

PROTECTING HUMAN RIGHTS IN A FEDERATION*

PAMELA TATE SC**

In his address to the American Bar Association in 1942, Sir Owen Dixon described the Australian constitution makers as lacking enthusiasm for constitutional guarantees of personal liberty. The comment was sharply accurate. He compared the Australian Constitution with that of the United States and noted that the Constitution under which the colonies united in a federal Commonwealth was ‘framed after the pattern of that of the United States’.¹ As he said:

The men who drew up the Australian Constitution had the American document before them; they studied it with care; they even read the standard books of the day which undertook to expound it.²

It was necessary for him to explain, however, that the *Australian Constitution* parts company with the American model in failing to include a formal set of guarantees echoing the United States Bill of Rights.³ Speaking in America, Dixon said:

In this country men have come to regard formal guarantees of life, liberty and property against invasion by government [in the Fourteenth Amendment], as indispensable to a free constitution. Bred in this doctrine you may think it strange that in Australia, a democracy if ever there was one, the cherished American practice of placing in the fundamental law guarantees of personal liberty should prove unacceptable to our constitution makers. But so it was. The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself. The working of such provisions in this country was conscientiously studied, but, wonder as you may, it is a fact that the study fired no one with enthusiasm for the principle. With the probable unnecessary exception of the guarantee of religious freedom, our constitution makers refused to adopt any part of

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** Solicitor-General for Victoria.

1 Sir Owen Dixon, ‘Two Constitutions Compared’ in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965) 100, 101. See also *New South Wales v Commonwealth* (1948) 76 CLR 1.

2 Ibid 101.

3 In particular, there is no equivalent constitutional protection afforded to an accused to refuse to answer questions on the ground that the answers are potentially incriminating. While an accused can take the benefit of the common law privilege against self-incrimination, that privilege may be abrogated by statute depending on the type of offence. In other words, there is no Australian Constitutional equivalent of ‘taking the Fifth’ amendment. However, the High Court has at times come close to suggesting it might recognise the privilege against self-incrimination as an implication to be drawn from the Constitution: see Justice William Gummow, ‘Full Faith and Credit in Three Federations’ (1995) 46 *South Carolina Law Review* 979, fn 10.

the Bill of Rights of 1791 and *a fortiori* they refused to adopt the Fourteenth Amendment.⁴

Sir Owen Dixon was correct to observe that the *Australian Constitution* expressly protects very few rights and those it does protect, it does so in a limited fashion.⁵ He may have been surprised to learn, pleasantly or otherwise, that the requirement under the *Constitution* that senators and members of the House of Representatives be ‘directly chosen by the people’⁶ has been recognised by the High Court as impliedly guaranteeing a freedom of communication on political and governmental matters that does not permit disproportionate or excessive interference.⁷ More recently, in the case of *Roach v Electoral Commissioner*,⁸ the High Court has recognised a limitation upon legislative power from arbitrary exclusions from the franchise drawn as an incident of representative government.⁹

Dixon was also correct to describe the constitution makers as lacking enthusiasm for the formal protection of personal liberty. As it happens, when Andrew Inglis Clark and other members of the drafting sub-committee of the 1891 Convention sailed down the Hawkesbury River on the *SS Lucinda* on the Easter weekend of 1891, Clark proposed the insertion of an equal protection clause.¹⁰ It was adopted as part of the draft constitution by the 1891 Convention.¹¹ By the time of the 1898 Convention in Melbourne, the idea had developed and Clark proposed, through the Tasmanian Parliament, a more extensive clause prohibiting a

state [from] depriv[ing] any person of life, liberty, or property without due process of law, or deny[ing] to any person within its jurisdiction the equal protection of its laws.¹²

In support of the proposal, Clark had quoted Justice Cooley of Michigan, who had said:

- 4 Dixon, above n 1, 101-102. See also the judgment of Gleeson CJ in *Roach v Electoral Commissioner* [2007] HCA 43, [3].
- 5 Section 80 confers a right to a trial by jury where charged with an indictable offence against the Commonwealth. In addition there are a scattering of express restrictions imposed upon the Commonwealth Parliament which create freedoms for individuals: s 116 restricts the Commonwealth (but not the States) from making any law which establishes any religion, and s 51(xxxi) prohibits the acquisition of property except on just terms. See generally Geoffrey Kennett, ‘Individual Rights, the High Court and the Constitution’ (1994) 19 *Melbourne University Law Review* 581; Paul Kildea, ‘The Bill of Rights Debate in Australian Political Culture’ [2003] *Australian Journal of Human Rights* 7 and George Williams, *Human Rights Under the Australian Constitution* (1999).
- 6 See ss 1, 7, 8, 13, 24, 25, 28 and 30 of the *Australian Constitution*.
- 7 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v State of Victoria* (1997) 189 CLR 579; *Coleman v Power* (2004) 220 CLR 1.
- 8 [2007] HCA 43.
- 9 By reference to ss 1, 7, 8, 13, 24, 25, 28, 30 and 44 of the *Constitution*.
- 10 Williams, above n 5, 37.
- 11 As clause 17 of Ch V of the draft Bill adopted by the 1891 Convention. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 April 1891, 962, 927.
- 12 Clause 17 of Ch V of the draft Bill had by then become clause 110. The variation to clause 110 which Clark had proposed was debated at the 1898 Convention: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 664-691, especially 667.

[T]he security of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power.¹³

The extended clause was rejected¹⁴ and eventually the entire clause was struck out.¹⁵ It was replaced by what Justice Gaudron has described as ‘that curious guarantee’¹⁶ in s 117 that an individual resident of one State must not be subject to any discrimination or disability in any other State to which a resident of that other State would not be equally subject. That measure now defeats local protectionism but little else.

The grounds for the rejection were candid. State governments might not be able to include within employment contracts terms and conditions which overtly discriminated on the ground of race. In the debates the concern was expressed that a clause guaranteeing equal protection of the laws and due process could mean that the ‘state would not be able to impose disabilities upon coloured aliens’.¹⁷ Worse still, the fear was expressed that Western Australia might not be able to continue preventing people from Asia or Africa from obtaining miners’ rights or going on to a goldfield.¹⁸ Indeed, a State might not be able to stipulate that a solitary Chinaman was deemed to be a ‘factory’ and thereby prohibited from ownership of a mineral lease.¹⁹

The motivation of the framers of the *Constitution* for rejecting a Constitutional Bill of Rights may now be universally condemned. Whether the decision to reject was a good or bad thing is a question about which reasonable minds will differ. Be that as it may, it is a consequence of that refusal that, in Australia, the protection of human rights by means of human rights instruments has fallen to individual legislatures. Well over 100 years after the voyage of the *SS Lucinda*, State and Territory Parliaments have found the necessary enthusiasm. The ACT passed its *Human Rights Act* in 2004. The Victorian *Charter of Human Rights and Responsibilities* was passed in 2006 and the Western Australian and Tasmanian governments are currently engaged in community consultation. This type of legislation is likely to become a significant and perhaps a central part of Australian public law.

While the making of individual human rights instruments has been left to the respective Parliaments of each of the polities in the federation, as they so choose, it is nevertheless imperative that each of those Parliaments take account of, and

13 As quoted in Williams, above n 5, 38.

14 *Official Record*, above n 12, 690.

15 *Ibid* 691.

16 The Hon Mary Gaudron, address to the Women Barristers’ Association of the Victorian Bar (15 September 2005).

17 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 246 (Dr Quick).

18 *Official Record*, above n 12, 665-666 (Sir John Forrest).

19 *Official Record*, above n 17, 247.

work within, the constraints imposed by federalism and by the particular shape of federalism drawn by the *Australian Constitution*.

I want to explore in this lecture the ways in which the State of Victoria's *Charter of Human Rights and Responsibilities* has sought to take account of the constraints imposed by Australian federalism. In doing so, I wish to examine the ways in which Victoria's *Charter* differs from the other statutory Bills of Rights to be found in the United Kingdom and, to a lesser extent, New Zealand. In particular, I want to consider three features of Australia's constitutional arrangements that affect the measures provided by the *Charter*.

