from the purpose of the legislation as discerned from its text and the context of its enactment.²⁶⁸

She concluded that

if ‘purpose’ could sensibly be given the meaning contended for by counsel (being something different from the intention of the enacting legislature), then a provision in the form of the orthodox purposive interpretation provision could be read so that the meaning of a provision could be determined having regard to the scheme, scope, essential principles or ‘grain’ of the larger legislative unit and irrespective of the legislature’s intention. Section 30, however, does not clearly provide that option — the purpose to be considered is, grammatically, the purpose of the provision being interpreted, although, ... considering both the purpose of the provision in question and a higher-level purpose may be available under the ACT provisions. However, the fact that such an application of s 30 may be available, under a provision that, read literally, does not provide for it, is not a sound basis on which to find that the reference to *Ghaidan* in the Explanatory Statement was a direction to read s 30 as if it had expressly drawn a distinction in the nature of that relied on in the orthodox purposive interpretation provision between a provision and the higher-level purpose of the legislation in which it is found.²⁶⁹

It is possible to characterize the *Ghaidan* limitations as expressions of purpose identified at a high level of abstraction. As was seen in the previous section, the *Ghaidan* limitations alone were not considered by the ACT and Victorian legislatures to be sufficient. However, it is not necessary, as Penfold J seems to assume, that purpose as referred to in ACTHRA, s 30 must be consistently identified at the same level of abstraction — high or low — in all cases. There is room for both, and which one is appropriate in a given case will depend on the indications in legislative language and history, as well as the subject matter. *Islam* does not therefore provide an ideal example of the potential role of purpose to achieve an appropriate balance between rights-consistency and competing values such as legal certainty.

²⁶⁸ *ibid* [114].

²⁶⁹ *ibid* [115].

(b) Victoria

In Victoria, two cases have involved consideration of different levels of abstraction of purpose. In *Re Kracke and Mental Health Review Board*,²⁷⁰ Bell J, sitting as President of the VCAT, held that the reference to purpose in Charter, s 32(1) ‘was intended to put into s 32(1) the approach to s 3(1) adopted by the House of Lords in *Ghaidan* ...’²⁷¹ While, as we saw above, this approach has been rejected, Bell J did explain *Ghaidan* in a way that is consistent with the overall approach of this thesis:

the court ... adopted a broad approach to the identification of the fundamental feature, grain or purpose of the legislation. In the words of Lord Nicholls, the policy of the legislation was to extend ‘security of tenure ... to the survivor of couples living together as husband and wife,’ which was equally applicable to same-sex partners. The court did not identify the policy as confining succession to heterosexual partners, even though that was the policy of the legislation literally interpreted. To identify the underlying purpose of a provision for the application of the special interpretative obligation in s 32(1) of the Charter, it is thus necessary to work at an appropriately general level of abstraction.²⁷²

In another Charter case, Bell J was more pithy: ‘This purpose is ascertained at a higher level of abstraction than under the standard principles of interpretation. ... The discernment of this purpose is the method by which the limits of the extended interpretation are judicially identified.’²⁷³

²⁷⁰ *Kracke* (n 47).

²⁷¹ *ibid* [214]. cf *AB* (n 47) [274] (Ross J).

²⁷² *Kracke* (n 47) [229] (citation omitted), see also [230]. See also *Lifestyle Communities* (n 11) [92] (Bell J, President). cf *South* (n 148) 148.

²⁷³ *Lifestyle Communities* (n 11) [94].

While Bell J's conclusion as to which level of abstraction is appropriate differs from that of Penfold J in *Islam*, he appears to fall into the same trap as his ACT counterpart by holding that purpose identified at a high level will always be preferable. This trap has claimed more judicial victims. The unanimous Court of Appeal in *Momcilovic* noted that under s 32(1)

The test is one of consistency with the purpose of the provision(s) in question. This focus on the purpose of *the provision* being interpreted may be contrasted with an approach which concerned itself with the purpose of *the legislation* as a whole, as embodied, for example, in s 35 of the Interpretation of Legislation Act: ...

But s 32(1) was not drafted in those terms. It requires that interpretation under the Charter accord with the purpose of the provision(s) being interpreted. In the circumstances, this must be taken to have been a deliberate choice of language ...²⁷⁴

Apart from suffering from the same problem as the approaches in *Islam* and *Kracke*, the Court of Appeal also made the more obvious error of omitting to consider the definition of 'provision' in Charter, s 3: '**statutory provision** means an Act ... or a provision of an Act' (the Explanatory Memorandum also weighed against the Court's approach²⁷⁵).²⁷⁶ Happily, the consequences of this error were not serious, as the Court concluded that, even identifying purpose at a high level of abstraction, 'the statutory language would still have precluded'²⁷⁷ a rights-consistent interpretation; an assessment that has been described as 'clearly correct, without question'.²⁷⁸

²⁷⁴ *Momcilovic* (VSCA) (n 94) [75]–[76] (Maxwell P, Ashley and Neave JJA), cited with approval in *Patrick's case* (n 84) [240] (Bell J); Beck (n 240) 102. See also South (n 148) 158.

²⁷⁵ Explanatory Memorandum to the Charter (n 250) 1, cf 20.

²⁷⁶ Debeljak, 'Who Is Sovereign Now?' (n 40) 27; Gans and others (n 2) 77.

²⁷⁷ *Momcilovic* (VSCA) (n 94) [114] (Maxwell P, Ashley and Neave JJA).

²⁷⁸ Cremean 'Meaningless Reference' (n 8) 116.

In conclusion, Australian courts are struggling to define purpose as either identifiable at a low level — and therefore equivalent to intention — or identifiable at a high level — implying that the Australian interpretive provisions import the UK approach. Their failure to find a middle position — involving a choice between levels of abstraction depending on legislative language and history, and subject matter — means that the interpretive provisions will either consistently have little effect on other legislation²⁷⁹ or will pose a significant risk to legal certainty. The middle position, for which this thesis argues, strikes a balance between these unattractive options and demonstrates that there is common ground between the UK (and New Zealand) and Australian interpretive provisions in terms of methodology, even though the results will often differ because of the stronger pressure on s 3 as a remedial provision in the broader context of the ECHR. An Australian High Court Justice has referred to ‘the blessed vagueness of the word “purpose” in s 32(1)’.²⁸⁰ While his tone was pejorative, and ‘blessed’ may be overstating the importance of purpose (!), his terminology actually points to the concept’s utility as a means to pursue the difficult balancing act which interpretive provisions call for courts to engage in. A former Chief Justice of Australia has opined that

Why the Victorian qualification was expressed in terms of ‘purpose’ is not altogether clear. I do not think the term was mentioned in *Ghaidan*. The word ‘purpose’ may have been selected in preference to ‘intention’ because ‘intention’ would have had a more constraining effect than was desired.²⁸¹

²⁷⁹ Watchirs and McKinnon (n 5) 154.

²⁸⁰ *Momcilovic* (HCA) (n 41) [455] (Heydon J, in dissent).

²⁸¹ Mason (n 110) 3.

CHAPTER EIGHT

CONCLUSION

It remains to draw together the conclusions at which we have arrived in the preceding chapters. In Chapter Two, the concepts of intention and purpose were explored and distinguished. Purpose was identified as the more flexible of the two concepts due to the possibility of applying it at differing levels of abstraction. Intention was identified as equivalent to purpose where the latter is applied at a low level of abstraction. Although the same approach could be taken to intention, it was noted that courts in practice tend not to do so.

Chapter Three set out the constitutional background against which the relevant human rights legislation was enacted. The orthodox doctrine of parliamentary sovereignty was explained and points relevant to its application in each jurisdiction were noted. The competing idea of common law constitutionalism was also set out but it was seen not to have displaced parliamentary sovereignty. Finally, legal certainty as an aspect of the rule of law was identified as a guiding principle in all of the countries under consideration.

Moving to the sphere of human rights, the principle of legality and the treaty presumption were explained in Chapter Four. It was noted that no precondition of ambiguity applies to the former, though one does apply to the latter in England and Australia — but not New Zealand, where the two principles have largely converged. The differences in the range of rights covered by each principle was another important point.

Chapter Five dealt in detail with s 3 of the UKHRA. It was concluded that the rule under that provision is stronger than the common law principles. The role of intention was seen to be lessened, though the application of purpose at a relatively high level of abstraction was identified as a feature of the case law. Legislative context and the subject matter of impugned legislation will bear on whether this is possible in a given case. The remedial nature of s 3 in light of the overall purpose of the UKHRA to ‘bring rights home’ was emphasized.

By contrast, in Chapter Six we discovered that s 6 of the NZBORA has not been applied in a similarly broad fashion. Indeed, in the same way as the common law principles have converged in New Zealand, s 6 has been subsumed into the same rule. This has meant that intention has retained a greater degree of emphasis in New Zealand than in the UK. However, particularly under the influence of s 5(1) of the Interpretation Act 1999 (NZ), purpose also finds a place in interpretive method under the NZBORA, and a similar methodology to that explained in the UK chapter can be seen to apply. However, the history of the NZBORA as a compromise measure following the failure of a proposal for an entrenched bill of rights provides a markedly different context from the ECHR’s influence on the UK. This history is not only borne out in the extrinsic materials, but also finds resounding expression in s 4.

Chapter Seven made clear that the Australian jurisdictions of the ACT and Victoria share more in common with New Zealand than with the UK. Again, intention is emphasized in the cases and again the purpose provisions in the respective interpretation Acts lead us to the common methodology involving the application of

purpose at differing levels of abstraction. The legislative history, though, is somewhat different: in both jurisdictions, the UK approach was clearly rejected. This is demonstrated by the extrinsic materials and by the express references to purpose in the interpretive provisions, which were designed to distinguish the provisions from s 3 of the UKHRA.

Throughout Chapters Five to Seven, a common methodology was proposed for the application of the interpretive provisions. Rather than focusing on the competing intentions behind these provisions and the provisions impugned thereunder, the interpreter's task is to identify instead the appropriate level of abstraction of purpose behind the impugned provisions. The higher the level of abstraction, the greater the flexibility in applying the relevant interpretive provision; the lower the level of abstraction, the greater the constraining effect of legislative intention, due to the coincidence of this concept with purpose identified at a low level of abstraction.

The question then arises: how does an interpreter decide at what level of abstraction to identify and apply purpose? Two criteria have been proposed in this thesis. The first is the indications to be found in legislative language or context; in some cases, the choice of words in a provision or some element in the legislative history, such as a statement made in the course of a parliamentary debate, will militate against using a high level of abstraction.

