

## INCHING TOWARDS AN AUSTRALIAN BILL OF RIGHTS: COUSINLY COMMENTS ON THE AUSTRALIAN NATIONAL HUMAN RIGHTS CONSULTATION REPORT

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### I INTRODUCTION

Comparative insights offered by those not well versed in the history, spirit and traditions of the legal systems and constitutional structures upon which they presume to comment run the risk of appearing misinformed at best and at worst inept.<sup>1</sup> I have nevertheless accepted an invitation to contribute to the current review, not least because the protection of human rights through the judicial process is an area in which I have had a longstanding interest in relation to both the United Kingdom ('UK')<sup>2</sup> and New Zealand,<sup>3</sup> two of the comparators adopted

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\*\* Editor's Note: The following article was written before the release of the Australian Government's response to the National Human Rights Consultation Report: see Australian Government, *Australia's Human Rights Framework* (2010); Robert McClelland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).

1 It is potentially hazardous for an outsider, even perhaps for a commentator whose country of origin is identified in the *Australian Constitution* as being a constituent part of Australia, to seek to reflect upon the *terra incognita* that is for him the *Australian Constitution*.

2 See A T H Smith, 'The *Human Rights Act 1998* and the Criminal Lawyer: The Constitutional Context' [1999] *Criminal Law Review* 251; A T H Smith, 'The *Human Rights Act 1998*: The Constitutional Context' in University of Cambridge Centre for Public Law, *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing, 1999) 3. My interest subsequently has been in working through the implications of certain parts of the Act (fair trial rights and freedom of expression) in the context of the law of contempt of court. See especially A T H Smith, 'Free Press and Fair Trial: Challenges and Change' in Jack Beatson and Yvonne Cripps (eds), *Freedom of Information and Freedom of Speech: Essays in Honour of Sir David Williams* (Oxford University Press, 2000) 123; Anthony Arlidge, Sir David Eady and A T H Smith, 'Contempt of Court: the Constitutional Dimensions' in Anthony Arlidge, Sir David Eady and A T H Smith (eds), *Arlidge, Eady and Smith on Contempt* (Sweet & Maxwell, 3<sup>rd</sup> ed, 2005) ch 2 pt IV ('Contempt of Court: The Constitutional Dimensions').

3 In A T H Smith, 'The Criminal Law and the *Constitution*' in James Bruce Robertson (ed), *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Brookers, 2004) 119, I argued that the criminal law was increasingly seen as an integrated part of a wider constitutional structure, largely as a result of the impact of the implementation of the *New Zealand Bill of Rights Act 1990* (NZ).

in the National Human Rights Consultation Report.<sup>4</sup> That Report is undoubtedly a formidable exercise in public consultation, and it affords an exciting opportunity to reignite interest in the longstanding question of whether the time has come to introduce a federal<sup>5</sup> Bill of Rights into the Australian constitutional mix.

These observations are advanced in the hope that it might be useful to offer a slightly more nuanced interpretation of the developments in New Zealand and the UK than is apparent in the discussion in chapter 11 (in particular) of the Report, and to reflect upon the accuracy of some of the claims made by protagonists on both sides of the debate about what has happened in those two jurisdictions. This is not meant to be a criticism of the Report itself, which is necessarily a somewhat broad-brush end product of a consultation exercise, rather than an academic review that might be expected to address the particularistic issues that are of concern to the body of scholars who now scrutinise minutely these developments and their possible implications.

A few contextual comments may perhaps be pertinent at the outset: I am not particularly fervent as to the question of whether or not there should be a Bill of Rights in Australia, one way or the other. This is a debate with a long history,<sup>6</sup> but it is not one in which I feel well qualified to participate. Concerned agnosticism would best summarise my stance. I am in no doubt, however, about the hugely controversial character of what is at stake in the proposals made by the National Human Rights Consultation Committee ('NHRCC'). By comparison with the two political systems with which I am far more familiar, the opposition in Australia seems altogether more determined – at times even ferocious. Throughout the desultory debates that surrounded the New Zealand exercise, passions ran low and the debates, such as they were, tended to be confined within a rather narrowly legal catchment area. In England, the development was so rapid that, apart from some rather frantic lobbying by the press concerned to protect its own position – fearing, for example, that the Human Rights Bill 1997 (UK) was a

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4 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) ('Report'). The Consultation, chaired by Frank Brennan, presented its report to the Attorney-General on 30 September 2009, having been commissioned to act on 10 December 2008.

5 Victoria and ACT have taken the plunge: see Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008); George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2007) 30 *Melbourne University Law Review* 880.

6 See the summary in National Human Rights Consultation Committee, above n 4, ch 10. See also Philip Alston (ed), *Towards an Australian Bill of Rights* (Australian National University Centre for International and Public Law, 1994); Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009); George Williams, *A Charter of Rights for Australia* (UNSW Press, 2007); Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights* (Ashgate Publishing, 2006).

trojan horse from which a privacy law would ultimately leap forth<sup>7</sup> – there was almost no informed public debate about the merits and demerits of what was proposed.

Resolution in debate of the questions posed by the Report is for the participants in the Australian legal and political communities. They will not lack guidance in the matter in local literature. The crusading zeal of a Geoffrey Robertson<sup>8</sup> must be measured against the principal (and for the most part principled) contemporary expression of the case against having such a Bill in the recent work edited by Julian Leaser and Ryan Haddrick.<sup>9</sup> Some of the concerns expressed in that book about dimensions of the issues involved in the implementation of Bills of Rights measures are familiar from the debates in the UK and New Zealand. Experience shows that a number of the concerns have been somewhat exaggerated, such as the impact of such a development upon the position and capacities of the judiciary.<sup>10</sup>

Insofar as the politics of the matter are concerned, one striking feature that may be noted that is that in each of the three jurisdictions outside Australia that have relatively recently adopted such a Bill, it is possible to identify the powerful personalities of determined politicians who were strongly supportive of the development. In the UK, the Lord Chancellor Derry Irvine is believed to have been the driving force;<sup>11</sup> in New Zealand, it was without question the brainchild of Sir Geoffrey Palmer;<sup>12</sup> and in Canada, Pierre Trudeau. This is not, of course, to minimise the efforts of others who played a part. In the UK, Lord Anthony Lester in particular campaigned tirelessly over the structure and details of the

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7 Subsequent developments have shown that the press might have been right about this, but its insistence on changes as the Bill went through its parliamentary course actually made its own position worse, by allowing the courts to take into account the various codes of conduct by which the press held itself out as being regulated; see particularly *Human Rights Act 1998* (UK) c 42, s 12(3). For a critical survey of recent developments, see House of Commons Culture, Media and Sports Committee, *Press Standards, Privacy and Libel: Second Report of Session 2009–10*, House of Commons Papers 362-I, 362-II, Session 2009–10 (2010).

8 Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage Books, 2009).

9 Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzie's Research Centre, 2009). The book began its life as a submission to the NHRCC which itself contains a summary of the arguments for and against a federal Bill, respectively at chapters 12 and 13.

10 See below Part IV(C).

11 In a letter to Lord Goodlad, Chair of the Constitutional Committee of the House of Lords (2009), former Prime Minister Tony Blair says that Lord Irvine was 'a great public servant who was indispensable [sic] to the constitutional reform programme of the Government, which was the most far reaching since the 19<sup>th</sup> century': House of Lords Select Committee on the Constitution, The Cabinet Office and the Centre of Government: Report with Evidence, House of Lords Paper No 30, Session 2009–10 (2010) 89.

12 See Sir G W R Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System* (John McIndoe, 1992) ch 3 pt III. Sir Geoffrey Palmer there confesses to having had a change of heart in the matter, having previously given a lecture casting doubts on the question whether a Bill of Rights would have suited New Zealand's circumstances.

Bill.<sup>13</sup> But in the absence of some powerful if not charismatic champion of the cause that is represented by the enactment of a Bill, experience tends to suggest that the prospects for success are considerably diminished.