The first feature is the status of the High Court as a final court of appeal under s 73 of the *Constitution* to which an appeal lies from the Supreme Court of any State from all judgments, decrees, orders and sentences; that is, the requirement that appeals to the High Court only lie from decisions involving the exercise of judicial power.²⁰

The second feature relates to the investment of State courts with federal jurisdiction under s 77(iii) of the *Constitution*. Associated with this feature is the mechanism by which State laws are 'picked up' and applied in federal jurisdiction pursuant to s 79 of the *Judiciary Act 1903* (Cth).

The third feature to consider is the doctrine that Australia has a single common law.

The critical question is: how must State laws seeking to offer statutory protection of human rights operate if they are to find their place within those fixed constitutional arrangements?

Before attempting a detailed answer to that question, might I make two preliminary points aimed at demonstrating that express human rights protection is neither foreign nor unfamiliar to Australia.

The first observation is that while there was a resistance to the creation of positive guarantees of equality and due process rights under the *Constitution*, the framers of the *Constitution* nevertheless recognised that a constitution should afford protection to individuals against the misuse of public power. This recognition famously took expression in s 75(v) of the *Constitution*. Of this, Sir Owen Dixon said:

[It] was written into the instrument to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power.²¹

Section 75(v) is a constitutional guarantee that affords practical results. When the High Court was faced in *Lim v Minister for Immigration*²² with a direction from the Parliament of the Commonwealth 'in unqualified terms, that no court, including [the

20 *Consolidated Press Ltd v Australian Journalists' Association* (1947) 73 CLR 549. However, note the manner in which this proposition is queried in *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 299-300.

21 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363.

22 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

High] Court, shall order the release from custody of a person whom the Executive of the Commonwealth ha[d] imprisoned',²³ if the person fell under the definition of a 'designated person',²⁴ despite the detention being potentially unlawful, it was this 'entrenched minimum provision of judicial review'²⁵ that permitted the Court to invalidate the direction on the ground that it violated that constitutional guarantee. It is s 75(v) which guarantees that the administrative decisions and conduct of Commonwealth officers cannot escape review – it is a 'means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them'.²⁶

This is strikingly analogous to the rationale behind the enactment in 1998 of the *Human Rights Act* in the United Kingdom, which gave effect to the *European Convention on Human Rights* ('ECHR'). As Baroness Hale recently remarked, those proposing the enactment of the *Human Rights Act* took 'the view that the central purpose of the ECHR is to protect the individual against the misuse of power by the state'.²⁷

The second preliminary observation is that Australia has a distinctive and proud history of administrative law governing the relationship between the individual and the State at Commonwealth and State levels. As a result of the work of the Kerr Committee²⁸ in the late 1960s and early 1970s, Australian administrative law includes statutory forms of judicial review²⁹ aimed at clarifying and simplifying the supervisory jurisdiction of superior courts and the protection that jurisdiction affords to individuals from abuse of public power. Administrators became obliged to provide reasons for their decisions – a measure that initially met with great fear by the bureaucracy.³⁰ In addition, the Kerr Committee, and later the Committee on Administrative Discretions under Sir Harry Bland,³¹ recommended the establishment of a separate system of merits review to be conducted by tribunals,³² which has had the effect of promoting consistent, fair and rational

23 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36. See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 81 ALJR 905, 914 [48].

24 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 35-36.

25 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103].

26 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513-514 [104].

27 *YL v Birmingham City Council* [2007] 3 All ER 957, 972 [54], quoting Jack Straw and Paul Boateng, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law* (December 1996).

28 The Kerr Committee was established in 1968 as a committee of legal experts, which included Sir Anthony Mason (who drafted the initial terms of reference), the then Commonwealth Solicitor-General, Justice J R Kerr, Professor Harry Whitmore and (later) Mr RJ Ellicott QC: see Sir Anthony Mason, 'Administrative Law Reform: The Vision and the Reality' (2001) 8 *Australian Journal of Administrative Law* 135, 136-137.

29 *The Administrative Decisions (Judicial Review) Act 1977* (Cth).

30 See Ernst Wilhelm, 'Recollections of an Attorney-General's Department Lawyer' (2001) 8 *Australian Journal of Administrative Law* 151, 159-160.

31 The Bland Committee consisted of Sir Harry Bland, Professor Harry Whitmore and Professor Peter Bailey, assisted by Ernst Wilhelm: see Professor Harry Whitmore, 'Administrative Law Reform: A Personal Recollection' (2001) 8 *Australian Journal of Administrative Law* 144, 145-146.

32 *Ibid*, 146.

decision-making by government officers. There is now a plethora of freedom of information legislation, privacy protection, and protection for whistleblowers.³³ Discrimination by both public and private entities, in certain circumstances, is prohibited and compensable.³⁴ Victoria's *Charter of Human Rights* is another step in the continuum of these forms of administrative law protection in Australia.

Let me turn then, to an examination of Victoria's *Charter of Human Rights* to explain how it operates and whom it binds before I consider the effects of federalism upon it.

I THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

The aim of the *Charter* is to protect and promote human rights where those rights are modelled on those recognised under international law.

There are four central questions at the heart of the *Charter*. Who does the *Charter* benefit? Who does the *Charter* bind? (By 'bind' I mean impose obligations or duties upon.) Which human rights are protected and promoted? How does the *Charter* protect and promote rights?

The answer to the first question, 'Who does the *Charter* benefit?', is a simple one – viz natural persons, that is, human beings.³⁵ The beneficiaries of the rights under the *Charter* are natural persons alone and not legal persons such as corporations. This differs from the coverage afforded by the New Zealand *Bill of Rights Act*,³⁶ where all legal persons have the benefit of human rights (at least so far as is practicable) and differs also from the UK *Human Rights Act*³⁷ and the Canadian *Charter of Rights and Freedoms*.³⁸

33 See, for example, in Victoria: the *Freedom of Information Act 1982* (Vic); the *Whistleblower Protection Act 2001* (Vic); the *Ombudsman Act 1973* (Vic); the *Police Regulation Act 1958* (Vic) and the *Public Administration Act 2004* (Vic).

34 See, for example, *Equal Opportunity Act 1995* (Vic).

35 *Charter*, s 3 (definition of 'person').

36 Section 29: 'Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.'

37 This is because the Convention rights under the *Human Rights Act 1998* (UK) (s 1(1) and Schedule 1) are formulated wholly generally, for example, 'Everyone has the right to freedom of expression' (Article 10 of the European Convention) and it has long been recognised under Convention case law that a 'person' can be a natural or artificial person. See, for example, *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885, in which the UK Court of Appeal held that a company could have privacy rights.

38 Peter Hogg, *Constitutional Law of Canada* (4th ed 1997) at [34.1(b)] says that 'Sections 2, 7, 8, 9, 10, 12, and 17 of the [Canadian] Charter open with the phrase, "Everyone has the right". In ss 11 and 19 "any person" replaces "everyone"; s. 20 uses "any member of the public"; and s. 24 uses "anyone". It seems likely that these various terms are synonymous and that each is apt to include a corporation as well as an individual.' See also *McDonald v Canada* [1995] 3 SCR 199, where the Canadian Supreme Court held that as corporations enjoyed human rights, including the right to freedom of expression, tobacco legislation governing advertising and health warnings were invalid as being inconsistent with that right. The South African Bill of Rights also extends to corporations as all 'juristic persons' are entitled to the rights 'to the extent required by the nature of the rights and the nature of that juristic person' (s 8(4)).

The fact that the protection of the *Charter* extends only to natural persons should not be seen as implying a philosophical commitment to the existence of ‘natural rights’ if by that is meant ‘certain inalienable and fundamental entitlements that inhere in us all as human beings’.³⁹ These rights are of the type declared by the Declaration of the Rights of Man and the Citizen issued in 1789 in the course of the French Revolution, the so-called first wave of rights. This led Jeremy Bentham to make his famous complaint when he wrote:

In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights; – a reason for wishing that a certain right were established, is not that right – want is not supply – hunger is not bread.

