

A MINIMALIST CHARTER OF RIGHTS FOR AUSTRALIA: THE UK OR CANADA AS A MODEL?

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Minimalist: Involving minimum change or intervention

– Oxford English Dictionary

Most commentators agree that, if Australia is to adopt a charter of rights, such a charter should so far as possible involve a 'minimalist' form of constitutional change.¹ It should both be enacted by ordinary statute and seek to preserve broad scope for the Commonwealth Parliament, in appropriate cases, to override the interpretation of non-Constitutional rights by the High Court. When it comes to questions of form and enforceability, the thinking is that it should be modelled on either the *Human Rights Act 1998* (UK) c 42 ('UK HRA'), and the largely equivalent state statutory charters in the ACT and Victoria,² or on the *Canadian Bill of Rights*, SC 1960, c 44 ('CBOR').

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1 For the idea of minimalism in constitutional law, particularly as applied to the process of judicial review, see Cass R Sunstein, *One Case At A Time: Judicial Minimalism on the Supreme Court* (1999).

2 See *Human Rights Act 2004* (ACT) ('ACT HRA'); *Victorian Charter of Rights and Responsibilities 2006* (Vic) ('Victorian Charter'). For relevant differences, see, eg, Carolyn Evans, 'British Influences on Australian Human Rights Acts' (Paper presented at the Faculty of Law, Oxford University, 24 April 2007); Simon Evans, 'The Victorian Charter of Rights and Responsibilities and the ACT *Human Rights Act*: Four Key Differences and their Implications for Victoria,' Paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Canberra, 21 June 2006. In many ways, the *Bill of Rights 1990* (NZ) is also another model in this same broad category, but as a potential precedent raises certain additional complications. One complication is that it contains no express power to make a declaration of incompatibility or inconsistency, and therefore to the extent such a power is judged desirable even on minimalist grounds, raises unnecessary complications. Another difficulty is that it has been interpreted by the New Zealand Court of Appeal to imply certain fairly maximalist remedies, including a right to damages for the breach of the Act: see, eg, *Simpson v A-G* [1994] 3 NZLR 667 ('Baigent's Case'). For some, this raises concerns about the stability of weak-form judicial review: see, eg, James Allan, 'Take Heed Australia – A Statutory Bill of Rights and Its Inflationary Effect' (2001) 6 *Deakin Law Review* 322, 333 (discussing the emotive power of 'rights talk' referencing a bill of rights); Grant Huscroft,

Not only would a statutory charter of this kind be easier to adopt than a more entrenched model of charter, such as a charter modelled on the US Bill of Rights, the Canadian *Charter of Rights and Freedoms* 1982 (the second and later of Canada's two operative human rights charters) ('Canadian Charter'), or *Constitution of the Republic of South Africa* 1996. By formally preserving broad scope for Parliament to override a decision of the High Court in respect of rights, it would also, proponents argue, be more respectful of existing democratic commitments than a US-style rights charter.³

As between the two different statutory charter models provided by the UK *HRA* and *CBOR*, when it comes to the question of judicial enforcement, most charter commentators further suggest that the British model is the *more* minimalist of the two.⁴ By purporting to limit the power of courts to declare legislation invalid for inconsistency with a rights charter, or adopting a system of 'weak remedies',⁵ the British model not only gives Parliament formal power to amend or expressly to suspend rights as they have been interpreted by the Court, but also the formal power to decline to respond to a declaration of incompatibility by the Court. It is therefore even closer, so the argument goes, to Australia's current system of human rights protection.⁶ Partly for this reason, it is also now the model endorsed by National

³ 'Protecting Rights and Parliamentary Sovereignty: New Zealand's Experience with a Charter Inspired, Statutory Bill of Rights' (2002) 21 *Windsor Yearbook of Access to Justice* 111, 129 (arguing that increased rights-consciousness produces a strong gravitational pull away from weak-form judicial review); Mark Tushnet, 'Judicial Activism or Restraint in a Section 33 World' (2003) 53 *University of Toronto Law Journal* 89, 89-90. However, it may also reflect more specific problems associated with the design of the NZBOR, and the approach of some members of the New Zealand Court of Appeal in the early years of the operation of the NZBOR: see, eg, Andrew S Butler, 'Declaration of Incompatibility or Interpretation Consistent with Human Rights in New Zealand' (2001) *Public Law* 28 (on design); Anna Adams, 'Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal' (1996) *New Zealand Law Review* 368 (summarizing the approach of Lord Cooke and other members of the Cooke court to the NZBOR).