### A Differing Political and Constitutional Contexts

It is sometimes supposed that jurisdictions with a shared common law, Westminster inheritance and early constitutional history are such that legal transplants from one to the other ought to be possible relatively painlessly. This is, of course, not so. Some of the problems confronting the adoption of such a measure in the UK, Canada and New Zealand were in some respects similar – for example, each had to grapple with the difficulty of reconciling the existing traditions of parliamentary sovereignty with an overarching Bill of Rights. But the precipitants of change in each case were decidedly different from one jurisdiction to the other, and these are bound to affect the solutions adopted by the individual jurisdictions. Each nation sets out on its own constitutional journey and is then susceptible to the problems of uncertainty of outcome implicit in this sort of constitutional experimentation. Unlike the Federation of Australia, neither New Zealand nor the UK have consciously set out to commit their constitutional fundamentals to a statutory form.

## II REFLECTIONS UPON ASPECTS OF THE REPORT

### A The Terms of Reference

One of the first aspects of the NHRCC that strikes an outsider to Australia is the astonishingly wide terms of reference. The Attorney-General asked the NHRCC to consult the community on three questions:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?<sup>14</sup>

It was made plain by the terms of reference that the consultation was to be extremely wide, particularly including those who live in rural and regional areas, and whose awareness of the consultation was to be stimulated by the NHRCC for the purposes of ensuring the widest possible engagement. The NHRCC resolved that it would seek out the views of the ‘vulnerable and marginalised groups’ and was ‘particularly concerned to hear from Indigenous Australians, the homeless,

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13 Lord Anthony Lester, ‘Parliamentary Scrutiny of Legislation under the *Human Rights Act*’ (2002) 33 *Victoria University of Wellington Law Review* 1, 3. Lord Lester acknowledges the influence of the New Zealand experience in the UK: ‘The *Human Rights Act 1998* has a New Zealand pedigree, based as it is upon the interpretative model found in the BORA’.

14 National Human Rights Consultation Committee, above n 4, 383.

people with disabilities, people with mental illness, refugees new migrants, [and] prisoners'.<sup>15</sup>

This approach seems to have been framed in such a way as to give rise to heightened (and quite possibly unrealistic) aspirations. For a start, they were almost bound to raise the extremely difficult issue as to whether or not they should include economic and social rights questions such as minimum standard of living, health care and education rights and so forth, which may not be particularly appropriate for judicial resolution.<sup>16</sup>

One constraint imposed upon the NHRCC by its terms of reference was that any solution to protect rights had to 'preserve the sovereignty of parliament and not include a constitutionally entrenched Bill of Rights'.<sup>17</sup> This injunction removed at a stroke one of the potentially most politically difficult issues,<sup>18</sup> and turned the inquiry decisively away from the experience of the United States, the *Constitution of the Republic of South Africa Act 1996* (South Africa) and some European constitutional arrangements. The jurisdictions selected for comparison by the NHRCC were the UK and New Zealand, together with the two Australian jurisdictions, the Australian Capital Territory and Victoria, that have taken the plunge. The absence of Canada from this list is probably explained by the consideration that it is thought to have a 'constitutional bill of rights'<sup>19</sup> which was excluded from consideration by the terms of reference. This is perhaps a matter of some regret. After all, since Canada is (unlike the chosen comparators) a federal jurisdiction, and it was initially prompted to take action because of (amongst other matters) a perceived need to comply with international obligations, and particularly those related to the *International Covenant on Civil and Political Rights*.<sup>20</sup> It too has experience of managing complex relationships with indigenous peoples, the handling of terrorism, originally arising from the Quebec Separatist movement but more recently as the closest neighbour of the United States post-9/11, and it was the jurisdiction in which the 'dialogue'

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15 Ibid 4.

16 Not that judicial involvement is by any means a given in this context. See below Part IV(C).

17 See Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346. Waldron advances a powerful case against permitting the judiciary to be the ultimate custodians of a Bill of Rights, as they are in the United States of America.

18 It was equally summarily dismissed in the UK context, with the remark in United Kingdom, *Rights Brought Home: The Human Rights Bill* (1997) [2.16] that this 'could not be reconciled with our own constitutional traditions'.

19 National Human Rights Consultation Committee, above n 4, 241.

20 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). Canada had ratified the *Convention* in 1976, but the point has been made that impetus for the enactment of the Charter was 'not the *Covenant*, but rather the proposal made by the Trudeau government since 1968 ... Nevertheless, both supporters and critics based many of their arguments upon the duty of this country to implement its international obligations under the *Covenant*': Justice W S Tarnopolsky, 'A Comparison between the *Canadian Charter of Rights and Freedoms* and the *International Covenant on Civil and Political Rights*' (1983) 8 *Queen's Law Journal* 211, 213.

metaphor was originally coined.<sup>21</sup> Canada's solution to the reconciliation of the competing demands of legislative sovereignty and rights protection through the inclusion of an override/notwithstanding clause<sup>22</sup> at least has the merit that it places political responsibility for any derogation from rights protection where it properly belongs: with the legislators.

But those are difficult and controversial issues, and the understandable pressures of time within which the NHRCC was expected to report are very possibly the explanation for the gap in what was not, after all, a leisurely academic survey but rather a publicly accessible exercise in consultation that was required to be conducted in a considerable hurry, in the fulfilment of an electoral pledge.

The NHRCC took the view that what was common to all of the chosen comparators was that they had the aim of facilitating a 'dialogue' between the three arms of government – the executive, Parliament and the judiciary.<sup>23</sup> For reasons that I shall explain below,<sup>24</sup> I believe that this is wrong in relation to New Zealand, not just as a matter of historical fact, but because the system in its operation does not in fact promote dialogue. It was, quite simply, not conceived of as having that function. The importance of the point is that the system is the worse for it insofar as it enables an already powerful executive to ignore the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZ Bill of Rights Act*') with impunity, and leaves the judges in a position where they are almost powerless to intervene.

## B The 'Dialogue' Model

I hesitate to add further to the already considerable literature that has been devoted to the discussion of what has become known as the 'dialogue model',<sup>25</sup> which has been portrayed in some quarters as a continuing personal interaction between the courts and the other organs of government, or that what was envisaged was some sort of personal and constant interplay. That is certainly not what Professor Peter Hogg and his colleagues mean by it. In the most recent article, the authors say:

In '*Charter Dialogue*,' we referred to the sequence of new laws following *Charter* decisions as a '*Charter dialogue*' between the courts and legislatures. By this, we

21 Peter W Hogg and Allison A Bushnell, 'The *Charter Dialogue* between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal* 75. The authors of that enormously influential paper have returned to the fray more recently in an important article, Peter W Hogg, Allison A Bushnell Thornton and Wade K Wright, '*Charter Dialogue Revisited – Or "Much Ado about Metaphors"*' (2007) 45 *Osgoode Hall Law Journal* 1.

22 *Canada Act 1982* (UK) c 11, sch B pt I, s 33 ('*Canadian Charter of Rights and Freedoms*').

23 National Human Rights Consultation Committee, above n 4, 241.

24 See below Part III(C).

25 Tom R Hickman, 'Constitutional Dialogue, Constitutional Theories and the *Human Rights Act 1998*' [2005] *Public Law* 306; Sara Jackson, 'Designing Human Rights Legislation: "Dialogue", the Commonwealth Model and the Roles of Parliament and Courts' (2007) 13 *Auckland University Law Review* 89; Philip A Joseph, 'Parliament, the Courts, and the Collaborative Exercise' (2004) 15 *King's College Law Journal* 321; Michael Taggart, 'Commentary: "Dialogue" as Inter-Branch Communication' in Claudia Geiringer and Dean Knight (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, 2008) 340.

did not mean that the courts and the legislatures were literally ‘talking’ to each other. We made it clear that all that we meant by the dialogue metaphor was that the court decision in *Charter* cases usually left room for a legislative response, and usually received a legislative response.<sup>26</sup>

There was no suggestion that, when the courts had spoken, they had had the last word or the most decisive one. What generally happened in response to an adverse judicial ruling in Canada as to the constitutionality of any particular decision was that the legislature found ways of accomplishing its objectives without violating *Charter* rights.