The second criterion is the subject matter of the impugned legislation; courts are more likely to identify and apply purpose at a high level of abstraction where the legislative subject matter is something traditionally held to be within their expertise, for example

the rules of procedure and evidence in criminal law. On the other hand, where matters of social policy are in play, courts are generally (and rightly) less willing to use purpose at a high level of abstraction. This approach has been followed at common law and, while human rights legislation may galvanize courts somewhat in relation to issues of social policy, it continues to provide assistance in applying the interpretive provisions.

Having reached the end of the comparative analysis and having set out a common methodology applicable across the jurisdictions, the final point which lingers is legal certainty. The approaches of the New Zealand and Australian courts, influenced by the respective legislative histories of the relevant legislation (including in the latter country the clear rejection of the UK approach) strike an appropriate balance between rights-consistency and legal certainty. Whether the same can be said of the UK approach is debatable. Ultimately, the answer depends on the importance that one attaches to rights-consistency, which in turn goes to broad issues of constitutional design and legal and political philosophy. This is not the place to address such issues, although one point deserves mention: the role of the UKHRA as a domestic mechanism of a supranational system for the protection of human rights (under the ECHR).

Legal certainty should be at the forefront of the minds of those tasked with drafting any new human rights legislation for the UK, to be enacted in place of the UKHRA.¹ In particular, a ‘British Bill of Rights’ which downplayed, or sought to

¹ Conor Gearty, ‘Beyond the Human Rights Act’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011); Helen Fenwick, ‘Replacing the Human Rights Act with a British Bill of Rights: Creating Greater Parliamentary Autonomy on Human Rights Matters?’ in Nicholas Kang-Riou, Jo Milner and Surya Nayak (eds),

remove, the link to the ECHR (so obvious in the UKHRA, with the ECHR rights scheduled to the Act) might remove the justification for a broad approach to any equivalent to s 3. As well as providing support for the positions at which the New Zealand and Australian courts have arrived, the comparison of the impact of s 3 with its Antipodean equivalents, and the exploration of the reasons for the divergence of approaches, should provide significant assistance to the drafters of any new UK legislation.

Confronting the Human Rights Act: Contemporary Themes and Perspectives (Routledge 2012). There is also a question mark over the Charter, and particularly s 32(1), though it is unclear whether repeal of the Act, or least the interpretive provision, might actually occur: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2009); Victorian Government Response (14 March 2012) to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2009) <www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20120314_sarc.govtresp.charterreview.pdf> accessed 24 September 2013.

BIBLIOGRAPHY

- — ‘Bill of Rights Auckland Seminar Commentaries’ [1986] NZLJ 230
- — ‘Controlling and Regulating Drugs: The Law Commission Reviews the Misuse of Drugs Act 1975’ [2011] NZLJ 153
- — *Laws of New Zealand* (edn unknown)
- — *Who’s Who in Australia 2012* (48th edn, Crown Content 2012)

A

- Adams A, ‘Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal’ [1996] NZL Rev 368
- Allan J, ‘Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990’ (2000) 9 Otago LR 613
- — ‘The Effect of a Statutory Bill of Rights Where Parliament Is Sovereign: The Lesson from New Zealand’ in Campbell T, Ewing KD and Tomkins A (eds), *Sceptical Essays on Human Rights* (OUP 2001)
- — ‘Oh That I Were Made Judge in the Land’ (2002) 30 FL Rev 561
- — ‘Paying For the Comfort of Dogma’ (2003) 25 Syd LR 63
- — ‘Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-first Century’ (2006) 17 KCLJ 1
- — ‘The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism’ (2006) 30 MULR 906
- — ‘Siren Songs and Myths in the Bill of Rights Debate’ in Walsh K (ed), *Constitutional Politics and Other Lectures in the Senate Occasional Lecture Series, 2008* (Department of the Senate 2008)
- — ‘The Victorian Charter of Human Rights and Responsibilities’ [2008] NZLJ 173
- — ‘Down Under Exceptionalism’ (2010) 29 UQLJ 143
- — ‘You Don’t Always Get What You Pay for: No Bill of Rights for Australia’ (2010) 24 NZULR 179
- — ‘Reasonable Disagreement and the Diminution of Democracy: Joseph’s Morally Laden Understanding of “The Rule of Law”’ in Ekins R (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011)
- — ‘Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament’s Clear Intention and You Shake It All About—Doin’ the Sankey Hanky Panky’ in Campbell T, Ewing KD and Tomkins A (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011)
- — and Cullen R, ‘A Bill of Rights Odyssey for Australia: The Sirens Are Calling’ (1997) 19 UQLJ 171
- Allan TRS, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993)
- — *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003)
- — ‘Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective’ (2006) 59 CLP 27

Amos M, 'The Impact of the Human Rights Act on the United Kingdom's Performance before the European Court of Human Rights' [2007] PL 655

Arden M, 'The Interpretation of UK Domestic Legislation in the Light of European Convention on Human Rights Jurisprudence' (2004) 25 Stat LR 165

— — 'The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament' (2008) 67 CLJ 487

— — 'The Impact of Judicial Interpretation on Legislative Drafting' [2008] The Loophole 4

Arseneau T, 'A Bill of Rights' in Holland M and Boston J (eds), *The Fourth Labour Government: Politics and Policy in New Zealand* (2nd edn, OUP 1990)

B

Bacon F, *The Elements of the Common Lawes of England* (Assignes of J More Esq 1630)

Bailey P, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths Australia 2009)

Barak A, *Purposive Interpretation in Law* (Bashi S tr, Princeton UP 2005)

Bateman W and Stellios J, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 MULR 1

Beatson J, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 LQR 247

— — 'Common Law, Statute Law, and Constitutional Law' (2006) 27 Stat LR 1

— — and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell 2008)

Beck L, 'The Interpretation Provisions of Statutory Bills of Rights: A Little Bit Humpty Dumpty?' (2011) 22 PLR 97

Beckett S, 'Interpreting Legislation Consistently with Human Rights' (2008) 58 AIALF 43

Bell J, *Policy Arguments in Judicial Decisions* (Clarendon Press 1983)

Bell K, 'Enhancing Australian Democracy with a Federal Charter of Rights and Responsibilities' (2009) 60 AIALF 1

— — 'Victoria's Human Rights Charter' (Keynote Address to Law Institute of Victoria Human Rights and Administrative Law conference, Melbourne, 28 October 2011) <www.supremecourt.vic.gov.au/resources/cac53adf-50fc-4861-8f2d-a01505958f3a/keynote_address_to_liv_human_rights_conference_oct_2011.pdf> accessed 23 April 2013

Bellamy R, 'Political Constitutionalism and the Human Rights Act' (2011) 9 ICON 86

Beloff MJ, 'What Does It All Mean?' in Betten L (ed), *The Human Rights Act 1998: What It Means: The Incorporation of the European Convention on Human Rights into the Legal Order of the United Kingdom* (Martinus Nijhoff Publishers 1999)

Bennion FAR, 'What Interpretation Is "Possible" under Section 3(1) of the Human Rights Act 1998?' [2000] PL 77

— — *Understanding Common Law Legislation: Drafting and Interpretation* (OUP 2001)

— — 'Fractured Law — or Three Strikes against the HRA — Part 2' (2007) 171 JPN 380

— — *Bennion on Statutory Interpretation: A Code* (5th edn, LexisNexis 2008)

Berryman J, 'A Bill of Rights for New Zealand' (1988) 40 Pol Sci 39

Besson S, 'The Reception Process in Ireland and the United Kingdom' in Keller H and Stone Sweet A (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008)

Bingham TH, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 LQR 390

— — *The Business of Judging: Selected Essays and Speeches* (OUP 2000)

— — 'The Rule of Law' (2007) 66 CLJ 67

— — 'The Rule of Law and the Sovereignty of Parliament' (2008) 19 KLJ 223

— — 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (2009) 34 Alt LJ 74

— — 'The Human Rights Act' [2010] EHRLR 568

— — *The Rule of Law* (Allen Lane 2010)

Blackburn R, *Towards a Constitutional Bill of Rights for the United Kingdom: Commentary and Documents* (Pinter 1999)

Blackshield T and Williams G, *Australian Constitutional Law and Theory: Commentary and Materials* (5th edn, Federation Press 2010)

Boateng P and Straw J, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law' [1997] EHRLR 71

Bogdanor V, *Devolution in the United Kingdom* (OUP 2001)

— — *The New British Constitution* (Hart Publishing 2009)

Bohemen Gv, 'Sir Ken's Contribution to the Making of International Law — Observations from a Practitioner' in Geiringer C and Knight DR (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008)

Bonner D, Fenwick H and Harris-Short S, 'Judicial Approaches to the Human Rights Act' (2003) 52 ICLQ 549

Bonner D and Graham C, 'The Human Rights Act 1998: The Story So Far' (2002) 8 EPL 177

Bradley A, 'The Human Rights Act 1998 and the Development of Administrative Law in the United Kingdom' in Ziegler KS and Huber PM (eds), *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (Hart Publishing 2013)

— — and Ewing KD, *Constitutional and Administrative Law* (15th edn, Longman 2011)

Bradshaw B, 'The Human Rights Bill: Progress through Parliament' in Betten L (ed), *The Human Rights Act 1998: What It Means: The Incorporation of the European Convention on Human Rights into the Legal Order of the United Kingdom* (Martinus Nijhoff Publishers 1999)

Brady ADP, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (CUP 2012)

Brady P, 'Convention Compatible Statutory Interpretation: A Comparison of British and Irish Approaches' (2012) 33 Stat LR 24

Bratza N, 'The Treatment and Interpretation of the European Convention on Human Rights by the English Courts' in British Institute of International and Comparative Law/British Institute of Human Rights, *Aspects of Incorporation of the European Convention of Human Rights into Domestic Law* (British Institute of International and Comparative Law/British Institute of Human Rights 1993)

Brennan F, 'Involving Civil Society in Constitutional Reform: An Overview of the Australian National Human Rights Consultation and the Proposed National Human Rights Framework' in Morris C, Boston J and Butler P (eds), *Reconstituting the Constitution* (Springer 2011)

Brennan G, "'Introduction to Human Rights Law": Seminar — Part II' (2007) 81 ALJ 248

— — 'The Constitution, Good Government and Human Rights' (2008) 16 ALL 83

Bronitt S, 'The *Human Rights Act 2004* (ACT) — A "Claytons Bill Of Rights" or New Magna Carta?' (2004) 28 Crim LJ 325

Brookbanks WJ, 'Criminal Law' [1991] NZRL Rev 385

Brookfield FM, 'Constitutional Law' [1991] NZRL Rev 253

Broom H, *A Selection of Legal Maxims, Classified and Illustrated* (Manisty HF and Chitty H eds, 7th edn, Sweet & Maxwell 1900)