³ It should, of course, be noted that the degree to which the US leaves scope for democratic dialogue between the Supreme Court and the elected branches, either via *United States Constitution* art V, § 5 of the Fourteenth Amendment or otherwise, is itself a contested question.

⁴ When it comes to the substantive rights the two charters protect, the *CBOR* is generally agreed to be much narrower and to that extent more minimalist – but potentially too much so. See Walter S Tarnopolsky, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms' (1981) 44(3) *Law and Contemporary Problems* 169. See also Part III below.

⁵ On the distinction between strong – versus weak-forms of review, see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008).

⁶ See, eg, Hilary Charlesworth, 'Who Wins under a Bill of Rights?' (2006) 25 *University of Queensland Law Journal* 39, 50 (arguing that, whatever the merits of democratic concerns about judicial review in the name of human rights, such concerns are directly answered by such a power); Geoffery Robertson, *The Statute of Liberty: How Australians Can Take Back their Rights* (2009) 47-48 (arguing for such a model as representing a true 'half-way' house model); George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880.

Human Rights Consultation Committee in its *National Human Rights Consultation Report*.⁷

While sympathetic to the idea of charter minimalism, this paper challenges this minimalist orthodoxy favouring a UK-style charter.

At the level of substance, rather than form, charter minimalism requires not only that Parliament retain the ultimate power to override decisions of the High Court in respect of rights, but also that Parliament be in practice willing to contribute to defining the scope and priority to be given to particular rights. If the Court insists that, in order to achieve this, Parliament must rely exclusively on a formal power of override, then the process is likely to fail. For members of Parliament, the political costs of engaging in dialogue will simply be too high in most cases. A truly minimalist charter, if indeed it is achievable, therefore requires that under such a charter the Court be willing to empower members of Parliament to engage in dialogue via more ordinary legislative means.⁸ For the Court, this means avoiding an unduly strained approach to the interpretation of statutory language and intention, and, in some 'second look' cases, even showing additional deference to the constitutional judgments of Parliament.⁹

A UK-style charter directly undermines the likelihood that the Court will adopt such an approach to the interpretation of statutes, at least in cases that purport to determine individual rights and liabilities once and for all. In such civil and criminal, or non-pure public law, cases, judges under a UK-style charter face an extremely hard remedial choice, between, on the one hand, ensuring justice to individuals as they see it, and on the other, respecting the bounds of their limited remedial authority. Given their common law training and sensibility, when faced with this choice, judges will often choose to prioritize the interests of individuals at the expense of giving meaningful effect to the language and intent of a statute, a process resulting in broad

⁷ See National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) xxix-xxxviii.

⁸ The concept of dialogue is itself a potentially contested one which merits careful treatment. See Rosalind Dixon, *Designing Constitutional Dialogue: Bills of Rights & The New Commonwealth Constitutionalism* (SJD Thesis, Harvard University, 2008); Leighton McDonald, 'Rights, "Dialogue" and Democratic Objections to Judicial Review' (2004) 32 *Federal Law Review* 1, 26-28; Tom Campbell, 'Does Anyone Win Under a Bill of Rights? A Response to Hilary Charlesworth's "Who Wins under a Bill of Rights?"' (2006) 25 *University of Queensland Law Journal* 55, 59; Joo-Cheong Tham and Kenneth D Ewing, 'Limitations of a Charter of Rights in the Age of Counter-Terrorism' (2007) 31 *Melbourne University Law Review* 462, 470-73; Rosalind Dixon 'The Supreme Court of Canada, Charter Dialogue & Deference' 47 *Osgoode Hall Law Journal* (forthcoming, 2009) ('Charter Dialogue'). For scepticism about the possibility of such dialogue, see, eg, Allan, above n 2; Grant Huscroft, 'Rationalizing Judicial Power: The Mischief of Dialogue Theory' in James B Kelly and Christopher P Manfredi (eds), *Contested Constitutionalism: Reflections on the Charter of Rights and Freedoms* (2009); Andrew Petter, 'Taking Dialogue Theory Much Too Seriously (or Perhaps Charter Dialogue Isn't Such a Good Thing After All)' (2007) 45 *Osgoode Hall Law Journal* 147.