It may be true to say that the *Human Rights Act 1998* (UK) c 42 (*‘UK Human Rights Act’*) was intended to introduce what might be termed a ‘dialogue model’<sup>27</sup> (although it was not conceived of in those terms) but I believe that this is not true in New Zealand.<sup>28</sup> This is not meant to be a pedantic exercise in historical accuracy – there is an important point of substance here. The structure of the *NZ Bill of Rights Act* is such that there is simply no expectation that there will be a legislative response if the courts were to make any adverse remarks about any legislation that might not be consistent with that Act.

The reasons are: first, there is no specific statutory authority<sup>29</sup> for the making of a declaration of incompatibility.<sup>30</sup> Second, the *UK Human Rights Act* has an express mechanism for alerting the UK government when the making of a declaration by a court is contemplated so that it can, if it chooses to do so, become a party to the proceedings<sup>31</sup> – clear parliamentary recognition that there is a significant public interest in the litigation which requires public engagement by the government. There is nothing comparable in the New Zealand law. Third, there is also a statutory mechanism for fast tracking amendments, if necessary, by the executive,<sup>32</sup> an explicit acknowledgement that some executive and parliamentary response is called for when a declaration is made. In New Zealand, by contrast, the supporting machinery for the promotion of dialogue is absent. Judges can always point out difficulties with legislation to the relevant authorities, but they can have no expectation that the authorities will even listen, let alone respond to what has been said.

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26 Hogg, Thornton and Wright, above n 21, 4.

27 National Human Rights Consultation Committee, above n 4, 241.

28 Taggart, above n 25, 342 lends implicit support for this proposition by the remark that there was a ‘belated realisation’ that the courts possibly could make such a declaration. I am grateful to Sir John McGrath for reminding me of this aspect of the essay.

29 As to the argument that there may be some sort of implied power, see below Part III(C).

30 This may be contrasted with the position of the Human Rights Commission, which does have the power to make such a declaration, as has been pointed out by its current Chairman in Royden Hindle, ‘Rights against Legislated Discrimination: A Sleeping Giant? Part 1A of the *Human Rights Act 1993*’ [2008] *New Zealand Law Review* 213. The 1993 date of this Act is not as significant as might be supposed. The power was introduced as an amendment in 2001, and is clearly based upon the UK precedent. It seems bizarre to permit lesser tribunals to make such declarations. There is currently before Parliament a Regulatory Reform Bill containing a similar proposal.

31 *Human Rights Act 1998* (UK) c 42, s 5.

32 *Ibid* s 10.

There has, it is true, been some pressure applied to the courts to suggest that it is open to the courts to supply what Parliament has failed to provide, with the suggestion that there is an implied power to make a declaration of inconsistency, but it is pressure that the New Zealand courts have so far resisted.<sup>33</sup>

### III THE NEW ZEALAND EXPERIENCE<sup>34</sup>

As in the UK and Australia, the debates surrounding the possibility of the adoption of a Bill of Rights for New Zealand were somewhat distant memories when they were resurrected by Sir Geoffrey Palmer and his colleagues in 1985. In 1950, the abolition of the Upper House, the Legislative Council<sup>35</sup> and the first part of the post-electoral system, together handed executive and legislative power to the government, and so made constitution watchers – of whom it must be said, there were not that many – somewhat nervous, at least until the mixed member proportional voting system was introduced.<sup>36</sup> One argument in favour of action was the need to make the New Zealand legal system compliant with the requirements of the *ICCPR*.

Historically, discussion of the issue was almost invariably sidetracked if not sabotaged by the parliamentary sovereignty problem<sup>37</sup> which, simply stated, was that it was not possible for one Parliament to bind itself and its successors. To the extent that it was incompatible with an earlier piece of legislation, a later Act impliedly repealed the former. Initially the draft Bill of Rights Bill 1989 (NZ) intended to overcome this by following the Canadian model and conferring the power upon the judges to declare legislation invalid. This was seen as a step too far. Consultation suggested very strongly that the New Zealand public was simply not prepared for it at that stage. This gave rise as a fall back to what has been characterised as the ‘interpretative model’.<sup>38</sup> The courts were to interpret any legislation as best they could with the terms of the *Bill of Rights Act*, but if they could not find a rights-consistent interpretation that was the end of it. The later Act took precedence over the former. A major innovation was, however, to

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33 See below Part III(C).

34 The leading works on the *New Zealand Bill of Rights Act* are: Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis New Zealand, 2005); Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003).

35 The leading work on the subject is W K Jackson, *The New Zealand Legislative Council: A Study of the Establishment, Failure and Abolition of an Upper House* (University of Otago Press, 1972).

36 Sir Geoffrey Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, 2<sup>nd</sup> ed, 1987). Sir Geoffrey Palmer described the New Zealand Parliament as enacting ‘the fastest law in the west’. By the time of the third edition, he had been joined as author by Matthew Palmer, and the title of the work had metamorphosed into *Bridled Power: New Zealand under MMP*, a title that changed again to *Bridled Power: New Zealand's Constitution and Government* (Oxford University Press, 2004).

37 Petra Butler, ‘Human Rights and Parliamentary Sovereignty in New Zealand’ (2004) 35 *Victoria University Wellington Law Review* 341.

38 Lester, above n 13, 3. An alternative description and operation is analysed in Janet L Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 *Modern Law Review* 7.



be found in section 4 that set aside the doctrine of implied repeal, by providing in that no court should hold any provision to be impliedly repealed by reason only that that provision was inconsistent with the *NZ Bill of Rights Act*.

In 1990, there was the rather widespread view that, because of the way in which the sovereignty issue had been resolved, the adoption of such a measure would make very little difference in the New Zealand setting,<sup>39</sup> and could even go the same way as the original Canadian Bill of 1960, in spite of the best endeavours of its framers to prevent that fate from befalling their handiwork. Once the power of judicial review of legislation had been subtracted from the original proposals and draft Bill, the development lost much of its attraction for many practitioners and academics. It was a matter of concern to some<sup>40</sup> that, in the first few years of its life, the courts sought to give some teeth to the Act by excluding evidence that had been secured in criminal cases in breach of the Act<sup>41</sup> ‘inventing’ the power to award damages and considering suggestions that they might issue declarations of incompatibility.

It is clear, however, that the New Zealand experience was very influential on developments in the UK as that jurisdiction sought to ‘bring rights home’. It provided, for example, the mechanism whereby Parliament directed the courts not to apply the sovereignty doctrines of implied repeal in the event of a clash between the Bill of Rights and other legislation, even to legislation enacted after the *NZ Bill of Rights Act* became law, to be found in section 4 of that Act. This is mirrored almost precisely in the *UK Human Rights Act*,<sup>42</sup> and it is not impossible that the discussion of the possibility of conferring a statutory power to make a declaration had its origins in New Zealand’s experience.<sup>43</sup>

## A Impact upon Policy Formulation

One aspiration expressed for the *NZ Bill of Rights Act* was that it should operate as a beacon for those promoting and promulgating legislation.<sup>44</sup> It has certainly gone some way towards meeting this objective, but the overall

39 See Philip Joseph, *Constitutional and Administrative Law in New Zealand* (Lawbook, 3<sup>rd</sup> ed, 2007) ch 27; Butler and Butler, above n 34; Rishworth et al, above n 34.