Browne-Wilkinson (N), 'The Infiltration of a Bill of Rights' [1992] PL 397

Bryson J, 'Statutory Interpretation' (1991) 8 Aust Bar Rev 185

— — ‘Statutory Interpretation: An Australian Judicial Perspective’ (1992) 13 Stat LR 187

Burrows JF, ‘The Cardinal Rule of Statutory Interpretation in New Zealand’ (1969) 3 NZULR 253

— — ‘Interpretation of Legislation: The Changing Approach to the Interpretation of Statutes’ (2002) 33 VUWLR 561

— — and Carter RI, *Statute Law in New Zealand* (4th edn, LexisNexis NZ 2009)

Butler AS, ‘The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain’ (1997) 17 OJLS 323

— — ‘Same-sex Marriage and Discrimination’ [1998] NZLJ 229

— — ‘Interface between the Human Rights Act 1998 and Other Enactments: Pointers from New Zealand’ [2000] EHRLR 249

— — ‘Strengthening the Bill of Rights’ (2000) 31 VUWLR 129

— — ‘Declaration of Incompatibility or Interpretation Consistent with Human Rights in New Zealand’ [2001] PL 28

— — ‘Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand’ [2001] PL 586

— — ‘Judicial Review, Human Rights and Democracy’ in Huscroft G and Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002)

— — ‘The ACT Human Rights Act: A New Zealander’s View’ (2004) 194 Ethos 16

— — and Butler P, ‘The Judicial Use of International Human Rights Law in New Zealand’ (1999) 29 VUWLR 173

— — and Butler P, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis Butterworths NZ 2005)

Butler P, ‘Human Rights and Parliamentary Sovereignty in New Zealand’ (2004) 35 VUWLR 341

— — ‘15 Years of the NZ Bill of Rights: Time to Celebrate, Time to Reflect, Time to Work Harder?’ [2006] HRR 1

<www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-4/Butler.pdf> accessed 11 October 2013

— — ‘Australian Bills of Rights: The ACT and Beyond: Lessons from New Zealand’ (Australian Bills of Rights: The ACT and Beyond conference, Canberra, 21 June 2006) <http://acthra.anu.edu.au/documents/abor_conf_2006/ButlerP_Lessons_from_NZ.pdf> accessed 4 September

— — and Butler A, ‘16 Years of the New Zealand Bill of Rights’ (Australian and New Zealand Law Librarians conference, Melbourne, 29 September 2006)

<www.alla.asn.au/conference/2006/docs/A_P_Butler_NZ_Bill_of_Rights.pdf> accessed 6 February 2012

Byrnes A, Charlesworth H and McKinnon G, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press 2009)

C

Caldwell JL, ‘Judicial Sovereignty — A New View’ [1984] NZLJ 357

Caleo C, 'Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1993) 4 PLR 175

Callinan IDF, 'International Law and Australian Sovereignty' (2005) 49(7) *Quadrant* 9

Campbell T, 'Democratising Human Rights' in Leiser BM and Campbell TD (eds), *Human Rights in Philosophy and Practice* (Ashgate 2001)

— — 'Incorporation through Interpretation' in Campbell T, Ewing KD and Tomkins A (eds), *Sceptical Essays on Human Rights* (OUP 2001)

Cardozo BN, *The Nature of the Judicial Process* (Yale UP 1921)

Chapman GB, 'A Bill of Wrongs: The Argument against the Proposed Bill of Rights' [1985] NZLJ 226

Chappell L, Chesterman J and Hill L, *The Politics of Human Rights in Australia* (CUP 2009)

Charlesworth H, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall LJ* 195

— — 'The Australian Reluctance about Rights' in Alston P (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law/Human Rights and Equal Opportunity Commission 1994)

— — *Writing in Rights: Australia and the Protection of Human Rights* (UNSW Press 2002)

— — 'Human Rights and Statutory Interpretation' in Corcoran S and Bottomley S (eds), *Interpreting Statutes* (Federation Press 2005)

— — 'Australia's First Bill of Rights: The Australian Capital Territory's *Human Rights Act*' in Campbell T, Goldsworthy J and Stone A (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate 2006)

— — and McKinnon G, *Australia's First Bill of Rights: The Australian Capital Territory's Human Rights Act* (Federation Press 2006)

— — and others, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Syd LR* 423

Childs M, 'Constitutional Review and Underinclusive Legislation' [1998] PL 647

Christie N, 'The New Zealand Same-sex Marriage Case: From Aotearoa to the United Nations' in Wintemute R and Andenæs M (eds), *Legal Recognition of Same-sex Partnerships: A Study of National, European and International Law* (Hart Publishing 2001)

Churches S, 'An Activist Court or a Court Scrupulous to Common Law Standards?' (2011) 19 *AJ Admin L* 13

Clapham A, 'The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights' in Alston

P (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (OUP 1999)

Clark D, Bamford D and Bannister J, *Principles of Australian Public Law* (3rd edn, LexisNexis Butterworths Australia 2010)

Clayton R, 'The Limits of What's "Possible": Statutory Construction under the Human Rights Act' [2002] EHRLR 559
— — 'Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] PL 33
— — and Tomlinson H (eds), *The Law of Human Rights* (2nd edn, OUP 2009)

Cleveland L and Robinson AD (eds), *Readings in New Zealand Government* (Reed Education 1972)

Co Inst

Cooke R, 'A Standard for Justice' [1986] NZLJ 149
— — 'Fundamentals' [1988] NZLJ 158
— — 'Brass Tacks and Bills of Rights' (1995) 25 HKLJ 64
— — 'The British Embracement of Human Rights' [1999] EHRLR 243
— — 'The Basic Themes' (2004) 2 NZJPIL 113
— — 'The Road Ahead for the Common Law' (2004) 53 ICLQ 273
— — 'The Road Ahead for the Common Law' in Andenas M and Fairgrieve D (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009)

Cooper J and Marshall-Williams A (eds), *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (Hart Publishing 2000)

Coppel J, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (John Wiley & Sons 1999)

Corrin J, 'Australia: Country Report on Human Rights' (2009) 40 VUWLR 37

Craig P, 'Constitutional Foundations, the Rule of Law and Supremacy' [2003] PL 92

Cram I, 'Judging Rights in the United Kingdom: The *Human Rights Act* and the New Relationship between Parliament and the Courts' (2006) 12 Rev Const Stud 53

Cremean DJ, 'Editorial: Categories of Illusory (Meaningless) Reference' (2010) 17 AJ Admin L 63
— — 'Editorial: Meaningless Reference — The Last Word' (2010) 17 AJ Admin L 115

Cross R, *Statutory Interpretation* (Bell J and Engle G eds, 3rd edn, Butterworths 1995)

D

Davidson JS, 'The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 4 *Canta LR* 337

— — 'Individual Communications to the United Nations Human Rights Committee: A New Zealand Perspective' [1997] *NZL Rev* 375

— — 'Freedom of Navigation on the High Seas: *Sellers v Maritime Safety Inspector*' (1999) 14 *IJMCL* 435

— — 'Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee' [2001] *NZL Rev* 12

— — 'Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee' in Huscroft G and Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002)

Davis M and Williams G, 'A Statutory Bill of Rights for Australia? Lessons from the United Kingdom' (2002) 22 *UQLJ* 1

Debeljak J, 'Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26 *MULR* 285

— — 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection' (2003) 9 *AJHR* 183

— — 'The Human Rights Act 2004 (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights' (2004) 15 *PLR* 169

— — 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-making' (2007) 33 *Mon LR* 9

— — 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *MULR* 422

— — '*Momcilovic v The Queen and Ors*: From Definite Pessimism to Cautious Optimism in 273 Pages!' (Centre for International and Public Law, Australian National University, Public Law Weekend — 10 Years on from September 11: The Impact on Public Law, Canberra, 10 September 2011)

<www.law.monash.edu.au/castancentre/projects/momcilovic_v_queen_debeljak_public_law_weekend.pdf> accessed 23 April 2013

— — 'Who Is Sovereign Now? The Momcilovic Court Hands Back Power over Human Rights That Parliament Intended It to Have' (2011) 22 *PLR* 15

Dennis I, 'The *Human Rights Act* and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Syd LR* 333

Dicey, AV, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan & Co 1915)

Dickerson R, *The Interpretation and Application of Statutes* (Little, Brown & Co 1975)

- Dickson B, 'Safe in Their Hands? Britain's Law Lords and Human Rights' (2006) 26 LS 329
- — 'Judicial Activism in the House of Lords 1995–2007' in Dickson B (ed), *Judicial Activism in Common Law Supreme Courts* (OUP 2007)
- Dingwall G, 'Statutory Exceptions, Burdens of Proof and the Human Rights Act 1998' (2002) 65 MLR 450
- Dixon R, 'A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?' (2009) 37 FL Rev 335
- — 'A New (Inter)National Human Rights Experiment for Australia' (2012) 23 PLR 69
- Donaghue S, 'Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia' (1995) 17 Adel L Rev 213
- Donson F, 'Civil Liberties and Judicial Review: Can the Common Law Really Protect Rights?' in Leyland P and Woods T (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press 1997)
- Douglas J, 'England as a Source of Australian Law: For How Long?' (2012) 86 ALJ 333
- Doyle JJ, 'Common Law Rights and Democratic Rights' in Finn PD (ed), *Essays on Law and Government: Volume 1: Principles and Values* (Law Book Co 1995)
- — and Wells B, 'How Far Can the Common Law Go Towards Protecting Human Rights?' in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law/Human Rights and Equal Opportunity Commission 1994)
- — and Wells B, 'How Far Can the Common Law Go Towards Protecting Human Rights?' in Alston P (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (OUP 1999)
- Dugdale DF, 'Common Sense about the Bill of Rights: A Criticism of Geoffrey Palmer's Super-law' [1986] NZLJ 127
- Dunworth T, 'Public International Law' [2000] NZL Rev 217
- — 'Public International Law' [2006] NZL Rev 367
- — 'Law Made Elsewhere: The Legacy of Sir Ken Keith' in Geiringer C and Knight DR (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008)
- Dworkin R, *A Bill of Rights for Britain* (Chatto & Windus 1990)
- Dyzenhaus D, Hunt M and Taggart M, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 OUCLJ 5

E

Eastman K and Ronalds C, 'Using Human Rights Laws in Litigation' in Kinley D (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press 1998)

Editorial, 'Legislative Intention' (2008) 29 Stat LR iii

Edwards RA, 'Reading Down Legislation under the Human Rights Act' (2000) 20 LS 353

Ekins R, 'A Critique of Radical Approaches to Rights Consistent Statutory Interpretation' [2003] EHRLR 641

— — 'The Intention of Parliament' [2010] PL 709

— — 'Rights, Interpretation and the Rule of Law' in Ekins R (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011)