⁹ On the concept of second look cases, see Peter W Hogg and Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75.

statutory distortion. By this means, judges will also tend to undermine the capacity of Parliament to engage effectively in ordinary dialogue with the Court.

In Australia this danger of statutory distortion will be even more acute, given the doubts surrounding the constitutionality of the High Court's issuing, or hearing appeals against the grant of, certain weak-form remedies. While Ch III of the *Australian Constitution* (the '*Constitution*') need not ultimately create any serious obstacle to the adoption of a UK-style rights charter in Australia,¹⁰ there is clearly room for reasonable disagreement, and therefore uncertainty, on this question. By itself, in the crucial early years of a charter's operation, uncertainty of this kind also has a clear potential to distort the approach of lower courts to the grant of weak remedies.

By contrast, whether modelled on either the *CBOR* or the later more entrenched Canadian *Charter*, a Canadian-style charter which contains provision for strong judicial remedies is both more likely in the first place to deliver the 'true value' of statutes and also to be unaffected by the difficulties and doubts created by Ch III of the *Constitution*. Accordingly, it is also substantially less likely than a UK-style rights charter to lead to a form of de facto strong rather than weak or dialogic judicial review.¹¹ Translated into a contemporary Australian context, a Canadian-style charter is also unlikely, even in a pure statutory form, to create anything like the same problem of overly weak, as opposed to overly strong, judicial review associated with the *CBOR* itself.¹²

The more realistic danger is that even a Canadian-style statutory rights charter is likely to be interpreted by the Court in a way that is insufficiently, rather than too, deferential; and in this context, Canadian experience, this time under the more entrenched Canadian *Charter*, again offers a useful model for Australia. The challenge for the drafters of any Australian rights charter will be to encourage both the High Court to emulate this model; and Parliament to follow the lead of Canadian legislators in enacting the kind of legislative sequels necessary for such a model to succeed. In the latter context in particular, comparative experience suggests the chances of success will further tend to be lower, rather than higher, under a UK-style charter, with its attendant dangers of statutory distortion, than under either a statutory or entrenched Canadian-style charter.

On purely minimalist criteria, the paper argues, a Canadian-style rights charter modeled on the *CBOR* therefore clearly dominates a UK-style charter. If a UK-style charter is to be defended as a preferred charter model, it accordingly cannot be on minimalist grounds alone.

The paper is divided into four parts. Part I sets out in more detail the contours of the British and Canadian-style statutory rights models, and explains how, by preserving a power of Parliamentary override, both models could help maintain the current legislative-judicial balance between the High Court and Parliament. Part II discusses the even greater importance, from the point of view of judicial-legislative

¹⁰ See Stephen Gageler, 'In the Matter of Constitutional Issues Concerning a Charter of Rights,' SG No. 40 of 2009; Stephen Gageler, 'In the Matter of Constitutional Issues Concerning a Charter of Rights – Supplementary Opinion' SG No. 68 of 2009.

¹¹ For criticism of the UK *HRA* on these grounds, see, eg, Tom Campbell, 'Incorporation through Interpretation' in Adam Tomkins et al (eds), *Skeptical Essays on Human Rights* (2001) 85; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009).