40 A particularly shrill critic is James Allan, ‘What’s Wrong about a Statutory Bill of Rights?’ in Julian Leaser and Ryan Haddrick (eds), *The Case against an Australian Bill of Rights* (Menzie’s Research Centre, 2009) 83. He speaks of ‘Alice in Wonderland’ interpretations. Allan identifies 12 further articles in which he rails against modern tendencies to accord the unelected judiciary any further powers: at 83 n 1.

41 *Simpson v Attorney-General* [1994] 3 NZLR 667 (‘Baigent’s Case’).

42 For a thorough account of the way in which the legislation accommodates the traditional doctrines of parliamentary sovereignty, see Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, 2008).

43 The suggestion appears to have been made first in F M Brookfield, ‘Constitutional Law’ [1992] *New Zealand Recent Law Review* 231, 239. Brookfield said that where a court found an inconsistency, it ‘should ... formally declare that inconsistency even though it can go no further than that’.

44 In the introduction to New Zealand Ministry of Justice, *A Bill of Rights for New Zealand – A White Paper* (1985) 6, Geoffrey Palmer wrote ‘In practical terms the Bill of Rights is a most important set of messages to the machinery of Government itself. ... a Bill of Rights provides a set of navigation lights for the whole process of Government to observe’.

conclusion would have to be that this is not nearly as far as was desired by the framers of the Act. The mechanisms that were fashioned to accomplish these objectives were to be found in section 7 of the Act, which requires the Attorney-General to certify in appropriate cases a belief that a particular measure does not comply with the *NZ Bill of Rights Act*. One might have supposed, and certainly one might have wished, that this would be sufficient to bring the errant measures into line. The Attorney-General is in New Zealand a member of the government, and indeed a member of the Cabinet. But the evidence is that Ministers are by no means invariably chastened by an adverse report. Indeed, there is some evidence of political grandstanding surrounding the process, and it is not unknown for Ministers to treat such a report as ‘a badge of honour’.<sup>45</sup> A recent survey, quoted by the NHRCC,<sup>46</sup> paints a dispiriting picture, at least for those who expect that Ministers and governments will take seriously the commitments to respect rights that are inherent in the *NZ Bill of Rights Act*. The lesson from this would seem to be that, until there is any prospect that there might be some political damage arising from the decision to ignore legal advice, the protections expected of the certification process can be overridden with impunity. The Cabinet Manual does, it is true, require the Minister bringing a legislative proposal to Cabinet to certify that the measure is *NZ Bill of Rights Act*-compliant.<sup>47</sup> How effective this might be is a matter of some debate.<sup>48</sup> If a Minister is not going to be deterred by the public disapprobation of the Attorney-General, he or she is hardly likely to be deflected from a desired policy objective by a private rebuke.

Furthermore, the certification process can be circumvented if an amendment is made in the course of the progress of a Bill through Parliament. The internationally controversial ‘three strikes’ penal policy was introduced to the Sentencing and Parole Reform Bill 2009 (NZ) when it was before the Law and Order Select Committee and before the Bill’s second reading. The use of the so-called ‘urgency’ process, a vehicle that can be used to curtail parliamentary (never mind public) debate, is used with great frequency (by all recent governments, it must be said) and can be used as a way of avoiding the constraints of the *NZ Bill of Rights Act*. The ancient defence of provocation was abolished without any kind of replacement or substitute through use of the urgency device.<sup>49</sup> Nor is there any special parliamentary mechanism for ascertaining whether proposed legislation might fall foul of the Bill, comparable to the very important Joint Committee on Human Rights in the UK.

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45 See Paul Rishworth, ‘Human Rights’ [2005] *New Zealand Law Review* 87, 104.

46 Tessa Bromwich, ‘Parliamentary Rights-Vetting under the NZBORA’ [2009] *New Zealand Law Journal* 189. The figures given in that article at 189 (8 of the 17 Bills impugned in the five year period studied were enacted without any amendment to cater for the objections) rather outweigh the opinions expressed in Andrew S Butler, ‘Strengthening the Bill of Rights’ (2000) 31 *Victoria University Wellington Law Review* 129.

47 New Zealand Cabinet Office, *Cabinet Manual 2008* (2008) [7.60].

48 Andrew Geddis, ‘The Comparative Irrelevance of the *New Zealand Bill of Rights Act* to Legislative Practice’ (2009) 23 *New Zealand Universities Law Review* 465.

49 *Crimes (Provocation Repeal) Act 2009* (NZ).

## B On Interpretation

Under the *NZ Bill of Rights Act*, judges operate under the terms of section 6, which provides: ‘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 precise effect of that provision has been the subject of a considerable volume of litigation.<sup>50</sup> Most recently, it was accorded extended exegesis for the first time by the Supreme Court in *R v Hansen*<sup>51</sup> in the context of legislation that appeared on its face to place a probative burden of proof upon a defendant in drugs supply cases (‘until the contrary is proved’) in breach of the presumption of innocence contained in section 25(c) of the *NZ Bill of Rights Act*. The Court held that the language of the Act was clear, resisting the argument that it should (as had happened in the interpretation of a very similar provision in the UK in *R v Lambert*)<sup>52</sup> interpret the provision in such a way as to impose an evidential burden only.

There are, however, considerable differences of opinion between the members of the Court as to the precise methodology to be applied to the interpretative task mandated by the interplay between the relevant sections of the *NZ Bill of Rights Act*. If the critics of the *NZ Bills of Rights Act* generally are looking for the ammunition that these instruments have a destabilising effect on the clarity of the law, some is undoubtedly to be found in *Hansen*. It is quite simply unclear whether the courts are free to adopt a meaning that is manifestly at odds with a clearly expressed parliamentary intention – the majority in that case appeared to say not, but there was strong dissent from the Chief Justice, Dame Sian Elias, in particular.

## C An Implied Power to Make a Declaration of Incompatibility or Inconsistency?<sup>53</sup>

A recurrent question that has arisen over the operation of the New Zealand system is whether, despite parliamentary silence on the matter, there is an implied power to make a declaration of incompatibility. At the time when the legislation was enacted, the possibility of making such a declaration was not even considered. Drafters of legislation were expected to make their legislation

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50 See Kris Gledhill, ‘The Interpretative Obligation: The Duty to Do What Is Possible’ [2008] *New Zealand Law Review* 283.

51 [2007] 3 NZLR 1 (‘*Hansen*’). See Claudia Geiringer, ‘The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*’ in Claudia Geiringer and Dean Knight (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, 2008) 69. See also Hanna Wilberg, ‘The *Bill of Rights* and Other Enactments’ [2007] *New Zealand Law Journal* 112.

52 [2002] 2 AC 545.

53 See Claudia Geiringer, ‘On a Road to Nowhere: Implied Declarations of Inconsistency and the *New Zealand Bill of Rights Act*’ (2009) 40 *Victoria University Wellington Law Review* 613. Geiringer concludes that New Zealand should legislate for the possibility of review if that is what is thought desirable: at 647. See also Philip A Joseph, ‘Constitutional Law’ [2009] *New Zealand Law Review* 519, 529 (declarations of inconsistency).

consistent with the *NZ Bill of Rights Act* in the first place, and courts were to interpret the legislation in accordance with *NZ Bill of Rights Act*'s terms, but that was as far as it went.

Doubts as to whether or not there might be a power to make such a declaration have crept in to the arena, heightened perhaps by how the *UK Human Rights Act* explicit provides for this possibility. New Zealand academics have argued that there is such an implicit power,<sup>54</sup> and as the Report notes, at least one individual judge has gone further and issued a declaration.<sup>55</sup> The difficulty is that there can generally be no real expectation that if a court is critical of the provisions of an Act, there will be any executive or legislative reaction. This means that the dialogue, in the sense employed by Professor Hogg and his colleagues cited earlier,<sup>56</sup> is not really in play here. Of course, it is open to courts to draw perceived inadequacies in the law to the attention of those responsible for reforming and making the law. As Michael Taggart pointed out, 'on countless occasions over the centuries the judges in their judgments have commended remedial action to the legislature, and many times they have been heeded'.<sup>57</sup> There is not, however, in the New Zealand political context, an expectation that there will be an executive or legislative response to what is said by the court. The furthest that the courts have been prepared to go on this issue is probably to be found in *Hansen* where McGrath J spoke of a 'reasonable constitutional expectation'<sup>58</sup> that might arise in appropriate circumstances.