— — *The Nature of Legislative Intent* (OUP 2012)

— — and Goldsworthy J, 'The Reality and Indispensability of Legislative Intentions' (forthcoming)

— — and Ip J, 'Opening Pandora's Box?' [2002] NZLJ 117

Elias S, 'The Impact of International Conventions on Domestic Law' (Speech to Inaugural Meeting — International Association of Refugee Law Judges Australia/New Zealand Chapter, Auckland, 10 March 2000)

<www.refugee.org.nz/IARLJ3-00Elias.html> accessed 13 August 2011

— — 'Sovereignty in the 21st Century: Another Spin on the Merry-go-round' (2003) 14 PLR 148

— — 'Fighting Talk and Rights Talk' [2005] LSJ 70

— — 'Fundamentals: A Constitutional Conversation' (2011) 19 Waikato L Rev 1

Elkind JB, 'International Obligations and the Bill of Rights' [1986] NZLJ 205

— — 'Response by Dr J Elkind' [1986] NZLJ 423

— — 'The Bill of Rights' in Boston J and Holland M (eds), *The Fourth Labour Government: Radical Politics in New Zealand* (1st edn, OUP 1987)

— — 'The Optional Protocol: A Bill of Rights for New Zealand' [1990] NZLJ 96

— — 'The Optional Protocol and the Covenant on Civil and Political Rights' [1991] NZLJ 409

— — and Shaw A, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (OUP 1986)

Elliott M, 'Interpretative Bills of Rights and the Mystery of the Unwritten Constitution' [2011] NZL Rev 591

Emmerson B, 'This Year's Model — The Options for Incorporation' [1997] EHRLR 313

Erds D, 'Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)' (2007) 5 ICON 343

— — 'Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand' (2009) 34 L & Soc Inquiry 95

— — *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (OUP 2010)
— — ‘The Rudd Government’s Rejection of an Australian Bill of Rights: A Stunted Case of Aversive Constitutionalism?’ (2012) 65 *Parl Aff* 359

Evans C, ‘Responsibility for Rights: The ACT *Human Rights Act*’ (2004) 32 *FL Rev* 291
— — ‘*Human Rights Act* and Administrative Law’ (Assessing the First Year of the ACT Human Rights Act conference, Canberra, 29 June 2005)
<http://acthra.anu.edu.au/documents/afyhra_conf_2005/EvansC_The_Human_Rights_Act_and_Administrative_Law.pdf> accessed 1 June 2013
— — and Evans S, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths Australia 2008)

Evans J, *Statutory Interpretation: Problems of Communication* (OUP 1988)
— — ‘Questioning the Dogmas of Realism’ [2001] *NZL Rev* 145
— — ‘Questioning the Dogmas of Realism’ in Bigwood R (ed), *Legal Method in New Zealand: Essays and Commentaries* (Butterworths (NZ) 2001)
— — ‘Reading Down Statutes’ in Bigwood R (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004)

Evans S and Evans C, ‘Legal Redress under the Victorian Charter of Human Rights and Responsibilities’ (2006) 17 *PLR* 264

Evatt E, ‘The Impact of International Human Rights on Domestic Law’ in Huscroft G and Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002)

Ewing KD, *A Bill of Rights for Britain?* (Institute of Employment Rights 1990)
— — ‘Doughty Defenders of the Human Rights Act’ in Kang-Riou N, Milner J and Nayak S (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge 2012)
— — and Gearty CA, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press 1990)
— — and Tham J-C, ‘The Continuing Futility of the Human Rights Act’ [2008] *PL* 668

F

Faramarzi G, ‘The Bill of Reasonable Rights: Solving a Conundrum and Strengthening an Enactment’ (2009) 15 *Canta LR* 37

Feldman D, ‘The Human Rights Act 1998 and Constitutional Principles’ (1999) 19 *LS* 165
— — ‘Human Rights’ in Blom-Cooper L, Dickson B and Drewry G (eds), *The Judicial House of Lords 1876–2009* (OUP 2009)

Fenwick H, *Civil Rights: New Labour, Freedom and the Human Rights Act* (Longman 2000)
— — *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007)

— — ‘The Human Rights Act or a British Bill of Rights: Creating a Down-grading Recalibration of Rights against the Counter-terror Backdrop?’ [2012] PL 468
— — ‘Replacing the Human Rights Act with a British Bill of Rights: Creating Greater Parliamentary Autonomy on Human Rights Matters?’ in Kang-Riou N, Milner J and Nayak S (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge 2012)

Finn P, ‘Statutes and the Common Law: The Continuing Story’ in Corcoran S and Bottomley S (eds), *Interpreting Statutes* (Federation Press 2005)

Finnis J, *Natural Law and Natural Rights* (2nd edn, OUP 2011)

Fordham M, *Judicial Review Handbook* (5th edn, Hart Publishing 2008)

— — ‘Common Law Rights’ [2011] JR 14

— — and Mare Tdl, ‘Anxious Scrutiny, the Principle of Legality and the Human Rights Act’ [2000] JR 40

Forsyth C, ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review’ (1996) 55 CLJ 122

French RS, ‘Dolores Umbridge and Policy as Legal Magic’ (2008) 82 ALJ 322

— — ‘The Constitution and the Protection of Human Rights’ (Edith Cowan University Vice-Chancellor’s Oration, Perth, 20 November 2009)

<www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20nov09.pdf> accessed 24 April 2013

— — ‘International Law and Australian Domestic Law’ (Speech to Supreme Court of New South Wales Annual conference, Pokolbin, 21 August 2009)

<www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21aug09.pdf> accessed 16 August 2013

— — ‘Oil and Water? International Law and Domestic Law in Australia (The Brennan Lecture, Gold Coast, 26 June 2009)

<www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26June09.pdf> accessed 16 August 2013

— — ‘Protecting Human Rights without a Bill of Rights’ (2010) 43 J Marshall L Rev 769

— — ‘The Judicial Function in an Age of Statutes’ (2011 Goldring Memorial Lecture, Wollongong, 18 November 2011)

<www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18nov11.pdf> accessed 26 April 2013

— — ‘Liberty and Law in Australia’ (Address given to Washington University in St Louis School of Law, St Louis, 14 January 2011)

<www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj14jan11.pdf> accessed 2 June 2013

— — ‘What Were They Thinking? Statutory Interpretation and Parliamentary Intention’ (Sir Frank Kitto Lecture, Armidale, 23 September 2011)

<www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj23sep11.pdf> accessed 14 August 2013

— — ‘The Courts and the Parliament’ (Queensland Supreme Court seminar, Brisbane, 4 August 2012) <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj04aug12.pdf> accessed 28 April 2013

— — ‘Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons’ (Address to Anglo-Australasian Lawyers Society, and Constitutional and Administrative Law Bar Association, London, 5 July 2012)
 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf> accessed 27 April 2013

— — ‘Unelected Judges in a Representative Democracy’ (Speech to St Thomas More Society, Sydney, 22 June 2012)
 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22jun12.pdf> accessed 15 August 2013

Fuller LL, ‘The Case of the Speluncean Explorers’ (1949) 62 Harv L Rev 616
 — — *The Morality of Law* (rev edn, Yale UP 1969)

G

Galligan B, ‘Australia’s Rejection of a Bill of Rights’ (1990) 28 J Commonw & Comp Pol 344
 — — and Larking E, ‘Rights Protection: The Bill of Rights Debate and Rights Protection in Australia’s States & Territories’ (2007) 28 Adel L Rev 177
 — — and McAllister I, ‘Citizen and Elite Attitudes Towards an Australian Bill of Rights’ in Galligan B and Sampford C (eds), *Rethinking Human Rights* (Federation Press 1997)

Gans J, ‘Evidence Law under Victoria’s Charter: Responsibilities and Remedies — Part II’ (2008) 19 PLR 285
 — — ‘Evidence Law under Victoria’s Charter: Rights and Goals — Part I’ (2008) 19 PLR 197
 — — ‘A Reverse Onus Reviled and Retained — R v Momcilovic’ (2010) 14 E & P 253
 — — and others, *Criminal Process and Human Rights* (Federation Press 2011)

Gardbaum S, ‘The New Commonwealth Model of Constitutionalism’ (2001) 49 Am J Comp L 707
 — — ‘Reassessing the New Commonwealth Model of Constitutionalism’ (2010) 8 ICON 167
 — — ‘How Successful and Distinctive Is the Human Rights Act? An Expatriate Comparatist’s Assessment’ (2011) 74 MLR 195

Gardner P and Wickremasinghe C, ‘England and Wales and the European Convention’ in Dickson B (ed), *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland* (Sweet & Maxwell 1997)

Gargett A, Gerber P and Castan M, ‘A Right to Birth Registration in the Victorian Charter? Seek and You Shall Not Find!’ (2010) 36 Mon LR 1

Gearty CA, ‘The United Kingdom’ in Gearty CA (ed), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers 1997)
 — — ‘The Human Rights Act — One Year On’ (2001) 10 Nott LJ v

— — ‘The Human Rights Act and the Criminal Law: An Overview of the Early Case-law’ in Boyle A and others (eds), *Human Rights and Scots Law* (Hart Publishing 2002)

— — ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) 118 LQR 248

— — *Principles of Human Rights Adjudication* (OUP 2004)

— — ‘The Human Rights Act — An Academic Sceptic Changes His Mind but Not His Heart’ [2010] EHRLR 582

— — ‘Beyond the Human Rights Act’ in Campbell T, Ewing KD and Tomkins A (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011)

— — and Ewing KD, ‘Rocky Foundations for Labour’s New Rights’ [1997] EHRLR 146

Geddes RS, ‘Purpose and Context in Statutory Interpretation’ (2005) 2 U New Eng LJ 5

Geddis A, ‘The State of Freedom of Expression in New Zealand: An Admittedly Eclectic Overview’ (2008) 11 Otago LR 657

— — ‘The Comparative Irrelevance of the NZBORA to Legislative Practice’ (2009) 23 NZULR 465

— — ‘Inter-institutional “Rights Dialogue” under the New Zealand Bill of Rights Act’ in Campbell T, Ewing KD and Tomkins A (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011)

— — and Fenton B, “‘Which Is to Be Master?’ — Rights-friendly Statutory Interpretation in New Zealand and the United Kingdom’ (2008) 25 Ariz J Intl & Comp L 733

Geiringer C, ‘*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law’ (2004) 21 NZULR 66

— — ‘It’s Interpretation, Jim, but Not As We Know It: *Ghaidan v Mendoza*, the House of Lords and Rights-consistent Interpretation’ [2005] HRR 6
<www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-3/Geiringer.pdf> accessed 9 October 2013