¹² Only one statute was actually invalidated by the SCC under the *CBOR*. See below n 108.

balance, of the High Court interpreting legislation in a way which is relatively stable and 'true' to Parliament's choice of language; and the degree to which a UK-style charter is more prone to interpretive distortion both generally, and in Australia in particular. Part III considers the ability of a Canadian-style rights charter, modelled on the *CBOR*, to avoid the extremes of both strong and weak-form judicial review. Part IV concludes by discussing other potential criteria, aside from the substance of the rights they protect, on which a British and Canadian-style charter might be assessed.

I THE TWO STATUTORY MODELS AND EXTRAORDINARY LEGISLATIVE DIALOGUE

Compared to most other constitutional democracies, Australia currently has a human rights system which is strongly Parliament-centred.

When interpreting statutes, or even in developing the common law, the High Court will often seek to advance a different view from that of Parliament about the protection due to particular common law or international human rights. In order to do so the Court will, where necessary, read down statutory language so as to ensure that the statute conforms in its operation to the Court's view of the preferred scope or priority to be given to particular common law rights, such as the right to (informational) privacy, or the right to liberty and security of the person.¹³ At times the Court will also read down statutes to conform to international human rights standards.¹⁴ In a common law context, the Court has shown an even more consistent willingness to use its power to develop the law so as to advance international human rights, such as the right to a fair trial and the right to freedom from racial discrimination (at least as the Court understands them).¹⁵

However, in each case, if Parliament disagrees with the way in which the High Court chooses to interpret particular rights commitments, it has near unlimited freedom to pass legislation giving effect to a different interpretation of rights. In most cases, if Parliament uses clear language, it can by ordinary majority vote amend or impliedly repeal (ie suspend) the operation of particular rights, as they have been interpreted by the Court. The only exception relates to constitutional rights to political communication and basic political participation, to judicial review of unlawful government action, trial by jury, religious freedom and (arguably) property.¹⁶

¹³ See, eg, *Potter v Minahan*, (1908) 7 CLR 277, 304; *Coco v The Queen* (1994) 179 CLR 427; *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ) ('*Al-Kateb*').

¹⁴ See *Polites v Commonwealth* (1945) 70 CLR 60, 68–69, 77, 80–8 (regarding international law generally); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ). This, though, is a more contested principle of statutory interpretation: see eg *Al-Kateb* (2004) 219 CLR 562, 662 (Heydon J). But see *Al-Kateb* (2004) 219 CLR 562, 590 (McHugh J) (arguing that the principle is firmly established).

¹⁵ See, eg, *Dietrich v The Queen* (1992) 177 CLR 292; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan CJ).

¹⁶ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (freedom of political communication); *Roach v Electoral Commissioner* (2007) 233 CLR 162 (prohibition against arbitrary restrictions on the franchise, or basic political communication); *Constitution* ss 51(xxxi), 75(v), 80, 116. For discussion of the significance of s 75(v) in this context, see Pamela Tate, 'Protecting Human Rights in a Federation' (2007) 33 *Monash University Law*

Parliament is thus in practice at least equal, if not superior, to the Court in determining the scope and priority to be given to most individual rights.¹⁷

If a new rights charter is to maintain this balance between the Court and Parliament, it too must therefore give Parliament broad power to amend and/or suspend rights as they have been interpreted by the Court. As a formal matter, both a UK HRA and CBOR-style Charter also clearly meet this requirement.

In the UK, the substantive rights protected by the UK HRA are those rights guaranteed by various provisions of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (the 'Convention'), as well those contained in the first and sixth protocols to the *Convention*.¹⁸ Because the HRA has the formal status of an ordinary statute, the Westminster Parliament can, by ordinary majority vote, amend the substantive scope of the HRA by simply repealing, either in whole or in part, the incorporation of particular *Convention* rights. Subject to the constraints imposed by s 3 of the HRA, discussed further below, Parliament can also impliedly suspend the operation of particular *Convention* rights by careful choice of language.¹⁹