That which has no existence cannot be destroyed – that which cannot be destroyed cannot require anything to preserve it from destruction. *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts.⁴⁰

The firstwave of rights is vastly different from the contemporary or third-wave model of human rights *laws* which, as I will seek to show, allow for intrusions or interferences with rights providing those intrusions are proportionate to the objective to be achieved. Moreover, the reference point for contemporary human rights laws are those specific rights enshrined in international human rights treaties made since the end of World War Two – second-wave rights⁴¹ – which have imposed obligations under international public law on State parties to guarantee to all persons within their jurisdiction certain rights.⁴² The contemporary human rights instruments can remain neutral on the philosophical debate about the ultimate metaphysical origin of rights – realist or positivist – accepting only the fact, and significance of the fact, of international human rights treaties.

While not embracing the notion of ‘natural rights’, Victoria has taken the view that there is something significant about the *human* character of human rights and has restricted the range of protection under the *Charter* to human beings. It has sought to sidestep the thorny issue of when human life begins, not by following the ACT model and deeming human life to begin at birth (for the purposes of its *Human Rights Act*), but by providing that nothing in the *Charter* affects any law applicable to abortion.

The answer to the second question, ‘Who does the *Charter* bind?’, is that the *Charter* binds, or imposes duties or obligations on, the three branches of State

39 Conor Gearty, *Principles of Human Rights Adjudication* (2004) 8-9.

40 Jeremy Bentham, ‘Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution’, in Jeremy Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987) 53.

41 See Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights* (2000) for a discussion of the three waves of rights.

42 See David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002) 5, and Gearty, above n 39, 8-9, 13.

government: the Legislature, the Judiciary and the Executive. It is these obligations that provide the key to the operation of the *Charter*.

However, importantly, the *Charter* binds each of the three branches of government in different ways. It binds the Legislature by imposing upon it an obligation to prepare and table compatibility statements for each Bill introduced into Parliament.⁴³ Compatibility statements under the *Charter* are statements by a Member of Parliament expressing the opinion, in relation to a Bill he or she has introduced into Parliament, that the Bill is compatible with human rights, and explaining how it is compatible. Alternatively, if he or she considers the Bill to be incompatible with the *Charter*, the statement must indicate the nature and extent of any incompatibility. These statements are likely to affect policy development within government so as to ensure that the impact of government policy upon human rights is considered at an early stage.

The *Charter* binds the Judiciary by imposing upon it an obligation to interpret all Victorian statutory provisions compatibly with human rights, so far as it is possible to do so, and consistently with the purpose of the legislation.⁴⁴ As I will seek to demonstrate, this interpretive obligation can have a significant impact on litigation.

The *Charter* binds the Executive government of the State by imposing an obligation upon ‘public authorities’ to act compatibly with human rights and to take into account human rights in decision making.⁴⁵ It does this by means of a prohibition upon incompatible conduct and upon failures to take account of human rights in decision making. Conduct by public authorities in breach of this general obligation of compliance will be unlawful.

The definition of ‘public authorities’ is extensive in order to capture, not only Ministers and public servants, but also statutory bodies, local councils, and Victoria Police. Importantly, the definition extends to those bodies that discharge functions of a public nature. This functional definition of a public authority allows the reach of the *Charter* to cover those bodies engaged by the Executive government when it ‘contracts out’ its functions. It means that bodies, such as private corporations, when they are exercising public functions on behalf of the State, are prohibited from acting incompatibly with human rights or failing to take account of human rights in their decisions.

This would mean, for example, that if a private transport corporation is contracted to provide public transport on behalf of the State, the corporation will be bound by the *Charter* when it is exercising those functions but not when it is carrying out its private services. The same applies to private companies that undertake responsibility for the control and management of prisons.

Furthermore, if, for example, a private transport corporation subcontracts the provision of public transport on behalf of the State, the subcontractor will also be

43 *Charter*, s 28.

44 *Charter*, s 32.

45 *Charter*, s 38.

bound as performing public functions on behalf of the contracted private transport corporation, the first public authority in the chain.

What is clear is that the *Charter* does not bind purely private organisations carrying out private functions.⁴⁶

The answer to the third question, ‘Which human rights are protected and promoted?’, is that the rights protected and promoted under the *Charter* are liberal democratic rights modelled on those accepted by the international community in an international convention, the International Covenant on Civil and Political Rights (the ICCPR). This covenant is based on the United Nations Declaration of Human Rights and was adopted by the UN in 1966 and ratified by Australia in 1980.⁴⁷

The rights contained in the ICCPR are those traditionally associated with liberal or democratic humanism: the right to liberty and security of the person;⁴⁸ the right to freedom of movement;⁴⁹ the right to privacy;⁵⁰ the right to freedom of thought, conscience and religion;⁵¹ the right to political liberty including the right to freedom of expression⁵² and peaceful assembly⁵³ and association⁵⁴ and the right to political participation including the right to vote and to stand for office at genuine periodic elections held by universal and equal suffrage.⁵⁵

Let me consider a couple of rights in detail.

The right to freedom of expression is recognised as having two limbs – the right to *hold* an opinion without interference by the State and the right to *communicate* that opinion; that is, the right to seek, receive and impart information in various mediums,⁵⁶ for instance, in speech, writing or action. The right to freedom of expression includes a right to engage in political protest or criticism.⁵⁷

46 See support for the same proposition in the context of the *New Zealand Bill of Rights Act*, *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233, 245 [64].

47 Australia is a party to both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (the ICESCR), having ratified the ICESCR in 1975. However, international covenants are not binding in Australia unless they have been incorporated into Australia law by legislation. There is a limited common law presumption that, at least in the event of ambiguity, statutes are to be interpreted so as not to be inconsistent with established rules of international law: see *Coleman v Power* (2004) 220 CLR 1, 27 [17]–[19] (Gleeson CJ). See also Justice James Spigelman, ‘Blackstone, Burke, Bentham and the Human Rights Act 2004’ (2005) 26 *Australian Bar Review* 1, 7. See *Tomasevic v Travaglini* [2007] VSC 337, [60]–[62].

48 ICCPR, article 9.

49 ICCPR, article 12.

50 ICCPR, article 17.

51 ICCPR, article 18.

52 ICCPR, article 19.

53 ICCPR, article 21.

54 ICCPR, article 22.

55 ICCPR, article 25.

56 These mediums include television programs; commercial advertising; broadcasting, film and video; pictures; sign language; dress and images.

57 *Hopkinson v Police* [2004] 3 NZLR 704.

There are also rights under the *Charter* that apply to those charged with criminal offences. These include the right of a person charged with a criminal offence to be presumed innocent until proved guilty according to law;⁵⁸ the right to be tried without unreasonable delay;⁵⁹ and the right not to be compelled to testify against oneself or to confess guilt.⁶⁰ These are rights which are familiar at common law, but their inclusion in the *Charter* means that the novel mechanisms of the *Charter* apply to them. Any legislation which has an impact upon those rights must be accompanied by a reasoned statement of compatibility. Courts must interpret statutory offences compatibly with the rights under the *Charter*. In the United Kingdom and in New Zealand, this has had a significant effect on the burden of proof that a legislature can impose on an accused, and has restrained an unlimited introduction of reverse onus offences.⁶¹ While a reverse onus has been accepted as compatible for drink driving⁶² and many regulatory offences,⁶³ it has not been viewed as compatible with the presumption of innocence in relation to serious drug offences.⁶⁴ It has also meant, on occasion, that the mens rea element of a statutory offence has needed to be interpreted in light of the rights it might otherwise infringe.

This prompts an answer to the fourth question about the *Charter*: how does the *Charter* operate?

A vivid example of the likely operation of the *Charter* can be drawn from a political protest case that was heard in New Zealand.⁶⁵ In March 2003, a crowd of people marched through the streets of downtown Wellington in New Zealand and assembled in the grounds of Parliament House. One of the protestors held a New Zealand flag attached upside down to a pole as a sign of distress at the policies of the government. The protestor proceeded to douse the flag in kerosene and light it. The flag was consumed in a fireball. The singed end of the pole was extinguished on the grass. No member of the public was harmed.