— — ‘*Zaoui* Revisited’ [2005] NZLJ 285

— — ‘International Law through the Lens of *Zaoui*: Where Is New Zealand At?’ (2006) 17 PLR 300

— — ‘Parsing Sir Kenneth Keith’s Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case’ in Bigwood R (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ 2006)

— — ‘*Ding v Minister of Immigration; Ye v Minister of Immigration*’ (2008) New Zealand Centre for Public Law Working Paper VUW-NZCPL-001,
<www.victoria.ac.nz/law/centres/nzcpl/publications/working-papers/publications/VUW-NZCPL-001.pdf> accessed 10 September 2013

— — ‘The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*’ (2008) 6 NZJPIL 59

— — ‘The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*’ in Geiringer C and Knight DR (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008)

— — ‘On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act’ (2009) 40 VUWLR 613

Geuss R, *History and Illusion in Politics* (CUP 2001)

Gifford D, *Statutory Interpretation* (Law Book Co 1990)

Glazebrook S, 'The New Zealand Bill of Rights Act 1990: Its Operation and Effectiveness' (South Australian State Legal Convention, Adelaide, 22–23 July 2004) <www.courtsofnz.govt.nz/speechpapers/Speech22-07-2004.pdf> accessed 5 February 2012

Gledhill K, 'The Interpretative Obligation: The Duty to Do What Is Possible' [2008] NZL Rev 283

Gleeson M, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 PLR 26
— — 'Statutory Interpretation' (Justice Hill Memorial Lecture, Sydney, 11 March 2009) <www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/gleeson11mar09.pdf> accessed 13 August 2013
— — 'The Value of Clarity' in Andenas M and Fairgrieve D (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009)

Glover T, 'The Devil in the Detail: Lessons from the ACT Human Rights Act' in Leaser J and Haddrick R (eds), *Don't Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre 2009)

Goldsworthy J, 'The Constitutional Protection of Rights in Australia' in Craven G (ed), *Australian Federation: Towards the Second Century* (Melbourne UP 1992)
— — *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press 1999)
— — 'Legislative Sovereignty and the Rule of Law' in Campbell T, Ewing KD and Tomkins A (eds), *Sceptical Essays on Human Rights* (OUP 2001)
— — 'Parliamentary Sovereignty and Statutory Interpretation' in Bigwood R (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004)
— — 'Moderate versus Strong Intentionalism: Knapp and Michaels Revisited' (2005) 42 San Diego LR 669
— — *Parliamentary Sovereignty: Contemporary Debates* (OUP 2010)

Gray A, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31 U Tas LR 132

Greenawalt K, *Statutory and Common Law Interpretation* (OUP 2013)

Greenberg D, 'The Nature of Legislative Intention and Its Implications for Legislative Drafting' (2006) 27 Stat LR 15
— — (ed), *Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation* (10th edn, Sweet & Maxwell 2012)

Griffith G and Evans C, 'Teoh and Visions of International Law' (2000) 21 Aust YBIL 75

Griffith JAG, 'The Brave New World of Sir John Laws' (2000) 63 MLR 158

Gummow WMC, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 ALJ 167

H

Hailsham (Q), *The Dilemma of Democracy: Diagnosis and Prescription* (Collins 1978)

Hale B, 'High Points and Low Points in the First Ten Years: A View from the Bench' in Kang-Riou N, Milner J and Nayak S (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge 2012)

Harris B, 'Judicial Activism and New Zealand's Appellate Courts' in Dickson B (ed), *Judicial Activism in Common Law Supreme Courts* (OUP 2007)

Henaghan M, 'Same-sex Marriages in the Court of Appeal' [1998] NZLJ 40

Henderson A, 'Readings and Remedies: Section 3(1) of the HRA and Rectifying Constructions' [2000] JR 258

Herring J, 'The Human Rights of Children in Care' (2002) 118 LQR 534

Hettiarachi P, '*Some Things Borrowed, Some Things New*: An Overview of Judicial [sic] Review of Legislation under the Charter of Human Rights and Responsibilities' (2007) 7 OUCIJ 61

Heuston RFV, *Essays in Constitutional Law* (2nd edn, Stevens & Sons 1964)

Hewitt D, *The Nearest Relative Handbook* (2nd edn, Jessica Kingsley Publishers 2009)

Heyns C and Viljoen F, *The Impact of United Nations Treaties on the Domestic Level* (Kluwer Law International 2002)

Hickman TR, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] PL 306

— — 'The Courts and Politics after the Human Rights Act: A Comment' [2008] PL 84

— — *Public Law after the Human Rights Act* (Hart Publishing 2010)

Hiebert JL, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 MLR 7

— — 'Governing Like Judges?' in Campbell T, Ewing KD and Tomkins A (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011)

Higgins R, 'The Relationship between International and Regional Human Rights Norms and Domestic Law' (1992) 18 CLB 1268

Hodge M, 'Statutory Interpretation and Section 6 of the New Zealand Bill of Rights Act: A Blank Cheque or a Return to the Prevailing Doctrine?' (2000) 9 Auckland UL Rev 1

Hogg Q, *New Charter: Some Proposals for Constitutional Reform* (Conservative Political Centre 1969)

Hooper A, 'The Impact of the Human Rights Act on Judicial Decision-making' [1998] EHRLR 676

Hope (D), 'The Human Rights Act 1998: The Task of the Judges' (1999) 20 Stat LR 185

— — 'Human Rights — Where Are We Now?' [2000] EHRLR 439

Hopkins WJ, 'New Zealand' in Shelton D (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011)

Horrigan B, 'Commonalities, Intersections, and Challenges for the Scrutiny and Interpretation of Legislation in Trans-Tasman Jurisdictions and Beyond' (2012) 27 Aust Parl Rev 4

— — 'Reforming Rights-based Scrutiny and Interpretation of Legislation' (2012) 37 Alt LJ 228

Hovell D, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 Alt LJ 297

Hunt M, *Using Human Rights Law in English Courts* (Hart Publishing 1997)

— — 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession' (1999) 26 JL & Soc 86

Hunt P and Bedggood M, 'The International Law Dimension of Human Rights in New Zealand' in Huscroft G and Rishworth P (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's 1995)

Huscroft G and Rishworth P, "'You Say You Want a Revolution': Bills of Rights in the Age of Human Rights' in Dyzenhaus D, Hunt M and Huscroft G (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009)

I

Ip J, 'What a Difference a Bill of Rights Makes? The Case of the Right to Protest in New Zealand' (2010) 24 NZULR 239

Irvine AAM, 'Judges and Decision Makers: The Theory and Practice of Wednesbury Review' [1996] PL 59

— — 'The Legal System and Law Reform under Labour' in Bean D (ed), *Law Reform for All* (Blackstone Press 1996)

— — 'Constitutional Change in the United Kingdom: British Solutions to Universal Problems' (1998) 23 J Sup Ct Hist 26

— — 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] PL 221

— — 'Opening Address' in Markesinis BS (ed), *The Impact of the Human Rights Bill on English Law: The Clifford Chance Lectures: Volume Three* (OUP 1998)

- — ‘Activism and Restraint: Human Rights and the Interpretative Process’ [1999] EHRLR 350
- — ‘Activism and Restraint: Human Rights and the Interpretative Process’ (1999) 10 KCLJ 177
- — ‘Sovereignty in Comparative Perspective: Constitutionalism in Britain and America’ (2001) 76 NYUL Rev 1
- — ‘The Impact of the Human Rights Act: Parliament, the Courts and the Executive’ [2003] PL 308

Irving H, ‘The Dilemmas in Dialogue: A Constitutional [sic] Analysis of the NHRC’s Proposed Human Rights Act’ (2010) 33 UNSWLJ 60

J

Jackson S, ‘Designing Human Rights Legislation: “Dialogue”, the Commonwealth Model and the Roles of Parliaments and Courts’ (2007) 13 Auckland UL Rev 89

Jaconelli J, *Enacting a Bill of Rights: The Legal Problems* (Clarendon Press 1980)

— — *Incorporating the European Convention on Human Rights: A Critical Guide to the Issues* (Faculty of Law, University of Manchester 1996)

Jeffries (J), ‘The Bill of Rights’ [1988] NZLJ 97

Jellis B, ‘Look but Don’t Leap: Lessons from the Victorian Statutory Bill of Rights’ in Leaser J and Haddrick R (eds), *Don’t Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre 2009)

Jenkins D, ‘Common Law Declarations of Unconstitutionality’ (2009) 7 ICON 183

Jennings WI, *The Law and the Constitution* (5th edn, University of London Press 1959)

- Joseph PA, ‘The Challenge of a Bill of Rights: A Commentary’ [1986] NZLJ 416
- — ‘The New Zealand Bill of Rights’ (1996) 7 PLR 162
- — ‘The New Zealand Bill of Rights Experience’ in Alston P (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (OUP 1999)
- — ‘Constitutional Law’ [2001] NZL Rev 449
- — ‘Parliament, the Courts, and the Collaborative Enterprise’ (2004) 15 KCLJ 321
- — *Constitutional & Administrative Law in New Zealand* (3rd edn, Brookers 2007)
- — ‘Constitutional Law’ [2012] NZL Rev 515
- — and Joseph T, ‘Human Rights in the New Zealand Courts’ (2011) 18 AJ Admin L 80

Jowell J, ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ [2000] PL 671

K

Kavanagh A, ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’ (2004) 24 OJLS 259

— — ‘Statutory Interpretation and Human Rights after Anderson: A More Contextual Approach’ [2004] PL 537
 — — ‘Unlocking the Human Rights Act: The “Radical” Approach to Section 3(1) Revisited’ [2005] EHRLR 259
 — — ‘The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998’ (2006) 26 OJLS 179
 — — ‘Choosing between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v. Mendoza*’ in Fenwick H, Phillipson G and Masterman R (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007)
 — — *Constitutional Review under the UK Human Rights Act* (CUP 2009)

Keith KJ, ‘A Bill of Rights for New Zealand? Judicial Review versus Democracy’ (1985) 11 NZULR 307
 — — ‘The Bill of Rights: Reply to a Criticism’ [1985] NZLJ 270
 — — ‘Professor Smillie’s Alternative Bill of Rights: A Comment’ (1986) 6 Otago LR 208
 — — ‘The Impact of International Law on New Zealand Law’ (1998) 6 Waikato L Rev 1
 — — ‘Roles of the Courts in New Zealand in Giving Effect to International Human Rights — With Some History’ (1999) 29 VUWLR 27
 — — ‘Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness’ in Bigwood R (ed), *Legal Method in New Zealand: Essays and Commentaries* (Butterworths (NZ) 2001)
 — — ‘The New Zealand Bill of Rights Experience: Lessons for Australia’ (2003) 9 AJHR 119
 — — *Interpreting Treaties, Statutes and Contracts: Occasional Paper No 19* (New Zealand Centre for Public Law 2009)