In my view, the New Zealand courts have been wise to be circumspect about claiming any power to make a declaration, and to be reluctant to harness the ordinary declaratory power for these purposes, in the absence of the constitutional support and surrounding remedial structures as are to be found in the UK legislation. This is perhaps especially the case when it is quite clear that Parliament intended the offending legislation to operate in the way that is said to be objectionable under the *NZ Bill of Rights Act*. There are, it is perfectly true, good constitutional reasons why courts should not stand by when the rights of individual litigants are at variance with the protection that they are intended to be accorded by the *NZ Bill of Rights Act*.<sup>59</sup> But if Parliament wants the courts to intervene in such situations, it is for Parliament to indicate as much. Again, it

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54 See Brookfield, above n 43; Paul Rishworth, 'Reflections on the *Bill of Rights* after *Quilter v Attorney-General*' [1998] *New Zealand Law Review* 683; Butler, above n 46; Andrew S Butler, 'Judicial Indications of Inconsistency – A New Weapon in the *Bill of Rights* Armoury?' [2000] *New Zealand Law Review* 43; Claudia Geiringer, 'Declarations of Inconsistency Dodged Again' [2009] *New Zealand Law Journal* 232.

55 National Human Rights Consultation Committee, above n 4, 244, citing *R v Poumako* [2000] 2 NZLR 695, 715–8 [86]–[107] (Thomas J); *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17 [20] ('*Moonen*'). As written, the section in the Report is slightly misleading, since Thomas J was in a dissenting minority of one – the other members of the Court were not persuaded that it was necessary or appropriate, and in *Moonen* the Court did no more than give an 'indication' that the legislation was inconsistent, rather than make a declaration to that effect: at 720 of the Report.

56 Hogg, Thornton and Wright, above n 21.

57 Taggart, above n 25, 342.

58 *Hansen* [2007] 3 NZLR 1, 80.

59 *R v Poumako* [2000] 2 NZLR 695, 715–8 [86]–[107] (Thomas J).

would seem wise for the drafters of an Australian Bill to make their intentions in the area abundantly plain.

#### D Constitutional Reform in New Zealand

In view of the remarks that are made below relating to the impact of the reform of the judicial system in the UK,<sup>60</sup> it may be noted that, during the period under discussion, a major constitutional reform was undertaken, which affected the position of the judiciary, namely the abolition of an appeal to the Privy Council, and its replacement by an appeal to the newly created Supreme Court.<sup>61</sup> Although this measure, whose gestation period began well back in the middle of the 20<sup>th</sup> century, was surrounded by a measure of controversy, it was not a development that threatened in any sense the independence of the judiciary in a way that happened in the UK. On the contrary, by cutting formal links with a significant part of New Zealand's heritage, parliamentarians may have been seen by the public and the judges as offering an expression of confidence in the local judiciary.

### IV THE UNITED KINGDOM<sup>62</sup>

Even though it has been in place for a period of 10 years, the future and status of the *UK Human Rights Act* within the UK Constitution are both somewhat uncertain.<sup>63</sup> There have been a number of reviews of the Act conducted by government agencies,<sup>64</sup> and the influential parliamentary Joint Committee on Human Rights has subjected the experience to a thoroughgoing review.<sup>65</sup> In the run up to the general election held on 6 May 2010, all three of the major political parties had expressed varying degrees of dissatisfaction with the current situation. It cannot, even now, be regarded as a deeply embedded part of

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60 See below Part IV(B).

61 *Supreme Court Act 2003* (NZ) ss 6, 42. The Act took effect in October 2003, although it was not until February 2010 that the Court operated from a separately constructed new courtroom. See generally Philip A Joseph, 'The Higher Judiciary and the *Constitution*: A View from Below' in Rick Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, 2006) 213.

62 There are many books on the operation of the *Human Rights Act* in the United Kingdom. The most comprehensive is Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2009). See also Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in Its First Decade* (Hart Publishing, 2008).

63 For a valuable recent survey, see Merris Amos, 'Problems with the *Human Rights Act 1998* and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 *Modern Law Review* 883.

64 See Department of Constitutional Affairs, United Kingdom, *The Review of the Implementation of the Human Rights Act* (2006); Ministry of Justice (UK), *Rights and Responsibilities: Developing our Constitutional Framework*, Cm 7577 (2009).

65 Joint Committee on Human Rights, *A Bill of Rights for the UK?* House of Lords Paper No 165, House of Commons Paper No 150, Session 2007–08 (2008). For an analysis of the work that such committees undertake throughout the Commonwealth, see Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' [2006] *Public Law* 785.

the Constitution of the UK.<sup>66</sup> That said, the Conservative Party's stated intention to repeal the Act and replace it with a British Bill of Rights seemed farfetched in its aspirations, and misconceived in the remedies that it proposes.

The genesis of the *UK Human Rights Act* is not perhaps widely understood.<sup>67</sup> This is not unimportant since, as has been pointed out,<sup>68</sup> the genesis of the Bill can have a considerable impact on its subsequent reception. The main purpose of the Act was to incorporate the 1950 *Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>69</sup> a treaty of the Council of Europe, into UK municipal law. This has nothing to do with the different regime, the European Union ('EU'), which began life as a movement towards economic integration, and was for a time known as the European Economic Community, headquartered in Brussels. The treaty, the *European Convention on Human Rights*, undoubtedly had its origins in the revulsion at the horrors perpetrated by Nazi Germany during the Second World War, and it was a guarantee given by the signatory nations to one another that they would not treat their own nationals in ways that would violate the *Convention*. Since it was an international instrument, proceedings were initially to be brought by governments rather than individuals,<sup>70</sup> but a right of individual petition was also provided for, and the UK conferred that right on its citizens in 1966.<sup>71</sup>

The treaty was drafted in large part by British civil servants and the rights it contained were thought to be summaries of the relevant sections of the common law.<sup>72</sup> All the more puzzling, then, that as the years progressed, and particularly after the UK accorded the right of individual petition in 1966, and the full

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66 Francesca Klug, 'A Bill of Rights – Do We Need One or Do We Already Have One?' [2007] *Public Law* 701.

67 See Felicity McMahon, 'The *Human Rights Act 1998* (UK): An Impossible Compromise' in Julian Leeser and Ryan Haddrick (eds), *Don't Leave us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre, 2009) 271, who having stated that 'the effect of the *ECHR* in the UK was confusing' at 272, goes on to assure us that '[w]hereas the European Community exercised legislative powers within the scope of EC law, the *ECHR* constituted general principles of EC law': at 271–2. It is beyond the scope of this exercise to explain the distortions and misunderstandings that those few words contain.

68 As Masterman points out, the UK courts have paid considerable heed to the *European Convention* jurisprudence: Roger Masterman, 'Interpretations, Declarations and Dialogue: Rights Protection under the *Human Rights Act* and *Victorian Charter of Human Rights and Responsibilities*' [2009] *Public Law* 112, 115.

69 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

70 An example of this form of proceeding is to be found in *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A), in which it was argued by the Irish government that some of the methods of interrogation being employed in Northern Ireland were a violation of the anti-torture provisions of the *Convention*.

71 Lord Lester, 'UK Acceptance of the Strasbourg Jurisdiction: What Really Went on in Whithall in 1965' [1998] *Public Law* 237.