The protestor was arrested. He was charged with an offence under the New Zealand *Flags, Emblems and Names Protection Act 1981* (the Flag Act). The Flag Act is cast in these terms: every person commits an offence who

in, or within view of any public place, uses, displays, destroys or damages the New Zealand flag in any manner with the intention of *dishonouring* it.⁶⁶

The protestor was convicted by the District Court and fined \$600. He decided to appeal. One of his grounds of appeal was that the Judge in the District Court

58 *Charter*, s 25(1). This is modelled on Article 14(2) of the ICCPR.

59 *Charter*, s 25(2)(c). This is modelled on Article 14(3)(c) of the ICCPR. It serves to protect, inter alia, the interest of an accused in having evidence tested while it remains fresh.

60 *Charter*, s 25(2)(k). This is modelled on Article 14(3)(g) of the ICCPR.

61 See *R v Lambert* [2002] 2 AC 545.

62 *Sheldrake v DPP* [2005] 1 AC 264; *R v Whyte* [1988] 2 SCR 3.

63 *Attorney-General's Reference (No 1 of 2004)* [2004] 1 WLR 2111.

64 *R v Lambert* [2002] 2 AC 545; *R v Hansen* [2007] 3 NZLR 1.

65 *Hopkinson v Police* [2004] 3 NZLR 704.

66 Section 11(1)(b) (emphasis added).

had not been alert to the variety of meanings that the word ‘dishonour’ carries. The Judge had interpreted it as meaning ‘disrespecting’ when he ought to have interpreted ‘dishonouring’, it was submitted, as equivalent to “defiling”, imputing an active and lively sense of shaming or a deliberate act of callousness.⁶⁷ The protestor argued on appeal that, if the statutory offence was interpreted in this way, the type of conduct caught by the offence would be, for example, intentionally urinating on the ashes of the flag or knowingly blowing one’s nose on it, and he had done no such thing.⁶⁸ By contrast, he argued that, according to flag etiquette, burning a flag is the only honourable way to destroy it.⁶⁹

Under the *New Zealand Bill of Rights Act*, the protestor had a right to freedom of expression,⁷⁰ as well as the right of peaceful assembly.⁷¹ On appeal, the Court considered whether, in adopting a natural or broad meaning of the word ‘dishonour’ as the Judge at first instance had done, the offence of dishonouring the flag would restrict or limit the protestor’s right of freedom of expression. It found that there was no doubt that, by adopting a broad meaning of the word ‘dishonour’, prima facie the statutory offence of dishonouring the flag would involve a breach of a person’s right to freedom of expression.⁷²

However, the Court acknowledged that the right to freedom of expression is not absolute. It considered whether the interference or limitation imposed on the right to freedom of expression by the Flag Act was a reasonable, justified or proportionate limit.

The objective of the Flag Act was recognised as the important one of protecting and preserving the flag as an emblem of national significance.⁷³ The Court then engaged in a balancing exercise. This consisted of considering whether the manner in which the Flag Act sought to achieve its objective by imposing a criminal sanction, which might extend even to political protests, was in *reasonable proportion* to the importance of the objective.

The Court concluded that in New Zealand there was an acceptance of the ability to express staunch criticism of the government, even if many in society disagreed with the criticism. It held that *if* the criminal offence extended even to acts of political protest, it was *not* a justified limit on freedom of expression.⁷⁴ As the Court considered that the statutory offence, broadly construed, was a disproportionate intrusion on a right, it moved to the second stage of analysis, that of considering whether any other more compatible interpretation was available.

67 *Hopkinson v Police* [2004] 3 NZLR 704, 708 [22]-[23].

68 *Hopkinson v Police* [2004] 3 NZLR 704, 708 [23].

69 The protestor relied on the United States *Flag Code* 4 USC s 8(k) (1998). See *Hopkinson v Police* [2004] 3 NZLR 704, 709 [31].

70 *New Zealand Bill of Rights Act 1990*, s 14.

71 *New Zealand Bill of Rights Act 1990*, s 16.

72 *Hopkinson v Police* [2004] 3 NZLR 704, 711 [41].

73 *Hopkinson v Police* [2004] 3 NZLR 704, 713 [49].

74 *Hopkinson v Police* [2004] 3 NZLR 704, 717 [77].

The Court sought ‘to identify the meaning which constitute[d] the least possible limitation on the right or freedom in question’.⁷⁵ The Court accepted the protestor’s submissions that the proper meaning of ‘dishonour’, read consistently with the right to freedom of expression, meant to ‘vilify’ or ‘defile’ the flag and this the protestor had not done.⁷⁶ It was that narrow reading, consistent with the protestor’s rights, which the Court was therefore obliged to adopt.⁷⁷ Such was the effect of the interpretive direction that the protestor’s conviction was quashed.

A number of comments can be made about this case. One is that it assists in answering the criticism that a statutory human rights instrument makes no difference. On the other hand, for those who think it suggests that too much latitude is given to a court, one can point out that under the *Charter* the Parliament may, if it wishes, include an express override in an Act which removes that Act from the *Charter* regime.

The case illustrates that before a court is obliged to look for a rights-compatible interpretation, it must first have determined that, *prima facie*, the statute involves a disproportionate intrusion on a human right. The need for a court to find a threshold incompatibility means that the interpretive obligation should only come to life in a limited number of cases. Indeed, in the United Kingdom there have been only 14 recorded cases where the interpretive obligation has been used by a court to find a compatible interpretation since the commencement of the UK *Human Rights Act*.⁷⁸

The flag-burning case also shows that the key to any analysis under contemporary human rights laws is that of proportionality – the question of whether an interference with a right, either by statute or by way of the conduct of public authorities, is a reasonable limit that can be demonstrably justified in a free and democratic society.⁷⁹ This is a complex principle but the nub of proportionality is the simple notion that a sledgehammer should not be used to crack a nut.⁸⁰ The test involves considering whether the law or the conduct is directed at a pressing and substantial objective and whether the means used to achieve the objective is

75 See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 [17].

76 *Hopkinson v Police* [2004] 3 NZLR 704, 717 [79], [81].

77 Note that the test adopted by France J (on appeal from the District Court) differs somewhat from the five-stage test outlined by the New Zealand Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 [16] – [19]. France J at 709 [27] noted that the New Zealand Court of Appeal did not intend the five-stage test to be prescriptive and that other approaches were open.

78 See 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 *Public Law Review* 119, Appendix A ‘Cases Applying s 3(1) of the *Human Rights Act 1998* (UK)’. The Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006) 4, referred to there being 12 cases applying s 3 from October 2000 to July 2006.

79 *Charter*, s 7(2).

80 As the New Zealand Court of Appeal said in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 when applying principles from the leading Canadian Supreme Court decision of *R v Oakes* [1986] 1 SCR 103.

rationally connected to it, and not arbitrary or unfair. The interference should be amongst the range of measures which minimally impair the right.⁸¹

As a visiting scholar to Melbourne said recently, the importance of proportionality means that a human rights culture is a ‘culture of justification’⁸² – a society in which any interference with human rights must be rationally and publicly justified. This approach exposes the Benthamite flaw of considering human rights as absolute and inalienable and substitutes in its place a reasoned and logical approach to the justification of interferences with human rights.

The type of principles underlying the test of proportionality are already familiar in Australia in other contexts.⁸³ While there is no direct application of international human rights jurisprudence to the *Australian Constitution* – and nor could there be given the decision taken by the constitution makers – nevertheless, ‘aspects of the reasoning [from that jurisprudence] are instructive’.⁸⁴ Assessments of proportionality arise in constitutional law with respect to the implied freedom of political communication⁸⁵ and to the guarantee under s 92 that inter-state trade and commerce shall be absolutely free.⁸⁶

- 81 As Chief Justice Dickson said in *R v Oakes* [1986] 1 SCR 103, 138-139: ‘To establish that a limit is reasonably and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom” ... Second, once a sufficiently significant objective is recognized, then the party invoking ... [the reasonable limits test] must show that the means chosen are reasonable and demonstrably justified. This involves a form of “proportionality test” ... There are ... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of “sufficient importance.”’
- 82 Murray Hunt, ‘The UK Human Rights Act: Key Lessons for Australia’ (Paper presented at the Protecting Human Rights Conference, Melbourne, 25 September 2007).
- 83 Brian Fitzgerald, ‘Proportionality and Australian Constitutionalism’ (1993) 12 *University of Tasmania Law Review* 263; Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21 *Melbourne University Law Review* 1; H P Lee, ‘Proportionality in Australian Constitutional Adjudication’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 126; Bradley Selway, ‘The Rise and Rise of the Reasonable Proportionality Test in Public Law’ (1996) 7 *Public Law Review* 212.
- 84 *Roach v Electoral Commissioner* [2007] HCA 43, [17] (Gleeson CJ). See also the reasons of the majority at [101].
- 85 As the majority said in *Roach v Electoral Commissioner* [2007] HCA 43, [85]: ‘[A]s remarked in *Lange* [(1997) 189 CLR 520, 567 fn 272], in this context [the implied freedom of political communication] there is little difference between what is conveyed by that phrase [“reasonably adapted and appropriate”] and the notion of “proportionality”. What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power.’ See H P Lee, ‘The “Reasonably Appropriate and Adapted” Test and the Implied Freedom of Political Communication’ in Matthew Groves (ed), *Law and Government in Australia* (2005) 59-81.
- 86 *Cole v Whitfield* (1988) 165 CLR 360; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472-473.