Kelly E, ‘Human Rights Act 2004: A New Dawn for Rights Protection?’ (2004) 41 AIALF 30

Kelsey J, ‘Judges and the Bill of Rights’ (1986) 3 Canta LR 155

Killeen A, Ekins R and Ip J, ‘Undermining the Grundnorm?’ [2001] NZLJ 299

King LJ, ‘The Attorney-General, Politics and the Judiciary’ (2000) 74 ALJ 444
 — — ‘The Attorney-General, Politics and the Judiciary’ (2000) 29 UWAL Rev 155

Kinley D and Ernst C, ‘Exile on Main Street: Australia’s Legislative Agenda for Human Rights’ [2012] EHRLR 58

Kirby M, ‘Lord Cooke and Fundamental Rights’ in Rishworth P (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths (NZ) 1997)
 — — ‘The Growing *Rapprochement* between International Law and National Law’ in Anghie A and Sturges G (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International 1998)
 — — ‘Human Rights Protection in Australia: The Commonwealth’s Odd One Out?’ in Kang-Riou N, Milner J and Nayak S (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge 2012)

Klug F, 'The Human Rights Act 1998, *Pepper v Hart* and All That' [1999] PL 246
 — — *Values for a Godless Age: The Story of the UK's New Bill of Rights* (Penguin Books 2000)
 — — 'Judicial Deference under the Human Rights Act 1998' [2003] EHRLR 125
 — — 'The United Kingdom Experience' in Debono C and Colwell T (eds), *Comparative Perspectives on Bills of Rights* (National Institute of Social Sciences & Law 2004)
 — — and Starmer K, 'Standing Back from the Human Rights Act: How Effective Is It Five Years On?' [2005] PL 716

L

Lacey W, 'The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-doors, Platitudes and Window-dressing' in Charlesworth H and others (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press 2005)
 — — *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications 2008)
 — — 'Beyond the Legalese and Rhetoric: Improving Human Rights Protection in Australia' (2012) 16 AJHR 1

Laws J, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] PL 59
 — — 'Law and Democracy' [1995] PL 72
 — — 'An Overview' in The Centre for Public Law at the University of Cambridge, *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999)
 — — 'The Impact of the Human Rights Act 1998 on the Interpretation of Enactments in the UK' in Bigwood R (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004)

Legal Research Foundation, *A Bill of Rights for New Zealand* (Legal Research Foundation 1985)

Leigh I, 'The UK's Human Rights Act 1998: An Early Assessment' in Huscroft G and Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002)
 — — and Lustgarten L, 'Making Rights Real: The Courts, Remedies, and the Human Rights Act' (1999) 58 CLJ 509
 — — and Masterman R, *Making Rights Real: The Human Rights Act in the First Decade* (Hart Publishing 2008)

Lester A, *Democracy and Individual Rights* (Fabian Society 1969)
 — — *A Bill of Rights for Britain* (Charter 88 1991)
 — — 'First Steps Towards a Constitutional Bill of Rights' [1997] EHRLR 124
 — — 'The Art of the Possible — Interpreting Statutes under the Human Rights Act' [1998] EHRLR 665

- — ‘The Impact of the Human Rights Act on Public Law’ in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998)
- — ‘The Art of the Possible: Interpreting Statutes under the Human Rights Act’ in The Centre for Public Law at the University of Cambridge, *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999)
- — ‘The Challenge of Bangalore: Making Human Rights a Practical Reality’ [1999] EHRLR 273
- — ‘Interpreting Statutes under the Human Rights Act’ (1999) 20 Stat LR 218
- — ‘Developing Constitutional Principles of Public Law’ [2001] PL 684
- — ‘The Magnetism of the Human Rights Act 1998’ (2002) 33 VUWLR 53
- — ‘The Human Rights Act 1998 — Five Years On’ [2004] EHRLR 258

Lewis P, ‘The Human Rights Act 1998: Shifting the Burden’ [2000] Crim LR 667

Lücke H, ‘Statutes and the Intention of the Lawmaker as the Ultimate Guide to their Applicability: History and Prospects’ [2010] Supreme Court History Program Yearbook 1

Lyell N, ‘Whither Strasbourg? Why Britain Should Think Long and Hard Before Incorporating the European Convention on Human Rights’ [1997] EHRLR 132

Lynch P, ‘Court of Appeal Makes Declaration of Incompatibility’ (2010) 35 Alt LJ 124

— — ‘High Court Affirms Importance and Validity of Victorian Charter’ (2011) 36 Alt LJ 285

M

MacKay D, ‘The UN Covenants and the Human Rights Committee’ (1999) 29 VUWLR 11

Madsen MR, ‘France, the UK, and the “Boomerang” of the Internationalisation of Human Rights (1945–2000)’ in Halliday S and Schmidt P (eds), *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004)

Mance (J), ‘Should the Law Be Certain?’ (The Oxford Shrieval Lecture, Oxford, 11 October 2011) <www.supremecourt.gov.uk/docs/speech_111011.pdf> accessed 17 September 2013

Marshall G, ‘Interpreting Interpretation in the Human Rights Bill’ [1998] PL 167

— — ‘Patriating Rights — With Reservations: The Human Rights Bill 1998’ in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998)

— — ‘Two Kinds of Compatibility: More about Section 3 of the Human Rights Act 1998’ [1999] PL 377

— — ‘The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained?’ [2003] PL 236

- Mason A, 'The Relationship between International Law and National Law, and Its Application in National Courts' (1992) 18 CLB 750
- — 'Courts, Constitutions and Fundamental Rights' in Rawlings R (ed), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895–1995* (Clarendon Press 1997)
- — 'International Law as a Source of Domestic Law' in Opeskin B and Rothwell D (eds), *International Law and Australian Federalism* (Melbourne UP 1997)
- — 'Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power' (2011) 9 NZJPI 1
- Mason K, 'Legislator's Intent: How Judges Discern It and What They Do If They Find It' in Stefanou C and Xanthaki H (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008)
- Masterman R, 'Interpretations, Declarations and Dialogue: Rights Protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities' [2009] PL 112
- — *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011)
- Mathieson DL, 'Interpreting the Proposed Bill of Rights (I)' [1986] NZLJ 129
- — 'Interpreting the Proposed Bill of Rights (II)' [1986] NZLJ 160
- Maxwell C, 'The Victorian Charter of Human Rights and Responsibilities So Far: A Judge's Perspective' (2009 Annual Castan Centre conference, Melbourne, 17 July 2009) <www.law.monash.edu.au/castancentre/events/2009/conf-09-justice-maxwell-paper.pdf> accessed 28 February 2013
- — 'Judges and Human Rights' (Address to Queen's Inn Dinner, Melbourne, 4 May 2012) <www.supremecourt.vic.gov.au/resources/6448e662-cb1e-458a-85a4-b00c66716d33/address%2Bto%2Bqueen's%2Binn%2Bdinner.pdf> accessed 23 April 2013
- Maxwell PB, *On the Interpretation of Statutes* (Theobald JA ed, 4th edn, Sweet & Maxwell 1905)
- McClelland R, 'Promotion and Protection of Human Rights' (Castan Centre Human Rights conference 2009, Melbourne, 17 July 2009) <www.law.monash.edu.au/castancentre/events/2009/conf-09-mcclelland-paper.pdf> accessed 10 September 2013
- McCluskey (J), *Law, Justice and Democracy* (Sweet and Maxwell/BBC Books 1987)
- McDonald L, 'New Directions in the Australian Bill of Rights Debate' [2004] PL 22
- McGarry J, 'Effecting Legal Certainty under the Human Rights Act' [2011] JR 66
- McGoldrick D, 'The United Kingdom's Human Rights Act 1998 in Theory and Practice' (2001) 50 ICLQ 901

- McGrath J, 'Purpose, *Hansard*, Rights, and Language' in Bigwood R (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004)
- — 'International Law's Recent Influence on Domestic Court Decisions in New Zealand' in Geiringer C and Knight DR (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008)
- McHugh M, 'The Law-making Function of the Judicial Process' — Part I' (1988) 62 ALJ 15
- — 'The Law-making Function of the Judicial Process' — Part II' (1988) 62 ALJ 116
- — 'A Human Rights Act, the Courts and the Constitution' (2009) 11 CLPR 86
- McHugh P, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (OUP 1991)
- McHugh R, 'Implications of the Proposed *Human Rights Act* for the Rule of Law as Manifested in Australian Courts' ('Is the Rule of Law under Challenge in Australia?' conference, Sydney, 20 November 2009) <www.ruleoflaw.org.au/wp-content/uploads/2012/08/Media-3-12-09-Implications-of-the-proposed-Human-Rights-Act-for-the-rule-of-law-as-manifested-in-Australian-courts-Richard-McHugh.pdf> accessed 14 August 2013
- McKay I, 'Interpreting Statutes — A Judge's View' (2000) 9 Otago LR 743
- McKinnon G, 'An Opportunity Missed? Comment on *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125' (2006) 9 Canb LR 21
- — 'Home Truths: Housing under the Human Rights Act' (2008) 21 Parity 23
- — 'Strengthening Human Rights: Amendments to the Human Rights Act 2004 (ACT)' (2008) 19 PLR 179
- McLean J, 'Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights' [2001] NZL Rev 421
- — *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012)
- — Rishworth P and Taggart M, 'The Impact of the New Zealand Bill of Rights on Administrative Law' in Legal Research Foundation, *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation 1992)
- McLeod I, 'Legislative Intent' in Stefanou C and Xanthaki H (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008)
- McMahon F, 'The Human Rights Act 1998 (UK): An Impossible Compromise' in Leeson J and Haddrick R (eds), *Don't Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre 2009)
- Mead D, 'Swallowing the Camel, Straining at the Gnat: The Implications of *Mendoza v Ghaidan*' [2003] EHRLR 501
- Meagher D, 'The Scope of Judicial Rights Interpretation under Bills of Rights (and its Political Consequences)' (2009) 20 PLR 214

— — ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 MULR 449
— — ‘The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)’ [2012] NZL Rev 465

Meyerson D, ‘Why Courts Should Not Balance Rights against the Public Interest’ (2007) 31 MULR 873

Mirfield P, ‘Human Wrongs?’ (2002) 118 LQR 20

Morrison J, *Reforming Britain: New Labour, New Constitution?* (Reuters/Pearson Education 2001)

Mountfield H and Beloff MJ, ‘Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales’ [1996] EHRLR 467