72 Geoffrey Marston, 'The United Kingdom's Part in the Preparation of the *European Convention on Human Rights 1950*' (1993) 42 *International & Comparative Law Quarterly* 796.

significance of this development began to manifest itself,<sup>73</sup> the UK was found with increasing and embarrassing frequency to be in violation of the *Convention*. The judges adhered for as long as they could to the constitutional objection that they should not incorporate the *Convention* through the back door,<sup>74</sup> when Parliament had not taken steps to implement the treaty in municipal law. That said, however, the courts appeared to take the view, increasingly, that they were caught within an impossible place by their position under an unincorporated treaty. The few judicial techniques that were available to them – such as the presumptions of statutory interpretation in favour of treaty compliance when legislation was enacted – were not sufficient to enable them to administer the law in a *Convention*-compliant way. Shortly before the *UK Human Rights Act* was enacted, it was probably true to say that the senior judiciary were more or less unanimously in favour,<sup>75</sup> and it is probably fair to say that judicial calls for the enactment of the Bill were probably decisive.

What was astonishing about the enactment of the *UK Human Rights Act* was the speed with which the *Convention* came in the end to be incorporated into domestic law. The Conservative Party was consistently opposed to any such development, and the conversion of the Labour Party to the cause would have been describable as deathbed but for the fact that the corpse arose and walked. A consultation paper was published on December 1996, by Jack Straw MP and Paul Boateng MP,<sup>76</sup> setting out the Labour Party's plans to incorporate the *European Convention*,<sup>77</sup> and a White Paper was published very shortly after the government took office on 1 May 1997.<sup>78</sup> The Bill to accomplish this objective, the UK

73 It took some time for the ramifications of this change to work their way through the legal system. Even then cases could take a considerable time to reach the European Commission whose task was to seek to find a friendly settlement between the parties. It was the decision of the Court in *Sunday Times v United Kingdom* (1979) 2 EHRR 245 which awoke the public awareness of the potential power of the weapon contained in the *Convention*. There is the possibility of individual petition under the *International Covenant on Civil and Political Rights*, but it has not proved to be a particularly effective constraint upon governmental action so far as either the UK or New Zealand is concerned.

74 *Brind v Secretary of State for the Home Department* [1991] 1 AC 696.

75 See Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] *Public Law* 397; Sir Thomas Bingham, 'The *European Convention on Human Rights*: Time to Incorporate' (1993) 109 *Law Quarterly Review* 390; Lord Woolf, 'Droit Public – English Style' [1995] *Public Law* 57; Sir Stephen Sedley, 'Human Rights: A Twenty-First Century Agenda' [1995] *Public Law* 386; Lord Lester, 'The Mouse That Roared: The Human Rights Bill 1995' [1995] *Public Law* 198, 198 n 1 stated that his Bill had the support of most Law Lords, both serving and retired. As has been pointed out, this was 'an entirely new and very significant development': Michael Zander, *A Bill of Rights?* (Sweet and Maxwell, 4<sup>th</sup> ed, 1997) 37.

76 Paul Boateng and Jack Straw, 'Bringing Rights Home: Labour's Plans to Incorporate the *European Convention on Human Rights* into UK Law' [1997] *European Human Rights Law Review* 71.

77 For comment, see John Wadham, 'Bringing Rights Home: Labour's Plans to Incorporate the *European Convention on Human Rights* into UK law' [1997] *Public Law* 75. See generally Lord Lester, 'First Steps towards a Constitutional Bill of Rights' [1997] *European Human Rights Law Review* 124; Sir Nicholas Lyell, 'Whither Strasbourg? Why Britain Should Think Long and Hard before Incorporating the *European Convention on Human Rights*' [1997] *European Human Rights Law Review* 132; John Wadham, 'Bringing Rights Half-Way Home' [1997] *European Human Rights Law Review* 141; Conor A Gearty and K D Ewing, 'Rocky Foundations for Labour's New Rights' [1997] *European Human Rights Law Review* 146.

78 United Kingdom, above n 18.

Human Rights Bill, was introduced into the House of Lords on 23 October 1997, and received Royal Assent on 9 November 1998. It is perhaps noteworthy that although the *UK Human Rights Act* was passed in 1998, it was not actually brought into force until 2 October 2000, mainly to allow for time to educate those responsible for implementing it, that is, lawyers, judges and administrators.

Even after the *UK Human Rights Act* was implemented, it remains possible for the disappointed litigant in the UK to approach the European Court.<sup>79</sup> One slightly odd feature of the operation of the *Human Rights Act* and the *Convention* that is perhaps worth noting is that when proceedings are taken in Strasbourg, the government becomes a party to the litigation. Its obligation in the event of an adverse finding is to alter the law (or practice) to ensure that it is made *Convention*-compliant. The European Court does not generally give any guidance as to how the change might be implemented. It is an early example, in that sense, of a dialogue model of rights protection.<sup>80</sup>

### A Interpretation in the UK

One of the major criticisms of the operation of the *UK Human Rights Act* has concerned the extent to which the courts have been prepared to stretch the language in the Act under construction to make the outcome rights-compliant.<sup>81</sup> Critics argue that this is often judicial law making under the guise of interpretation.<sup>82</sup> Two points may perhaps be made in defence of the judiciary. In the first place, Parliament intended to introduce a stronger mode of interpretation, since it departed from the conventional position that the courts were supposed to be looking for the intention of Parliament,<sup>83</sup> whatever that might mean. And second, there is a subtle interplay at work in the UK between the task of interpreting statutes under the section 3 obligation, and a finding of inconsistency

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79 A recent example being *Financial Times v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 821/03, 15 December 2009). The proceedings are not, technically, an appeal. Rather, they are parallel proceedings, the decision of the Court having no direct impact upon the domestic proceedings. There is an obligation upon the state against which there is an adverse ruling in particular proceedings to take steps to remedy the deficiency in its laws, but no obligation to do so retrospectively in the case giving rise to the ruling.

80 See Merris Amos, 'The Impact of the *Human Rights Act* on the United Kingdom's Performance before the European Court of Human Rights' [2007] *Public Law* 655.

81 See especially Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) pt I 'Questions of Interpretation'.

82 For criticisms of judicial law making, particularly in the context of the criminal law, see A T H Smith, 'Judicial Law Making in the Criminal Law' (1984) 100 *Law Quarterly Review* 46.

83 See the remarks of Cooke LJ in the House of Lords when the Bill was under discussion there, in United Kingdom, *Parliamentary Debates*, House of Lords, 18 November 1997, vol 583, col 533 (Robin Cooke): 'Clause 3(1) of the Bill definitely goes further than the existing common law rules of statutory interpretation, because it enjoins a search for possible meanings as distinct from the true meaning'. The gist of those remarks is repeated in *R v Director of Public Prosecutions; Ex parte Kebilene* [2000] 2 AC 326, 373–4. Claudia Geiringer questions whether any real difference between the two provisions can be found, at least so far as the language employed is concerned: Claudia Geiringer, 'The Principle of Legality and the *Bill of Rights Act*: A Critical Examination of *R v Hansen*' in Claudia Geiringer and Dean Knight (eds), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, 2008) 69.



under section 4. The particular target of the critics is the decision of the House of Lords in *Ghaidan v Godin-Mendoza*,<sup>84</sup> where the House of Lords held that legislation protecting the inheritance rights of a deceased's 'spouse' could be extended to protect a same sex partner. The House was unanimous in deciding that the legislation did violate the anti-discrimination provisions of the *UK Human Rights Act*, but was divided on the question whether it was legitimate to interpret the word 'spouse' in a way that was never intended by Parliament in the first place. To the puzzlement of the critics,<sup>85</sup> a majority decided that it was possible to give the word the rights-compliant 'meaning'.