In the recent case of *Roach*,⁸⁷ where the High Court showed a new-found respect for the Convention debates that had eluded the majority in *Work Choices*,⁸⁸ the majority of the High Court has shown how principles of proportionality apply in the context of disqualification from the federal franchise. The Court recognised that rational and non-arbitrary exclusions from the federal franchise are clearly permissible, for example, disqualification for unsoundness of mind or treason or serious or ‘infamous’ offences. However, it held that the disqualification of all persons convicted and serving a sentence was excessive and disproportionate to the proper objective sought to be achieved⁸⁹ as the disqualification applied no matter how small the sentence and did not include those similarly convicted who did not receive a custodial sentence. There was no regard to degrees of culpability and the provision operated more stringently than that imposed upon candidates and members of the Senate and the House of Representatives.⁹⁰ As Chief Justice Gleeson put it:

The step that was taken by Parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence *broke the rational connection* necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people.⁹¹

The majority said: ‘The net of disqualification is cast too wide ...’⁹²

This form of reasoning will assist Victorian courts in their assessment of whether an Act of Parliament, or conduct engaged in by the Executive, has disproportionately interfered with a human right.

To summarise the operation of the *Charter*, it is intended to provide a ‘check and balance’ on the exercise of public power by imposing duties on the Legislature, the Judiciary and the Executive for the benefit of natural persons. Those duties are to recognise and respect the human rights of natural persons by ensuring that any interference with a human right can be publicly and rationally justified.

87 *Roach v Electoral Commissioner* [2007] HCA 43, [63]-[67].

88 *New South Wales v Commonwealth* (2006) 231 ALR 1, (2006) 81 ALJR 34.

89 *Roach v Electoral Commissioner* [2007] HCA 43, [95].

90 See the reasons of the majority in *Roach v Electoral Commissioner* [2007] HCA 43, [90]: ‘The disharmony between s 93(8AA) of the Act [the impugned provision] and s 44(ii) of the Constitution is plain.’

91 *Roach v Electoral Commissioner* [2007] HCA 43, [24] (emphasis added). The previous provisions of the *Commonwealth Electoral Act 1918*, which excluded prisoners serving sentences of three years or longer, were held to be valid.

92 *Roach v Electoral Commissioner* [2007] HCA 43, [95].

II THE APPELLATE JURISDICTION OF THE HIGH COURT UNDER S 73 OF THE CONSTITUTION

In the flag-burning case, the Court managed to find an interpretation of the criminal offence that was compatible with the accused's right to freedom of expression and freedom of peaceful assembly. Had there been no way of interpreting the statutory offence to render it consistent with the accused's rights, the broader meaning would have had to have prevailed and the conviction would have stood.

In those circumstances, had the case been heard in the Supreme Court of Victoria, the Court could have made a Declaration of Inconsistent Interpretation in the course of convicting the accused. In the UK,⁹³ and the ACT,⁹⁴ these are described as Declarations of Incompatibility. This raises the question of the status of such a Declaration and its relationship to the appellate jurisdiction of the High Court under s 73 of the *Constitution*. Of course, this question does not arise in the United Kingdom.

The question is a thorny one in Australia because the *Charter* provides that 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.⁹⁵

At first sight, one might query why these forms of declaration are given such a weak operation. More significantly, in Australia it might be thought that such a weak mode of operation indicates that there could be no appeal from a proceeding in which a Declaration of Inconsistent Interpretation is made.

The response to the first query is to say that the weak mode of operation is to ensure fidelity to the doctrine of Parliamentary sovereignty. This is one of the many measures in the *Charter* which seeks to provide that assurance. This measure does that by stopping short of conferring on the Supreme Court a power to strike down or invalidate any legislation that is incompatible with the *Charter*. There is no power equivalent to that used by the High Court in *Roach*. Nor is there any power equivalent to that used by the United States⁹⁶ or Canadian Supreme Courts.⁹⁷ The legislation at issue remains in force.

The purpose of the Declaration is to initiate what has been described as a 'dialogue' between the Judiciary and the Parliament. The making of a Declaration puts the Legislature on notice that one of the Acts passed by the Parliament – it may have

93 *Human Rights Act 1998* (UK), s 4.

94 *Human Rights Act 2004* (ACT), s 32(2). See also the *European Convention on Human Rights Act 2003* (Ireland), s 5.

95 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5).

96 *Marbury v Madison*, 5 US 137 (1803).

97 *Canadian Charter of Rights and Freedoms* (Part 1, *Constitution Act 1982* (Canada)) s 24(1), and see s 52(1) of the *Constitution Act 1982*.

been passed at some considerably earlier time – is incompatible with the rights protected under the *Charter* and the Court has found it impossible to interpret the legislation to render it compatible with those rights. In turn, this triggers an accountability mechanism whereby the Attorney-General must, as soon as is reasonably practicable, give a copy of the declaration to the relevant Minister and within six months that Minister must prepare a written response to the declaration and table that response in Parliament. There is no requirement for the legislation to be amended or repealed and the Minister might have a different opinion on the issue of compatibility. Nevertheless, one would expect that the Executive and the Legislature would give very serious consideration to any such Declaration issuing from the Supreme Court.

In the United Kingdom, in the course of over seven years only 18 final Declarations of Incompatibility have been made.⁹⁸ One example is a provision under the *Mental Health Act* that placed the burden of proof on a patient to show that the conditions for his detention were no longer satisfied.⁹⁹ The government responded to that Declaration¹⁰⁰ and has responded on most occasions by amending, repealing or introducing new legislation.¹⁰¹ During the passage of the UK *Human Rights Act*, the Lord Chancellor said that:

[I]n 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility.¹⁰²

The Home Secretary agreed, when he said:

We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the [European] Convention.¹⁰³

In New Zealand there is no express power to make a formal order declaring a legislative provision to be inconsistent with the *New Zealand Bill of Rights Act*,

98 House of Lords, House of Commons, Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgements Finding Breaches of Human Rights*, Sixteenth Report of Session 2006-2007 (18 June 2007) 40-52. This states that between the day on which the *Human Rights Act 1998* (UK) came into force (2 October 2000) and 23 May 2007, a total of 24 Declarations of Incompatibility have been made by domestic courts. Of these, six were overturned on appeal and one remained subject to an appeal in which there is currently no final decision: *Wright v Secretary of State for Health* [2006] EWHC 2006 (Admin). See also Department of Constitutional Affairs (UK), 'Declarations of incompatibility made under section 4 of the Human Rights Act 1998' <<http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>> at 6 November 2007 and John Wadham et al, *Blackstone's Guide to the Human Rights Act 1988* (4th ed, 2007) 95-97.

99 *R (H) v Mental Health Review Tribunal North and East London Region, ex parte H* [2001] 3 WLR 512.

100 By the Mental Health Act 1983 (Remedial) Order 2001.

101 Of the 18 final Declarations of Incompatibility that have been made, 10 have been addressed by new primary legislation; one is currently being addressed by a Bill before Parliament; one was addressed by a remedial order; one is still subject to appeal and there are five remaining in which the UK government is considering how to respond to the incompatibility. See Wadham et al, above n 98, 95-96.