In Canada too, the CBOR was enacted as an ordinary act of the Canadian Parliament. Section 1 of the CBOR recognizes and declares certain individual rights, including the right of individuals, without discrimination: (a) to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; (b) equality before the law and the protection of the law; (c) freedom of religion; (d) freedom of speech; (e) freedom of assembly and association; and (f) freedom of the press, so that even more than in the UK, the Canadian Parliament has clear power to vary the scope of protected rights by ordinary legislative amendment. Providing Parliament uses clear, express language, the Supreme Court of Canada (SCC) has also held that Parliament retains unlimited power to suspend the operation of the rights protected by s 1.²⁰

For many commentators, however, compared to the CBOR, the UK HRA also offers a valuable *additional* mechanism for maintaining the existing balance in Australia between the Court and Parliament. In Canada, for example, the SCC has held that because s 2 of the CBOR provides that no law 'shall be construed or applied' (emphasis added) so as to 'abrogate, abridge or infringe' the rights protected by s 1, 'unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights', notwithstanding the status of the CBOR as an ordinary statute, the CBOR gives courts the power, traditionally associated with

Review 220, 223–24; for debate about the significance of s 51(xxxi) as a true rights guarantee, see Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution' (2005) 27 *Sydney Law Review* 639.

17 As a formal matter, the doctrine of parliamentary sovereignty means that Parliament is, of course, superior to the Court in this context: see generally Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32 *Federal Law Review* 57.

18 *Human Rights Act 1998* (UK) c 42, s 2.

19 Section 14 of the HRA also expands this power of suspension by providing that the executive (ie the Secretary of State) retains power under the Act, not just the *Convention*, to suspend the operation of *Convention* rights for a five-year renewable period. See *Human Rights Act 1998* (UK) c 42, ss 14, 16.

20 *R v Drybones* [1970] SCR 282.

strong-form Constitutional-style review, to invalidate legislation for inconsistency with s 1.²¹ (This, of course, is the power the High Court exercises when it finds incompatibility between the *Constitution* and a federal or state statute.) This means that, whatever interpretation of s 1 of the *CBOR* courts adopt, that interpretation has automatic legal effect, even if Parliament disagrees with that interpretation.

In the UK, under the *UK HRA*, by contrast, any declaration of incompatibility by a court has no immediate legal effect. Section 3 of the *UK HRA* provides that British courts have an obligation 'so far as it is possible to do so' to 'read and giv[e] effect' to legislation 'in a way which is compatible with the Convention rights'.²² Where such a reading is impossible, courts further provide that courts may make a 'declaration of incompatibility',²³ but such a declaration 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made'.²⁴ Parallel provisions, regarding the making of a declaration of incompatibility, are also found in s 32 of the *ACT HRA* and s 28 of the *Victorian Charter*, and (arguably) by implication, under the *Bill of Rights 1990* (NZ).²⁵ Under any UK-style rights charter, Parliament would therefore retain express legal power *not* to respond or implement a declaration of incompatibility with which it disagrees (a power of 'non-implementation').

Because of this, proponents of a UK-style charter argue that such a charter gives legislators three, rather than just two, potential methods by which they may override a court decision— amendment, suspension *and* non-implementation. Accordingly, proponents of a national human rights charter in Australia also argue that, as between the two statutory models represented by the *UK HRA* and *CBOR*, a UK-style charter is the more respectful of the current balance between the Court and Parliament — and to that degree, also more minimalist.²⁶

II THE TWO STATUTORY MODELS AND ORDINARY LEGISLATIVE DIALOGUE

A The importance of ordinary dialogue

A crucial factor to consider in assessing the desirability of various charter models, according to minimalist criteria, is the *way* in which Parliament is most likely to engage in rights dialogue with the High Court under any new national rights charter.

As Jeremy Waldron has noted, there are two potential reasons why legislators may disagree with judges about the application of particular rights. One reason is that they believe that certain rights have no proper application to the relevant context — ie they have 'misgivings' about the application of rights.²⁷ Another is that they may disagree with judges about the exact content or priority to be given to particular rights in given

²¹ Ibid.

²² *Human Rights Act 1998* (UK) c 42, s 3.