## B Constitutional Change in the Blair/Brown Years

Critics of the National Human Rights Consultation Report make the point that the implementation of a *UK Bill of Rights* of whatever form would inevitably result in constitutional change.<sup>86</sup> It is impossible to deny the truth of this assertion, but it is not at all easy to say how far change will be effected. One difficulty that confronts those seeking to identify the precise impact of the constitutional changes that might have been precipitated by the implementation of the *UK Human Rights Act* is that the introduction of that legislation was just one of a number of significant constitutional reforms undertaken in the years of the Blair Government.<sup>87</sup> Professor Vernon Bogdanor identified 15 such issues in his article 'Our New Constitution'.<sup>88</sup>

The measures included devolution of self-government powers to Scotland, Wales and Northern Ireland, which created a quasi-federated state, and introduced changes to the electoral system such as proportional representation into those jurisdictions and for the elections for the European Parliament. A *Freedom of Information Act 2000* (UK) c 36 was finally enacted (after much feet-dragging on the part of governments of all persuasions) and brought into force in January 2005. The House of Lords was substantially reformed as a political body by the enormous reduction of the number of hereditary peers who were permitted to participate in the legislative process.<sup>89</sup>

84 [2004] 2 AC 557. Another object of critics' ire is to be found in *R v A [No 2]* [2002] 1 AC 45, where the House of Lords read down a section of the *Youth Justice and Criminal Evidence Act 1999* (UK) c 23 affording victims of sexual offences the protection of 'rape shield' laws in such a way as to reinstate the judicial discretion to admit the complainant's sexual history, in spite of fairly clear evidence that Parliament's intention had been to remove the discretion.

85 See, eg, Claudia Geiringer, 'It's Interpretation, Jim, But Not as We Know It: *Ghaidan v Mendoza*, The House of Lords and Rights-Consistent Interpretation' (2005) 3 *Human Rights Research Journal* <<http://www.victoria.ac.nz/NZCPL/HRRJ/vol3/Geiringer.pdf>>. See also Claudia Geiringer, 'The Principle of Legality and the *Bill of Rights Act*: A Critical Examination of *R v Hansen*' (2008) 6(1) *New Zealand Journal of Public and International Law* 59. The Supreme Court of Victoria has declined to follow the reasoning of the House of Lords in *R v Momcilovic* [2010] VCSA 50 (17 March 2010) [69]–[110].

86 This is inherent in many of the contributions to the work of Leeser and Haddrick, above n 9.

87 Blair himself referred to 'the constitutional reform programme of the Government, which was the most far-reaching since the 19<sup>th</sup> century': House of Lords Select Committee on the Constitution, above n 11.

88 Vernon Bogdanor, 'Our New Constitution' (2004) 120 *Law Quarterly Review* 242.

89 *House of Lords Act 1999* (UK) c 34, s 1.

In his later book,<sup>90</sup> Professor Bogdanor claims that the *UK Human Right Act* ‘revolutionises our understanding of rights. It is likely, in the long run, to transform both our understanding of human rights and the relationship between government and the judiciary. It has also increased the power of the judiciary’.<sup>91</sup>

The most significant developments, for present purposes though, were the enormous changes made to the position of the judiciary at the highest level. The Judicial Committee of the House of Lords, for many years the highest court in the land, was replaced by a new Supreme Court,<sup>92</sup> a new judicial appointments system was introduced, and there were major changes to the role of the Lord Chancellor through the *Constitutional Reform Act 2005* (UK) c 4. It is still too early to piece together precisely what happened around this process. It came as a bolt from the blue when the government announced in June 2003 that it had abolished the office of the Lord Chancellor, as though by a stroke of the pen. Farce followed when it was pointed out that this would require, to say the least, a huge number of statutory amendments, and the ‘abolition’ was put on hold while this step was put in train.<sup>93</sup>

The tensions generated during this process are laid bare in the lecture given by the then Chief Justice, Lord Woolf,<sup>94</sup> who expressed the view that ‘[i]f the Constitutional Reform Bill becomes law in its present form, we cannot take the continued individual, or collective, independence of the judiciary for granted’.<sup>95</sup> Two years after that, his successor Lord Bingham was still expressing reservations,<sup>96</sup> although by that time, a ‘concordat’ guaranteeing judicial independence had been hammered out. In such an environment, where it became plain that the protection conventionally accorded to the judiciary through the office of the Lord Chancellor was being withdrawn,<sup>97</sup> it is perhaps not surprising that the judiciary became somewhat more assertive in the protection of their own position. This was not the judiciary being ‘activist’, to use the critic’s favourite weasel word. Their independence was being seriously undermined by a

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90 Vernon Bogdanor, *The New British Constitution* (Hart Publishing, 2009). See especially ch 3, ‘The *Human Rights Act*: Cornerstone of the New Constitution’.

91 Ibid 62.

92 Implementation of the Act was delayed until satisfactory accommodation could be found. See Lord Hope, ‘A Phoenix from the Ashes? – Accommodating a New Supreme Court’ (2005) 121 *Law Quarterly Review* 253.

93 Some insight is to be found in Constitution Committee, *The Cabinet Office and the Centre of Government*, House of Lords Paper No 30, Session 2009–10 (2010) [188]–[217], that is, the section titled ‘The Proposal to Abolish the Office of the Lord Chancellor’. Lord Irvine (who had been sacked by the Prime Minister to make way for the reforms) had himself earlier given evidence to the Committee.

94 Lord Woolf, ‘The Rule of Law and a Change in the Constitution’ (Speech delivered at the Squire Centenary Lecture, Faculty of Law, University of Cambridge, 3 March 2004), later published as Lord Woolf, ‘The Rule of Law and a Change in the Constitution’ (2004) 63 *Cambridge Law Journal* 317.

95 Lord Woolf, ‘The Rule of Law and a Change in the Constitution’ (2004) 63 *Cambridge Law Journal* 317, 327.

96 Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67.

97 In the course of his lecture, Lord Woolf referred to the then incumbent Lord Falconer as ‘that engagingly friendly and cheerful chappie’: Woolf, above n 95, 320.

government that took the view that nearly all constitutional change had to be for the good.

### C Altering the Role of the Judiciary<sup>98</sup>

At a conference<sup>99</sup> held in Sydney on 2 October 2009, one of the speakers, Keith Mason,<sup>100</sup> whose distinguished legal career culminated in the Presidency of the New South Wales Court of Appeal for a period of 11 years, advanced a series of what appeared to be formidable constitutional objections to any judicial involvement and participation in the proposed federal Charter of Human Rights. In particular, he said that he was ‘opposed to involving the courts in the enterprise, even or especially in the so-called dialogue model. In my view they should not be required or empowered to reinterpret statutes in light of [human rights] norms or to make non-binding declarations on a similar basis’.<sup>101</sup>

One of the reasons offered for this stance was that a Bill of Rights might raise matters with which the courts are not equipped to deal. Insofar as the objection is directed to the social and economic rights, involving as they do questions relating to the distribution of resources, I am inclined to agree,<sup>102</sup> although there is considerable comparative literature on the judicial handling of these claims successfully and effectively.<sup>103</sup> Whilst I believe that had the UK paused to consider these claims, the *UK Human Rights Act* would never have made it on to the statute book, it is arguable that the Australian political experience is sufficiently different to give rise to a more ambitious outcome. One of the great attractions for the UK in proceeding by way of incorporating the European *Convention* was precisely that the UK was in any event obliged to comply with

98 John Smillie, ‘Who Wants Juristocracy?’ (2006) 11 *Otago Law Review* 183. See also Ian Callinan, ‘In Whom We Should Trust’ 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) 73; Kenneth Handley, ‘Human Rights: The Question Is – Who Is the Master?’ 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) 111.

99 The ‘Protecting Human Rights’ Conference, organised by the University of New South Wales Gilbert + Tobin Centre of Public Law, and held on 2 October 2009.

100 Keith Mason, ‘A Judicial Perspective’ (Speech delivered at the 2009 Protecting Human Rights Conference, Art Gallery of NSW, Sydney, 2 October 2009) <[www.gtcentre.unsw.edu.au/publications/papers/558.asp](http://www.gtcentre.unsw.edu.au/publications/papers/558.asp)>.