102 Britain, *Parliamentary Debates*, House of Lords, 5 February 1998, col 840, (Lord Irvine, Lord Chancellor) cited by Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 575.

103 Britain, *Parliamentary Debates*, House of Commons, 16 February 1998, col 778 (Jack Straw, Home Secretary) cited by Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 575.

although it is clear that a court may make a finding of inconsistency and indicate its finding¹⁰⁴ in the reasoning of the Court. This confirms that the contemporary model of a human rights instrument could exist intact without the express power to make a Declaration of Incompatibility.¹⁰⁵ However, there is yet a considerable and unresolved controversy on whether a formal order of inconsistency could be made within the inherent jurisdiction of the superior courts of New Zealand.¹⁰⁶

The question of the status of a Declaration of Inconsistent Interpretation has attracted a degree of interest in Australia. Sir Gerard Brennan has commented that in the event of the Attorney-General or a party seeking to appeal to the High Court from a proceeding in which a Declaration of Inconsistent Interpretation was made, ‘there would be a preliminary question whether the subject of the appeal would constitute a “matter”’.¹⁰⁷ A ‘matter’ is usually considered to ‘require “some immediate right, duty or liability to be established by the determination” of a court’.¹⁰⁸ He notes that Professor Geoffrey Lindell favours the view that it would constitute a ‘matter’,¹⁰⁹ but he added:

if there be no issue affecting the rights, duties or liabilities of the parties, the question is not beyond argument. In a sense, such an appeal would be collateral to the issues in the litigation.¹¹⁰

This preliminary question does not affect the power of the Supreme Court, or the Victorian Court of Appeal, to make a Declaration of Inconsistent Interpretation. The High Court has repeatedly confirmed that the separation of powers doctrine

104 In *R v Hansen* [2007] 3 NZLR 1, in the course of undertaking the interpretative analysis, the majority of the Supreme Court found that the provisions in question were inconsistent with the *New Zealand Bill of Rights Act* but stopped short of making a formal declaration of inconsistency (see especially McGrath J, 80 [253]-[254]). In *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507, the Court of Appeal held that a declaration of inconsistency was not available on a criminal appeal as the Court did not have an originating jurisdiction and the issue had not been raised below. In refusing leave to appeal, the Supreme Court left open the issue of whether a declaration of inconsistency was available in criminal proceedings at all (although findings of inconsistency could be made) but confirmed it was appropriate not to make a declaration where no issue of interpretation arose.

105 See James Stellios, ‘Federal Dimensions to the ACT *Human Rights Act*’ (2005) 47 *AIAL Forum* 33, 35: ‘s 30 [the interpretive rule] could fully and completely operate as originally intended without the presence of the declaratory provision in the legislation.’

106 This was first seriously mooted in *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9, 17 (CA). See *Quilter v Attorney-General* [1998] 1 NZLR 523, 554; *R v Poumako* [2000] 2 NZLR 695, 716-718 (Thomas J); *Zaoui v Attorney-General* [2004] 2 NZLR 339; *Taunua v The Attorney-General* [2006] NZSC 95; *Belcher v Chief Executive of Department of Corrections* [2007] 1 NZLR 507. See Andrew Butler & Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) ch 28.

107 Sir Gerard Brennan, ‘“Introduction to Human Rights Law”: Seminar – Part II’ (2007) 81 *Australian Law Journal* 248, 258.

108 See Geoffrey Lindell, ‘The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?’ (2006) 17 *Public Law Review* 188, 204 citing *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265, 266.

109 Brennan, above n 107, 248, 258 citing Lindell, above n 108, 204 et seq.

110 Brennan, above n 107. See also Stellios, above, n 105.

does not directly apply to State Supreme Courts.¹¹¹ A State court may make a decision that involves no more than the giving of a consultative opinion but no appeal will lie to the High Court.¹¹² As Justice Gaudron made it plain in *Kable*:

[T]here is nothing to prevent the Parliaments of the States from conferring powers on their courts which are wholly non-judicial, so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth.¹¹³

Thus, even if the making of a Declaration of Inconsistent Interpretation was seen as a non-judicial administrative function, such functions can be performed by State courts providing they are not antithetical to the judicial process so as to compromise their institutional integrity.¹¹⁴ It would be difficult to imagine that a process designed to protect internationally accepted human rights, many of which have their origins in the common law, could be seen as repugnant or antithetical to the traditional judicial process.¹¹⁵

Moreover, as I hope will become apparent, a Declaration of Inconsistent Interpretation can only be made as part of a judicial proceeding initiated by a party in which the parties' rights and duties are in issue. Thus, even if the making of the Declaration of Inconsistent Interpretation was considered an administrative function, it would be ancillary or incidental to the exercise of judicial power.¹¹⁶

With respect to Sir Gerard Brennan's preliminary question, and in support of the view that the High Court would have jurisdiction on an appeal, it is worth emphasising two important features of this aspect of the *Charter*. The first is that, as far as possible, the ordinary principles governing the grant of declarations should apply and this has been accepted in the United Kingdom.¹¹⁷ The second is that the discretionary power of the Supreme Court to grant a Declaration of Inconsistent Interpretation is, as the name suggests, bound up with, and not separate from, the traditional curial task of statutory interpretation.

As for the ordinary principles governing the grant of a declaration, it is clear at least that the proceeding in which the issue of inconsistency arises must be directed to the determination of a legal controversy in which the plaintiff has a real interest and not to an abstract or hypothetical question.¹¹⁸ Thus, just as the compatibility of New Zealand's Flag Act with the right to freedom of expression

111 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 614; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 77-80 (Dawson J), 118 (McHugh J). See *Collingwood v Victoria (No. 2)* [1994] 1 VR 652, which is authority for the proposition that there is no general separation of powers under the Victorian Constitution. See also *R v Moffatt* [1998] 2 VR 229, 249-250 and Greg Taylor, *The Constitution of Victoria* (2006) 437-444.

112 *Smith v Mann* (1932) 47 CLR 426, 445-446.

113 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 106.

114 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

115 Geoffrey Lindell appears to share this view: Lindell, above n 108, 206.

116 *Cominos v Cominos* (1972) 127 CLR 588; *The Queen v Joske; ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194.

117 See Wadham et al, above n 98, 6.24.

118 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-582.

arose in the context of a criminal prosecution, so too the compatibility of any Victorian legislation with any of the rights protected under the *Charter* must arise in the context of a legal controversy between the parties, criminal or civil. There must be an underlying controversy to be determined by the proceedings – it would not be possible under the *Charter* to bring proceedings seeking no relief other than a Declaration of Inconsistent Interpretation.

The second feature to emphasise is that any Declaration of Inconsistent Interpretation which the Supreme Court might make should occur only at the end point of the process by which the Court seeks, as far as possible, to arrive at a construction that is compatible with the rights protected under the *Charter*. As Lord Steyn said:

What is necessary ... is to emphasise that [a compatible] interpretation ... is the prime remedial remedy and that resort to a [Declaration of Inconsistent Interpretation] must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights.¹¹⁹

It is the construction that is ultimately arrived at by the Court which is final, binding and determinative of the controversy between the parties, just as it was in the flag-burning case. Given the need for compatibility, did the offence require merely disrespect, or did it require contempt? The court decision on that issue was dispositive of the case. Whether a construction is compatible or incompatible with the *Charter*, it is nevertheless the particular construction arrived at by the Court that determines the matter. In the event of incompatibility, the Declaration of Inconsistent Interpretation formally records the character of that construction. It is connected to and is part of the process of construction.

What, then, of an appeal? To stick with the simple example of the flag-burning case, we could imagine that a Court might not have found it possible to accept a compatible interpretation of the statutory offence. Had the case been heard in Victoria, the Supreme Court might have adopted the broad construction of the offence requiring only disrespect and maintained the conviction of the defendant. It might further have held that the broad construction was inconsistent with the defendant's right to freedom of expression and granted a Declaration of Inconsistent Interpretation.