Myburgh P, ‘Shipping Law’ [1999] NZL Rev 387

N

Nardell G, ‘The Human Rights Act: Procedure, Standing and Remedies’ in Butler F (ed), *Human Rights for the New Millennium* (British Institute of Human Rights/Kluwer Law International 2000)

Neuberger (D), ‘Who Are the Masters Now?’ (Second Lord Alexander of Weedon Lecture, London, 6 April 2011)

<www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-weedon-lecture-110406.pdf> accessed 10 September 2013

— — ‘Judges and Policy: A Delicate Balance’ (Speech to Institute for Government, London, 18 June 2013) <www.supremecourt.gov.uk/docs/speech-130618.pdf> accessed 15 August 2013

Nicholls D, ‘My Kingdom for a Horse: The Meaning of Words’ (2005) 121 LQR 577

Nicol D, ‘Gender Reassignment and the Transformation of the Human Rights Act’ (2004) 120 LQR 194

— — ‘Statutory Interpretation and Human Rights after Anderson’ [2004] PL 274

O

O’Brien C and Klug F, ‘The First Two Years of the Human Rights Act’ [2002] PL 649

O’Leary J, ‘Inspiring or Undermining Confidence? Amendments to the Right to Judge Alone Trials in the ACT’ (2011) 10 Canb LR 30

O’Neill N, Rice S and Douglas R, *Retreat from Injustice: Human Rights Law in Australia* (2nd edn, Federation Press 2004)

Oliver D, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open UP 1991)

P

Paciocco DM, 'The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill' [1990] NZRL Rev 353

Palmer G, *Unbridled Power? An Interpretation of New Zealand's Constitution & Government* (2nd edn, OUP 1987)

— — 'Human Rights: The Proposed New Zealand Bill of Rights' (1988) 69 Parl 10

Palmer MSR, 'New Zealand Constitutional Culture' (2007) 22 NZULR 565

— — *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria UP 2008)

Parham E, *Behind the Moral Curtain: The Politics of a Charter of Rights* (Centre for Independent Studies 2010)

Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (7th edn, LexisNexis Butterworths Australia 2011)

Perry JW, 'At the Intersection — Australian and International Law' (1997) 71 ALJ 841

— — 'International Human Rights and Domestic Law and Advocacy' (Speech to Human Rights Law Resource Centre seminar, Melbourne, 7 August 2006)
www.hrlrc.org.au/files/96S542RKAI/Justice%20Perry%20Paper.doc accessed 10 September 2013

Phillips (N), 'The Interpretation of Contracts and Statutes' (2002) 68 Arb 17

— — 'The Art of the Possible: Statutory Interpretation and Human Rights' (First Lord Alexander of Weedon Lecture, London, 22 April 2010)
<www.brickcourt.co.uk/uploads/lecture---the-art-of-the-possible-by-lord-phillips.pdf> accessed 13 August 2013

Phillipson G, '(Mis)-reading Section 3 of the Human Rights Act' (2003) 119 LQR 183

— — 'Deference, Discretion, and Democracy in the Human Rights Act Era' (2007) 60 CLP 40

Pierce JL, 'Rights Protection and Constitutional Justice: Some Comparative Reflections' (2010) 22 Bond LR 212

Poole T, 'Bills of Rights in Australia' (2004) 4 OUCLJ 197

Porter C, 'Pluralism, Parliamentary Democracy and Bills of Rights' in Leeser J and Haddrick R (eds), *Don't Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre 2009)

Porter M, 'Marking the First Anniversary of the Human Rights Act' (2001) 151 NLJ 1204

Potter J and Ekins R, 'The New Zealand Bill of Rights Act 1990: A Judicial Perspective' (2002) 12 JJA 85

Pound A, 'The Victorian Charter of Rights and Responsibilities So Far: A Lawyer's Perspective' (2009 Annual Castan Centre conference: The Changing Human Rights Landscape, Melbourne, 17 July 2009)

<www.law.monash.edu.au/castancentre/events/2009/conf-09-pound-paper.pdf>
accessed 5 March 2013

— — and Evans K, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Lawbook Co 2008)

R

Rares S, 'Legality, Rights and Statutory Interpretation' (2013 AGS Administrative Law conference, Canberra, 20 June 2013)

<www.fedcourt.gov.au/__data/assets/word_doc/0020/23078/Rares-J-20130620.doc>
accessed 18 September 2013

Raz J, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009)

Reid (J), 'The Judge as Law Maker' (1972) 12 JSPTL 22

Reilly A and others, *Australian Public Law* (OUP 2011)

Rice S, 'Staring Down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law' (2011) 10 Canb LR 97

Richardson (I), 'Judges as Lawmakers in the 1990s' (1986) 12 Mon LR 35

Rishworth PT, 'The Potential of the New Zealand Bill of Rights' [1990] NZLJ 68

— — 'Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases' [1991] NZRL Rev 337

— — 'The New Zealand Bill of Rights Act 1990: The First Fifteen Months' in Rishworth P and Paciocco DM, *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation 1992)

— — 'Affirming the Fundamental Values of the Nation: How the Bill of Rights and the Human Rights Act Affect New Zealand Law' in Huscroft G and Rishworth P (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's 1995)

— — 'The Birth and Rebirth of the Bill of Rights' in Huscroft G and Rishworth P (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's 1995)

— — 'Lord Cooke and the Bill of Rights' in Rishworth P (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths (NZ) 1997)

— — 'Reflections on the Bill of Rights after *Quilter v Attorney-General*' [1998] NZL Rev 683

— — 'Human Rights' [1999] NZL Rev 457

- — ‘The Rule of International Law?’ in Huscroft G and Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002)
- — ‘Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights’ (2004) 15 PLR 103
- — ‘The Inevitability of Judicial Review under “Interpretive” Bills of Rights: Canada’s Legacy to New Zealand and Commonwealth Constitutionalism’ (2004) 23 SCLR (2d) 254
- — ‘Interpreting and Invalidating Enactments under a Bill of Rights: Three Inquiries in Comparative Perspective’ in Bigwood R (ed), *The Statute: Making and Meaning* (LexisNexis NZ 2004)
- — ‘Human Rights’ [2005] NZL Rev 87
- — ‘Human Rights and the Reconstruction of the Moral High Ground’ in Bigwood R (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ 2006)
- — ‘The New Zealand Bill of Rights and the Legislature: Praxis and Pitfalls’ (Legislatures and the Protection of Human Rights conference, Melbourne, 21 July 2006) <<http://cccs.law.unimelb.edu.au/download.cfm?DownloadFile=DBCf3890-1422-207C-BA3F28D4A306FD29>> accessed 5 February 2012
- — ‘Human Rights’ [2012] NZL Rev 321
- — and others, *The New Zealand Bill of Rights* (OUP 2003)

Roberts P, ‘Drug Dealing and the Presumption of Innocence: The Human Rights Act (Almost) Bites’ (2002) 6 E & P 17

Robertson G, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage Books 2009)

Rodrick S, ‘Open Justice, the Media and Reporting on Preventive Supervision and Detention Orders Imposed on Serious Sex Offenders in Victoria’ (2010) 36 Mon LR 136

Rolls A, ‘Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb Have Been Any Different If Australia Had a Bill of Rights Like Victoria?’ (2007) 18 PLR 119

Rose D and Weir C, ‘Interpretation and Incompatibility: Striking the Balance’ in Jowell J and Cooper J (eds), *Delivering Rights: How the Human Rights Act Is Working* (Hart Publishing 2003)

S

Sackville R, ‘A Bill of Rights: Form and Substance’ (2000) 19 Aust Bar Rev 101

— — ‘Bills of Rights: Chapter III of the Constitution and State Charters’ (2011) 18 AJ Admin L 67

Sales P, ‘A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998’ (2009) 125 LQR 598

— — ‘Three Challenges to the Rule of Law in the Modern English Legal System’ in Ekins R (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011)

— — ‘Judges and Legislature: Values into Law’ (2012) 71 CLJ 287
— — and Clement J, ‘International Law in Domestic Courts: The Developing Framework’ (2008) 124 LQR 388
— — and Ekins R, ‘Rights-consistent Interpretation and the Human Rights Act 1998’ (2011) 127 LQR 217

Samuels A, ‘Human Rights Act 1998 Section 3: A New Dimension to Statutory Interpretation?’ (2008) 29 Stat LR 130

Santow E, ‘The Act That Dares Not Speak Its Name: The National Human Rights Consultation Report’s Parallel Roads to Human Rights Reform’ (2010) 33 UNSWLJ 8

Saunders C, ‘Protecting Rights in Common Law Constitutional Systems: A Framework for a Comparative Study’ (2002) 33 VUWLR 83

Schaeffer A, ‘Linking *Marleasing* and s. 3(1) of the Human Rights Act 1998’ [2005] JR 72

Scorgie E and Killeen A, ‘*R v Poumako*’ [2000] NZLJ 429 (note)

Sedley S, ‘Human Rights: A Twenty-first Century Agenda’ [1995] PL 386
— — ‘A Bill of Rights for the United Kingdom: From London to Strasbourg by the Northwest Passage?’ (1998) 36 Osgoode Hall LJ 63
— — ‘The Rocks or the Open Sea: Where Is the Human Rights Act Heading?’ (2005) 32 JL & Soc 3

Singh R, *The Future of Human Rights in the United Kingdom* (Hart Publishing 1997)
— — ‘Interpreting Bills of Rights’ (2008) 29 Stat LR 82

Smillie JA, ‘The Draft Bill of Rights: Meaningful Safeguards or Mere Window-dressing?’ [1985] NZLJ 276
— — ‘A Bill of Rights for New Zealand? An Alternative Proposal’ (1986) 6 Otago LR 175
— — ‘The Allure of “Rights Talk”: *Baigent’s Case* in the Court of Appeal’ (1994) 8 Otago LR 188
— — ‘“Fundamental” Rights, Parliamentary Supremacy and the New Zealand Court of Appeal’ (1995) 111 LQR 209

Smith ATH, ‘The Human Rights Act 1998: The Constitutional Context’ in The Centre for Public Law at the University of Cambridge, *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999)
— — ‘The Human Rights Act 1998: Part 1: The Human Rights Act and the Criminal Lawyer: The Constitutional Context’ [1999] Crim LR 251

Smith J, ‘A Citizens’ Democracy’ (Speech at an event hosted by Charter 88, London, 1 March 1993)

Smith JC, ‘Case Comment: Prosecution — Terrorist Offences — Director of Public Prosecutions Consenting to Prosecution’ [1999] Crim LR 994