101 Ibid.

102 Principally for the reasons given in the Solicitor-General’s advice and included in Appendix E of the Report itself: see Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Supplementary Opinion*, Solicitor-General Opinion Nos 40, 68 (2009). There is tension here with the NHRCC’s terms of reference.

103 An opinion by a group of Melbourne barristers puts forward a sympathetic case: Peter Hanks, Debbie Mortimer, Kristen Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights – Memorandum of Advice*, Human Rights Law Resource Centre <<http://www.hrlrc.org.au/files/Advice-on-Constitutionality-and-Justiciability-of-ESC-Rights.pdf>>. In the UK too, there is considerable interest in moving towards the protection of economic and social rights. See Sandra Fredman, ‘New Horizons: Incorporating Socio-Economic Rights in a British Bill of Rights’ [2010] *Public Law* 297.

the *Convention* and there was no need to spend much time debating the merits and demerits of its contents.

But I find it more difficult to agree when the issue involves civil and political rights, such as the protection of freedom of speech. Under the traditional methods of rights protection, the courts have frequently had to mould the laws in such a way as to balance competing demands of, for example, free speech and the right to privacy. It is perhaps unique to the situation in the UK to ask the question: why should the judges from that jurisdiction be any less competent at evaluating the respective claims of say privacy and confidentiality (on the one hand) and freedom of the press on the other than the judges in the European courts?

More significantly, though, the problem arises even in the absence of a Bill of Rights, as can be shown by the example selected by the former judge. Mason instanced the protection to be accorded to journalistic sources as an area where the courts might be inhibited. In the UK, at least, the example is not particularly apposite to prove Mason's point. It has been litigated at the highest level as a result of the *Contempt of Court Act 1981* (UK) c 49, having been to the House of Lords on four occasions before the *UK Human Rights Act* was enacted.<sup>104</sup> Subsequently, the issue has been litigated before the European Court of Human Rights on two occasions, on both of which the UK law has been found wanting.<sup>105</sup>

There is nothing unusual about the political dimension of courts' decisions. In *M v Home Office*,<sup>106</sup> for example, the courts were confronted by a claim on the part of the executive that court orders addressed to Ministers of the Crown were not binding on the political figure. The Court insisted that the rule of law no less was at stake, and insisted that the executive must obey court orders as a matter of law and not as a matter of convenience.

Exposure to criticism by the press is also raised by Mason, as an objection to the proposed Bill, buttressed by the claim that the Australian press is particularly robust.<sup>107</sup> Administering the law involving the press in the UK is not without its hazards either, particularly when the press is disappointed at the outcome of a particular case or series of cases.<sup>108</sup> But this lack of respect on the part of the press has long been evident. After the decision of the House of Lords in *Attorney*

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104 See generally Anthony Arlidge, Sir David Eady and A T H Smith (eds), *Arlidge, Eady and Smith on Contempt* (Sweet & Maxwell, 3<sup>rd</sup> ed, 2005) ch 9. The cases were *British Steel Corp v Granada Television Ltd* [1981] AC 1096; *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339; *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660; *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1.

105 *Financial Times v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 821/03, 15 December 2009); *Goodwin v United Kingdom* (1996) 22 EHRR 123.

106 [1994] 1 AC 377.

107 See Mason, above n 100.

108 Some sections of the press have been particularly critical of Sir David Eady in his development of the law of privacy. But see House of Commons Culture, Media and Sports Committee, *Press Standards, Privacy and Libel: Second Report of Session 2009–10*, House of Commons Paper 362-I, Session 2009–10 (2010) 27 [76], which stated that it had 'received no evidence ... that the judgments of Mr Justice Eady in the area of privacy have departed from following the principles set out by the House of Lords and the European Court of Human Rights'.

*General v Times Newspapers Ltd*,<sup>109</sup> the *Daily Mirror* published a front page caption ‘You Fools’ and displayed the photographs of the majority members of the Lords (Templeman, Ackner, and Brandon) upside down. The law of contempt of court by scandalising is, in effect, a dead letter in the UK.<sup>110</sup> Robust treatment by the press has not prevented the courts from developing the concept of ‘responsible journalism’ whose standards must be complied with as the price to be paid by newspapers in order to be able to avail themselves of a species of qualified privilege.<sup>111</sup>

## V CONCLUSION

There can be no doubt that such a Bill would affect the *Australian Constitution*, and it seems idle to pretend otherwise. There was stout denial that this would occur in the UK (and I refer here particularly to the remarks of the Lord Chancellor when he introduced the Bill to the House of Lords on 23 November 1997, which asserted that it was intended to preserve the constitutional status quo).<sup>112</sup> As this paper rather shows, the *UK Human Rights Act* has had something of a destabilising effect on the constitution that manifests itself in debates about such matters as to the extent to which the courts are expected to exhibit some sort of ‘deference’ to the legislature.<sup>113</sup> So far as Australia is concerned, it is uncertain what changes would be effected to the *Constitution*, which hence makes it difficult to deal with the question: are the benefits that might be secured an adequate quid pro quo?

Notwithstanding my initial scepticism about the efficacy of Bills of Rights, particularly over the New Zealand model, I believe that it has been on balance a positive development in both New Zealand and the UK.<sup>114</sup> Both have flaws. The experience of New Zealand and the UK suggest that the weaker form of

109 [1992] 1 AC 191 (‘*Spycatcher’s Case*’).

110 See Arlidge, Eady and Smith, above n 104, ch 5, pt V [5], [204], [209]. Cf *Gallagher v Durack* (1983) 152 CLR 238, 244 (Gibbs CJ, Mason, Wilson and Brennan J).

111 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205. See Ian Loveland, ‘A New Legal Landscape? Libel Law and Freedom of Political Expression in the United Kingdom’ [2000] *European Human Rights Law Review* 476.

112 See Lord Irvine’s discussion of the changes that might be effected by the Act, in Lord Irvine, ‘The Development of Human Rights in Britain under an Incorporated *Convention on Human Rights*’ [1998] *Public Law* 221. See also Lord Irvine, ‘Keynote Address’ in Jack Beatson, Christopher Forsyth and Ivan Hare (eds), *Constitutional Reform in the United Kingdom: Practice and Principles* (Cambridge University Press, 1998) 2.

113 Richard Clayton, ‘Judicial Deference and “Democratic Dialogue”: The Legitimacy of Judicial Intervention under the *Human Rights Act 1998*’ [2004] *Public Law* 33; Francesca Klug, ‘Judicial Deference under the *Human Rights Act 1998*’ [2003] *European Human Rights Law Review* 125; T R S Allan, ‘Human Rights and Judicial Review: A Critique of “Due Deference”’ (2006) 65 *Cambridge Law Journal* 671; Alison L Young, ‘In Defence of Due Deference’ (2009) 72 *Modern Law Review* 554.

114 I am conscious that this view is not shared by all. See especially K D Ewing, *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (Oxford University Press, 2010). He argues that the experience of the *Human Rights Act* has been ‘another chapter in a sorry story of an ineffective judicial response to the exercise of real State power’: at viii.

interpretation provision that is to be found in the UK is more acceptable to traditional ways of thinking.<sup>115</sup> But the absence of an explicit power to make a declaration of inconsistency in New Zealand is a weakness, and a source of uncertainty. If the weaker form of interpretation were to be adopted, discouraging the element of judicial law making, and then coupled with an explicit power to make a declaration of inconsistency or incompatibility that invites the executive or legislature to think again about a measure that has been found to offend rights, then that would provide a true dialogue model which leaves the ultimate protection of rights in the hands of politicians (where it belongs) rather than with the courts.

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115 Jane Wright, 'Interpreting Section 2 of the *Human Rights Act 1998*: Towards an Indigenous Jurisprudence of Human Rights' [2009] *Public Law* 595; Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the *Human Rights Act 1998*' (2006) 26 *Oxford Journal of Legal Studies* 179.