The defendant may well have wished to institute a further appeal to the High Court. In those circumstances, the order from which the appeal would be brought would be the conviction. The requirement for there to be an order, sentence, judgment or decree under s 73 in such a proceeding would be satisfied. Moreover, in the High Court on the appeal, the available interpretations of the statutory offence would remain a live issue. The Court might adopt the interpretation that the offence did indeed require contempt. That narrow interpretation would directly affect the criminal liability of the defendant. The Court might go on to make a finding that

119 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 577.

the Declaration of Inconsistent Interpretation was wrongly made. The conviction might be quashed and the appeal allowed.

On the other hand, if the High Court agreed with the Supreme Court, the appeal would be dismissed, the construction of the offence would not be altered, and the Declaration of Inconsistent Interpretation and the conviction would remain.

None of this requires the High Court to entertain a proceeding on an abstract or hypothetical question or to consider an issue unrelated to any actual controversy between the parties.

Thus, it is a consequence of the need for a legal controversy between the parties in any proceeding in which a Declaration of Inconsistent Interpretation could be made, that substantive relief will be granted or refused in disposing of the proceeding. It is likely to be from those orders granting or refusing the substantive relief, rather than the Declaration of Inconsistent Interpretation itself, that a party would seek to appeal to the High Court. The s 73 requirements would be satisfied.

One would expect that it will be these type of circumstances that will comprise the bulk of those proceedings in which any Declaration of Inconsistent Interpretation might be made, where the construction of a statute which determines legal rights and liabilities is at issue before the court, both at first instance and on appeal, with consequential forms of traditional relief.

Let me consider another example in which ordinary and prosaic forms of substantive relief are made alongside the prospect, or the grant, of a Declaration of Incompatibility.

In the leading case of *Ghaidan v Godin-Mendoza*,¹²⁰ a landlord brought proceedings in the West London County Court claiming possession of a flat following the death of the tenant. He argued that the legislation, which conferred a statutory tenancy upon the surviving 'spouse' of a tenant, did not extend to the same-sex partner of the deceased tenant.¹²¹ The Judge granted traditional declaratory relief that the tenant's partner did not succeed to the tenancy of the flat. There was an appeal on the ground that the interpretation adopted by the trial judge would render the legislation incompatible with a person's right to respect for his or her home without discrimination.¹²² In allowing the appeal, the Court granted a declaration that the tenant's partner did indeed succeed to a statutory tenancy.¹²³ The landlord appealed to the House of Lords.

120 [2004] 2 AC 557.

121 This may be an example of what Geoffrey Lindell describes as 'the reverse side of the same juristic coin', where the right asserted by one party 'may necessarily involve the existence of a right or power which authorises [the other party] to act in a way that interferes with the right asserted [by the first party]': Lindell, above n 108 at 205. (It should be noted that the interpretive obligation may affect the construction of legislation the subject of a proceeding between purely private parties as the interpretation of the meaning of a statute remains uniform. In this way the *Charter* may have so-called indirect 'horizontal' effect.)

122 Article 8 combined with Article 14 of the European Convention.

123 *Ghaidan v Godin-Mendoza* [2003] Ch 380, 396 [36].

The House of Lords confirmed the Court of Appeal's interpretation and held that, as the legislation was not confined to persons who were married but also extended to persons who lived in an analogous relationship to marriage, it should be interpreted as extending to persons in a stable and permanent same-sex relationship. The consequence was that it was able to eschew the making of a Declaration of Incompatibility.

More importantly, for our purposes, the consequence for the defendant was that he was able to resist the proceeding brought by the landlord for possession. Equally importantly, had the House of Lords held that its favoured consistent construction went against the grain or the purpose of the legislation, it may have made a Declaration of Incompatibility at the same time as affirming the order at first instance that the tenant's partner was not a statutory tenant.

This example illustrates that the issue of whether to make, or refuse to make, a Declaration of Incompatibility is not something that is simply 'in the air'. It can arise in the context of ordinary civil litigation as part of a process involving a traditional judicial task, the determination of which includes the grant of ordinary forms of relief.

However, it would be unwise to be categorical. Perhaps there could be occasions in which a party, maybe the State, did not wish to disturb the construction adopted by the court below (maybe because the construction was all too clear), nor did it wish to challenge the grant of any substantive relief that had been made, yet it sought to appeal to the High Court against a Declaration of Inconsistent Interpretation. In those circumstances, the High Court might say that the appeal was incompetent – that it would not be exercising judicial power if it were to assess the compatibility of an agreed construction against the rights protected under the *Charter* and nothing more. This exercise might be too removed from the original justiciable controversy. The re-agitation of the compatibility would then have to wait for another first-instance proceeding. Alternatively, the High Court might adopt the view that the proceeding could be assimilated to that of *Mellifont v Attorney-General (Queensland)*.¹²⁴

In *Mellifont* the High Court upheld the validity of a provision of the Queensland *Criminal Code*, which permitted the Attorney-General to refer to the Court of Criminal Appeal any point of law that arose at the trial of a person on indictment where the person had been acquitted. The reference could not affect the trial or the acquittal. There could be no further determination of the charge. The High Court rejected an argument that a decision of the Court of the Criminal Appeal, because it did not affect the rights of any party, was not a decision made in the exercise of judicial power and so was not subject to an appeal to the High Court under s 73 of the *Constitution*. The High Court said that what was critical was that the decision by the Court of Appeal, although it could not affect the rights of the parties, arose out of curial proceedings and was a statutory extension of those proceedings. As they said:

124 (1991) 173 CLR 289.

The decision is ... to be distinguished from the abstract declaration sought by the Executive government in *In re Judiciary and Navigation Acts*. That opinion was academic, in response to an abstract question, and hypothetical in the sense that it was unrelated to any actual controversy between parties.¹²⁵

Similarly, given the requirements I have outlined, the High Court might take the view that it cannot be said that the making of a Declaration of Inconsistent Interpretation is unrelated to an actual controversy between the parties. Further support might be gleaned from *O’Toole v Charles David Pty Ltd*,¹²⁶ where the answers to questions of law, which did not of themselves determine the rights of parties, were recognised as not constituting merely an advisory opinion because they were given as an integral part of the process of determining the rights and obligations of the parties.¹²⁷ So, too, given that the effect of a Declaration of Inconsistent Interpretation is that no further compatible interpretation can be arrived at, with all the consequences that the particular final interpretation might yield for the parties, the Declaration may also be seen as something which is part of, and not divorced from, an attempt to administer the law. To convert the words used in *O’Toole*, as was done in *Mellifont*, ‘there is no “persuasive reason in law or policy why” [a Declaration of Inconsistent Interpretation] should not fall within the words “judgments, decrees, orders” in s 73’.¹²⁸ As Justices Deane, Gaudron and McHugh said in *O’Toole*:

[I]t is at least arguable that a narrow and legalistic construction of the general words of s. 73, which excludes from the direct appellate jurisdiction of this Court any decision, judgment or order which does not of itself ‘finally determine the rights of parties’ as a matter of strict legal theory ... has the effect of establishing and entrenching an undesirable and illogical defect in the ability of this Court to discharge its function as the final appellate court of the nation. Moreover, such a constrictive construction of the broad phraseology of s. 73 is not readily reconcilable with the settled approach to the [broad and generous] construction of general constitutional grants of power.¹²⁹

From the standpoint of a State Solicitor-General, I am yet to observe the High Court adopt a position of timidity when it comes to the construction of any conferral of power under the *Constitution*, even where it might be thought unanticipated by the framers. However, the final word on these difficult and deep questions must await a determination at some future date from the High Court itself.

125 *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289, 305.

126 (1991) 171 CLR 232.

127 *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 244 (Mason CJ), 283-285 (Deane, Gaudron and McHugh JJ), 302 (Dawson J), 309 (Toohey J).

128 *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289, 305 citing *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 283.

129 *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 283.

III THE INVESTMENT OF STATE COURTS WITH FEDERAL JURISDICTION: S 77(III) OF THE CONSTITUTION

Let me turn, then, to the remaining issues of federal jurisdiction and the separate question of the common law.

On the topic of federal jurisdiction, I wish to focus only upon the question of whether the interpretive obligation, that is, the obligation imposed by s 32 of the *Charter* to interpret all Victorian statutes and regulations compatibly with human rights, so far as it is possible to do so consistent with their purpose, will apply when State courts are exercising federal jurisdiction, or, indeed, when a federal court is exercising jurisdiction.