South J, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (2009) 28 UQLJ 143

Spigelman JJ, 'Rule of Law — Human Rights Protection' (1999) 18 Aust Bar Rev 29
— — 'Statutory Interpretation: Identifying the Linguistic Register' (1999) 4 Newc LR 1
— — 'Access to Justice and Human Rights Treaties' (2000) 22 Syd LR 141
— — 'The Poet's Rich Resource: Issues in Statutory Interpretation' (2001) 21 Aust Bar Rev 224
— — 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 ALJ 29
— — 'Blackstone, Burke, Bentham and the Human Rights Act 2004' (2005) 26 Aust Bar Rev 1
— — 'Principle of Legality and the Clear Statement Principle' (2005) 79 ALJ 769
— — *Statutory Interpretation and Human Rights* (University of Queensland Press 2008)

Starmer K, 'Two Years of the Human Rights Act' [2003] EHRLR 14
— — 'The Human Rights Act: Review of the Year: 2004–2005' [2006] EHRLR 1
— — and Klug F, 'Incorporation through the "Front Door": The First Year of the Human Rights Act' [2001] PL 654

Starrenburg N, 'Interpretive Theories in New Zealand Bill of Rights Jurisprudence' (2004) 10 Auckland UL Rev 115

Stellios J, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths Australia 2010)
— — and Palfrey M, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 AIALF 13

Stemplewitz J, 'Section 6 of the Bill of Rights Act 1990: A Case for Parliamentary Responsibility for Human Rights and Freedoms' (2002) 33 VUWLR 409

Stephen N, 'The Rule of Law' (2003) 22 Dialogue 8

Steyn J, 'Incorporation and Devolution — A Few Reflections on the Changing Scene' [1998] EHRLR 153
— — 'Interpretation: Legal Texts and their Landscape' in Markesinis BS (ed), *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Hart Publishing 2000)
— — 'The New Legal Landscape' [2000] EHRLR 549
— — '*Pepper v Hart*; A Re-examination' (2001) 21 OJLS 59
— — 'Democracy through Law' [2002] EHRLR 723
— — '2000–2005: Laying the Foundations of Human Rights Law in the United Kingdom' [2005] EHRLR 349
— — 'Democracy, the Rule of Law and the Role of Judges' [2006] EHRLR 243

Summers RS, 'The Principles of the Rule of Law' (1999) 74 Notre Dame L Rev 1691

Sumption J, 'Judicial and Political Decision-making: The Uncertain Boundary' [2011] JR 301

T

Taggart M, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' [1998] PL 266

— — 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998)

— — 'Administrative Law' [2003] NZL Rev 99

— — 'Rugby, the Anti-apartheid Movement, and Administrative Law' in Bigwood R (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ 2006)

— — "'Dialogue" as Inter-branch Communication' in Geiringer C and Knight DR (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria UP 2008)

Tanner G, 'Reflections on the Writing of Statutes' in Finn J and Todd S (eds), *Law Liberty, Legislation: Essays in Honour of John Burrows QC* (LexisNexis NZ 2008)

— — and Carter R, 'The Old Girl Still Looks Good to Me: Purposive Interpretation of New Zealand Legislation' (Paper delivered at 4th Australasian Drafting conference, Sydney, 4 August 2005) <www.pcc.gov.au/pccconf/2005/papers/9-George-Tanner.pdf> accessed 10 September 2013

Tate P, 'Some Reflections on Victoria's Charter of Human Rights and Responsibilities' (2007) 52 AIALF 18

— — 'A National Charter on Human Rights in Australia? Views from Victoria' (2009) 18 Com Lawyer 27

Taylor J, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32 FL Rev 57

Templeman (S), 'Treaty-making and the British Parliament' (1991) 67 Chi-Kent L Rev 459

Thomas EW, 'Fairness and Certainty in Adjudication: Formalism v Substantialism' (1999) 9 Otago LR 459

— — 'A Bill of Rights: The New Zealand Experience' in Debono C and Colwell T (eds), *Comparative Perspectives on Bills of Rights* (National Institute of Social Sciences & Law 2004)

— — *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP 2005)

— — 'So-called "Judicial Activism" and the Ascendancy of Judicial Constraints' (2005) 21 NZULR 685

Todd A, *Parliamentary Government in the British Colonies* (1st edn, Longman, Green & Co 1880)

Toohy J, 'A Government of Laws, and Not of Men?' (1993) 4 PLR 158

Tully S, 'Kracke v Mental Health Review Board & Ors [2009] VCAT 646' (2009) 16 Aust ILJ 293 (note)

Turpin C and Tomkins A, *British Government and the Constitution: Text and Materials* (7th edn, CUP 2012)

Twining W and Miers D, *How to Do Things with Rules* (5th edn, CUP 2010)

V

Vick DW, 'The Human Rights Act and the British Constitution' (2002) 37 Tex Intl LJ 329

Vines T and Faunce T, 'A Bad Trip for Health-related Human Rights: Implications of Momcilovic v The Queen (2011) 85 ALJR 957' (2012) 19 JLM 685

W

Wade W, 'Human Rights and the Judiciary' [1998] EHRLR 520

— — 'The United Kingdom's Bill of Rights' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998)

Wadham J, 'A Bill of Rights' in Bean D (ed), *Law Reform for All* (Blackstone Press 1996)

— — 'Why Incorporation of the European Convention on Human Rights Is Not Enough' in Gordon R and Wilmot-Smith R (eds), *Human Rights in the United Kingdom* (OUP 1996)

Waldron J, 'Some Models of Dialogue Between Judges and Legislators' (2004) 23 SCLR (2d) 7

— — 'The Concept and the Rule of Law' (2008) 43 Ga L Rev 1

Walker C and Weaver RL, 'The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World' (2000) 33 U Mich JL Reform 497

Walker GdQ, 'Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion' (1985) 59 ALJ 276

Walker K, 'Treaties and the Internationalisation of Australian Law' in Saunders C (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press 1996)

Walker (R), 'Problems of Human Rights Legislation: What Difference Can a Human Rights Charter Make?' (2007) 81 ALJ 923

— — 'A United Kingdom Perspective on Human Rights Judging' (2007) 8 TJR 295

Wallington P and McBride J, *Civil Liberties and a Bill of Rights* (Cobden Trust 1976)

Watchirs H and McKinnon G, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 UNSWLJ 136

Webber J, 'A Modest (but Robust) Defence of Statutory Bills of Rights' in Campbell T, Goldsworthy J and Stone A (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate 2006)

Wilberg H, 'The Bill of Rights and Other Enactments' [2007] NZLJ 112
— — 'Administrative Law' [2010] NZL Rev 177

Wilkins S, 'Constitutional Limits on Bills of Rights Introduced by a State or Territory' (2007) 35 FL Rev 431

Williams G, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 MULR 880
— — *A Charter of Rights for Australia* (UNSW Press 2007)
— — and Burton L, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 Stat LR 58

Wilmot-Smith R, 'Incorporation and the Loss of Illusions' in Gordon R and Wilmot-Smith R (eds), *Human Rights in the United Kingdom* (OUP 1996)

Wintemute R, 'Lesbian and Gay Britons, the Two Europes and the Bill of Rights Debate' [1997] EHRLR 466
— — 'Lesbian and Gay Inequality 2000: The Potential of the Human Rights Act 1998 and the Need for an Equality Act 2002' [2000] EHRLR 603
— — 'Same-sex Partners, "Living as Husband and Wife", and Section 3 of the Human Rights Act 1998' [2003] PL 621
— — 'The Human Rights Act's First Five Years: Too Strong, Too Weak, or Just Right?' (2006) 17 KCLJ 209

Winterton G, 'Extra-constitutional Notions in Australian Constitutional Law' (1986) 16 FL Rev 223
— — 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Sampford C and Preston K (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press 1996)
— — 'The ACT Bill of Rights' (2004) 7 CLPR 47

Woolf H, 'Droit Public — English Style' [1995] PL 57

Y

Yihan G, 'A Comparative Account of Statutory Interpretation in Singapore' (2008) 29 Stat LR 195

Young AL, 'Judicial Sovereignty and the Human Rights Act 1998' (2002) 61 CLJ 53
— — 'Ghaidan v Godin-Mendoza: Avoiding the Deference Trap' [2005] PL 23
— — 'A Peculiarly British Protection of Human Rights?' (2005) 68 MLR 858

— — *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009)
— — ‘The Rule of Law in the United Kingdom: Formal or Substantive?’ (2012) 6
Vienna J on Intl Const L 259

Young KG, ‘The World, through the Judge’s Eye’ (2009) 28 Aust YBIL 27

Z

Zander M, *A Bill of Rights?* (4th edn, Sweet & Maxwell 1997)
— — *The Law-making Process* (6th edn, CUP 2004)

Zhou S, ‘*Momcilovic v The Queen*: Implications for a Federal Human Rights Charter’
(2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128005> accessed 15
April 2013

Zyl Smit Jv, ‘The New Purposive Interpretation of Statutes: HRA Section 3 after
Ghaidan v Godin-Mendoza’ (2007) 70 MLR 294
— — ‘Statute Law’ in Hoffman D (ed), *The Impact of the UK Human Rights Act on
Private Law* (CUP 2011)

Official Papers and Policy Documents

— — *A Bill of Rights for New Zealand: A White Paper* (1985 AJHR A.6)

— — Explanatory Memorandum to the Charter of Human Rights and
Responsibilities Bill 2006 (Vic)

— — Explanatory Statement to the Human Rights Amendment Bill 2007 (ACT)

— — Explanatory Statement to the Human Rights Bill 2003 (ACT)

ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act:
Report of the ACT Bill of Rights Consultative Committee* (Publishing Services 2003)

Australian Capital Territory Department of Justice and Community Safety, Human
Rights Act 2004 — *Twelve-month Review — Report* (Department of Justice and
Community Safety 2006)

Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997)

Justice and Law Reform Committee, *Final Report of the Justice and Law Reform
Committee on a White Paper on a Bill of Rights for New Zealand* (1988 AJHR I.8C)

Justice and Law Reform Select Committee, *Interim Report of the Justice and Law
Reform Select Committee: Inquiry into the White Paper—A Bill of Rights for New
Zealand* (1986 AJHR I.8A)

Law Commission and Scottish Law Commission, *The Interpretation of Statutes* (Law
Com No 21, Scot Law Com No 11, 1969)

New Zealand Law Commission, *A New Interpretation Act: To Avoid 'Prolixity and Tautology'* (NZLC R 17, 1990)

New Zealand Law Commission, *A New Zealand Guide to International Law and Its Sources* (NZLC R 34, 1996)

New Zealand Law Commission, *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (NZLC R 122, 2011)

Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2009)

Victorian Government Response (14 March 2012) to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2009)
<www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20120314_sarc.govtresp.charterreview.pdf> accessed 24 September 2013

Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (Department of Justice 2005)