²³ *Human Rights Act 1998* (UK) c 42, s 4.

²⁴ *Human Rights Act 1998* (UK) c 42, s 4(6).

²⁵ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

²⁶ Tate, above n 16, 234.

²⁷ Jeremy Waldron, 'Some Models of Dialogue Between Judges and Legislators' in Grant Huscroft and Ian Brodie (eds), *Constitutionalism in the Charter Era* (2004) 7. ('Models')

context ('rights disagreements').²⁸ Both reasons for disagreement are potentially principled. The only key difference between the two is simply in the breadth of disagreement involved.

At the same time, from the perspective of charter design, the difference between the two kinds of disagreement is potentially far more significant.

In order for Parliament to override a court's interpretation of rights via reliance on a formal power of amendment or suspension, such as that found in a UK- or Canadian-style charter, Parliament will necessarily be required to use language which suggests that particular rights are inapplicable to – or not broad enough to cover – particular circumstances. This inevitably involves a representation that Parliament has rights misgivings in a given context. In cases where this is not in fact the case, and Parliament instead has rights disagreements, the *misrepresentation* the use of such a power implies can also have serious consequences for the political viability of legislators seeking to engage in dialogue.²⁹

When legislators decline to recognize particular rights claims, there is always the possibility that they are motivated by pure political expediency, rather than principled disagreement. This means that the public will rightfully be skeptical of legislation which purports to disregard or limit individual rights, unless it can be persuaded that such limitations are either necessary or appropriate. Where legislators deliberately engage in a form of misrepresentation in order to engage in dialogue, it is also extremely unlikely that they will meet this burden of persuasion – because in these circumstances, instead of appearing principled, they will appear both expedient and untrustworthy to the public.

In most cases, therefore, in cases of rights disagreement, rather than rights misgivings, the only truly realistic way for legislators to engage in dialogue will be to rely on the kinds of *informal* channels for dialogue that do not involve such misrepresentation - ie ordinary legislation that purports to modify the effect of a court decision, rather than on more formal powers of legal override that do (ordinary dialogue).³⁰

Because of this, if a rights charter is to *promote*, rather than undermine, actual dialogue,, it must therefore ensure that whatever formal powers of override or non-implementation it contains do not undermine this capacity for more informal, ordinary dialogue.³¹

²⁸ Ibid.

²⁹ On the misrepresentation involved, see *ibid* 37.

³⁰ For the contrary argument, that a formal power of legislative override should be understood to exhaust the scope for Parliamentary dialogue involving actual interpretive disagreement, see, eg, Peter Hogg, Alison Bushell Thornton and Wade Wright, 'Charter Dialogue Revisited – Or "Much Ado About Metaphors"' (2007) 45 *Osgoode Hall Journal* 47–8.

³¹ For similar arguments, though from somewhat different perspectives in relation to the interpretation of Australian state, UK and NZ rights charters, see, eg, James Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906; Butler, above n 2, 35; Campbell above n 11, 87; C A Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *Law*

The difficulty with a UK-style rights charter, in this context, is that it creates very strong incentives for courts to disrespect, rather than give effect to, ordinary legislative language and intention – and thereby also to undermine ordinary, informal channels for dialogue.

The reason for this is that, if courts under a UK-style charter rely on a declaration of incompatibility, rather than power of reading down, individual plaintiffs may ultimately be denied all form of legal relief. Not only will plaintiffs be denied immediate legal relief from the court itself in such circumstances. Much more troubling, in many civil and criminal cases parliaments may, also have limited capacity to provide them with relief.³²

Consider a case such as *Ghaidan v Godin-Mendoza* ('*Ghaidan*'),³³ decided by the House of Lords under s 4 of the *HRA*. The issue in *Ghaidan* was whether a same-sex partner could obtain the same benefit, of a statutory tenancy, as that enjoyed by the 'spouse' of a deceased tenant. (Other family members were entitled to a lesser form of protected tenancy, according to which the landlord had the right to adjust the rent paid.) Relying on s 3 of the UK *HRA*, the Legal Committee of the House of Lords in *Ghaidan* held that the definition of spouse, as persons living 'as [the] wife or husband' should be interpreted so as also to include persons living 'as if they were [the] wife or husband' of the tenant.³⁴