Sir Gerard Brennan has expressed the opinion that the interpretive obligation will apply in any jurisdiction in which Victorian laws are being interpreted. He said:

As a law of Victoria, the Charter must be given effect by all Australian courts and tribunals under the full faith and credit clause of the *Constitution*. Thus when, for example, a Victorian statute is relied on in proceedings in the Federal Court, that Court will necessarily construe the statute in accordance with s 32 of the Charter.¹³⁰

These comments must be interpreted against the background of the current understanding that a State law does not apply in federal jurisdiction of its own force. A State law only applies in federal jurisdiction if it is ‘picked up’ by s 79 of the *Judiciary Act* and is applied as what is called a ‘surrogate federal law’.¹³¹ The limits imposed by s 79 are that State laws will not be picked up if the *Constitution* or a law of the Commonwealth ‘otherwise provides’.

The *Constitution* does not address the manner in which legislation is to be interpreted and the interpretive direction under s 15AA of the *Acts Interpretation Act 1901* (Cth), which enshrines the purposive rule is confined to Commonwealth laws. In any event, it is a distinctive aspect of the *Charter*’s interpretive obligation that the construction to be arrived at must be consistent with the purpose of the statutory provision under consideration.

As I have mentioned, the interpretive exercise in s 32 will involve the courts making assessments of proportionality. Those assessments are a common feature of the machinery of similar human rights instruments, especially in Canada,¹³²

130 Brennan, above n 107, 258.

131 *Commonwealth v Mewett* (1997) 191 CLR 471, 554 (Gummow and Kirby JJ), *Northern Territory v GPAO* (1999) 196 CLR 553, 573-574 [28], 575 [33] (Gleeson CJ and Gummow J).

132 See s 1 of the *Canadian Charter of Rights and Freedoms*, and *R v Oakes* [1986] 1 SCR 103.

South Africa,¹³³ New Zealand,¹³⁴ and the United Kingdom.¹³⁵ As I indicated at the outset, this form of assessment is already relied on in the context of the implied freedom of political communication, the limitation on the exclusions from the federal franchise and in determining contraventions of s 92. That these exercises have involved the exercise of judicial power is unquestioned.

It follows that the interpretive obligation under s 32 is able to be picked up and adopted in federal jurisdiction or by a federal court.

Of course, the interpretive obligation cannot extend to the construction of Commonwealth laws and the *Charter* makes it plain that its operation is so confined.¹³⁶ However, one can infer that had the legislation in *Al-Kateb*¹³⁷ been Victorian, the construction favoured by the minority of the High Court,¹³⁸ which would not have permitted the indefinite detention of a Stateless person, may well have prevailed.

IV THE SIGNIFICANCE OF THE SINGLE COMMON LAW DOCTRINE

The third feature of Australian federalism which has constrained the operation of Victoria's *Charter* is the doctrine that recognises that in Australia there is a single, national common law.¹³⁹ It is not the case that each State has its own distinctive common law.¹⁴⁰ This doctrine has played an important part in the recent jurisprudence of the High Court.¹⁴¹ By contrast with the United States federal system, in which each State has its own common law ultimately determined by

133 Section 36 of the South African Bill of Rights (in Ch 2 of the *Constitution of the Republic of South Africa* 1966).

134 Section 5 of the *New Zealand Bill of Rights Act 1990*; *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (CA).

135 Although there is no equivalent to s 7(2) of the *Charter* in the *Human Rights Act 1998* (UK), the principle of proportionality is part of the jurisprudence of the European Court of Human Rights and has been applied on numerous occasions by UK courts in assessing the compatibility of legislation with the *Human Rights Act*.

136 *Charter*, s 32, s 4 (definition of 'statutory provision') and s 38 of the *Interpretation of Legislation Act 1984* (Vic).

137 *Al-Kateb v Godwin* (2004) 219 CLR 562; See Rolls, above n 78, 130-134.

138 Gleeson CJ, Gummow and Kirby JJ.

139 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563-564; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 112 (McHugh J); *Lipohar v The Queen* (1999) 200 CLR 485, 505-510 [43]-[57].

140 *Commonwealth v Mewitt* (1997) 191 CLR 471, 522.

141 See particularly *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

the respective State Supreme Court,¹⁴² in Australia the jurisdiction conferred on the High Court includes appeals from the courts in both the state and federal hierarchies. It is ultimately the High Court which will determine the common law for the whole of Australia.

Of course, the existence of a single national common law does not inhibit the incremental differentiation in common law development by State courts as new and unanticipated cases arise that need to be determined. However, that development is ultimately subject to pronouncements by the High Court.¹⁴³

Nor does the existence of a single common law preclude a State Parliament from modifying common law requirements; for example, by capping damages, or introducing statutory thresholds to be met before causes of action can be brought, or indeed by abolishing particular cases of action altogether.

However, a consequence of the existence of a single common law is that it is most likely beyond the power of a State Parliament to direct State courts to develop the common law by analogy with the values protected in the *Charter*. The constraint that flows from this consequence is that the *Charter* could not, and does not, impose direct duties on State courts to develop the common law in a manner that would intentionally entail the differential development of the common law in Victoria from its development throughout the rest of Australia.

By contrast, the United Kingdom Parliament is free to direct its courts to develop the principles of the common law in accordance with the principles embraced by the UK *Human Rights Act 1998*. It has done this by including them within the definition of ‘public authorities’. They are thus subject to a general obligation of compliance with the *Human Rights Act*, just like any other public authority. The courts have responded by developing the common law in this way, particularly in the protection of personal privacy.¹⁴⁴

This constraint of federalism provides the explanation as to why courts are not wholly included within the definition of ‘public authorities’ in the *Charter*. It does

142 See the comments by Sir Owen Dixon in ‘The Common Law as an Ultimate Constitutional Foundation’ (read on 16 July 1957 during the tenth convention of the Law Council of Australia held in Melbourne) in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses*, (1965) 205: ‘How different is the duty of a federal judge in the United States. He must ascertain what is the common law of each State and he must ascertain it from the judicial decisions of authority in that State. For there is no anterior common law. The law of the State, written or unwritten, proceeds from the authority of the organs of government of the State, statute law from the legislature, unwritten law from the judiciary ... It would be difficult to conceive of the exercise of federal jurisdiction in Australia on this basis. Of course it is inconsistent with the appellate jurisdiction of the High Court. But the true reason is that with us the common law was in fact an antecedent system of jurisprudence and has been instinctively so regarded. If it had been otherwise, probably the High Court would not have been established as a court of appeal for Australia. We act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute.’ While Sir Owen Dixon was pointing to the common law as a ‘jurisprudence antecedently existing into which our [Australian] system came’ (at 204), these remarks have also been relied upon to support the doctrine that throughout Australia there is a single common law and not a separate common law for each State. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 fn 259.

143 *Lipohar v The Queen* (1999) 200 CLR 485, 505-506 [45]-[46].

144 See, for example, *Douglas v Hello! Ltd* [2001] QB 967.

not mean that common law forms of relief, such as a stay of proceedings, cannot be given when an accused's right to a trial without unreasonable delay has been infringed. Moreover, common law discretions, which allow for the exclusion of evidence obtained unlawfully,¹⁴⁵ may now have a greater range of application solely because there are now more ways in which the obtaining of evidence can occur unlawfully, *viz.* when obtained in contravention of a relevant right of the accused.

But what the *Charter* cannot do, and does not do, is to embrace a directive from the State Parliament that the principles of the common law are to be developed by reference to a set of external principles mandated by the Legislature. Whether this constraint of federalism leads to a less robust human rights instrument is yet to be seen. In my view, the other mechanisms of the *Charter* provide sufficient scope for it to be seen as an instrument which does indeed take human rights seriously.

V CONCLUSION

The impact of the Victorian *Charter* will become apparent, one hopes gradually, over the next few years. While the *Charter* invites a connection with comparative jurisdictions – and in the case of the United Kingdom, a reconnection – it is clear that its operation must be grounded in the constitutional arrangements of the Australian federation, as set by the framers of the *Constitution*, including those on board the *SS Lucinda*.