Defenders of a UK-style charter have strongly criticised the approach of the Legal Committee in *Ghaidan*, on the basis that it would clearly have 'be[en] preferable to use the declaration of incompatibility mechanism to draw attention to the human rights breaches' in the relevant legislation.³⁵ They point, by way of illustration, to the decision of the Committee in the parallel case of *Bellinger v Bellinger* ('*Bellinger*'), in which the Law Lords relied on s 4 rather than s 3 of the *HRA*, after finding incompatibility between the *Matrimonial Causes Act 1973* (UK) c 18 and arts 8 and 14 of the European *Convention* to the extent that the Act failed to recognize the validity of the marriage of Mrs Bellinger, as a post-operative transsexual.³⁶

The difficulty with this view is that it ignores the degree to which reliance on a remedy under s 4, as opposed to s 3, can affect the chance of an individual plaintiff ultimately obtaining relief in different categories of case.

In a pure public law case such as *Bellinger*, even if it does not guarantee legal relief to the plaintiff, a decision by a court to rely on s 4 of the *HRA* will in no way preclude someone in the position of Mrs Bellinger from ultimately obtaining the relief she seeks (namely, having her marriage recognized as legally valid). Because individual public law rights do not 'vest' in a way which renders them immune from legislative revision,

Quarterly Review 248, 254; Paul Rishworth, 'Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights' (2004) 15 *Public Law Review* 103, 116.

³² In this sense, I do not share the view of many commentators that judicial rather than legislative relief is an inherently necessary condition for the effective protection of individual rights.

³³ [2004] 2 AC 557.

³⁴ *Ibid* 572 (Lord Nicholls); 577 (Lord Steyn); 604 (Lord Rodger); 609 (Baroness Hale).

³⁵ Charlesworth, above n 6, 49.

³⁶ [2003] 2 AC 467.

they are always subject to potential adjustment by Parliament – to the benefit, as well as detriment, of the individual.

In *Bellinger* itself, this is also exactly what happened to the status of Mrs Bellinger's marriage. Three months after the decision in *Bellinger*, the Lord Chancellor's department published a draft Gender Recognition Bill in July 2003, which was then introduced into Parliament in November 2003, and passed in June-July 2004.³⁷ The resulting *Gender Recognition Act 2004* (UK) c 7 provides that any person who is aged at least 18 may make an application to a Gender Recognition Panel for a 'gender recognition certificate,' and that the Panel must, subject to certain evidentiary requirements, grant such a certificate if the person has 'liv[ed] in the other gender' for the two years preceding the application, can show that they have or have had gender dysphoria, and intend to continue to live in the acquired gender until death. In the case of married persons, such as Mrs Bellinger, it provides for an 'interim certificate' to be issued which, though it provides grounds for the nullification of a marriage, operates so as to (re)define a person's gender for the purposes of the *Matrimonial Causes Act 1973* (UK) c 18.³⁸ The Act also clearly provides, in s 9(2) that, while it does not affect things done, or events occurring, before a certificate is issued, 'it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards)', so that Mrs Bellinger, if she applied for recognition under the scheme created by the Act, would clearly be entitled to benefit from its provisions.

In the Australian context, a pure public law case such as *Al-Kateb* provides a close analogue.³⁹ While a majority of the Court in *Al-Kateb* held that Mr Al-Kateb was not entitled to any form of concrete judicial relief, the administrative nature of his detention meant that it was clearly open to Parliament to amend s 196 of the *Migration Act 1958* (Cth) in a way which altered the terms of Mr Al-Kateb's detention, either to his benefit or to his detriment. On one reading, it also meant that it was open to the relevant Minister to exercise his discretion to release Al-Kateb – which was, in fact, what the Minister did (subject to various conditions) soon after the Court's decision.⁴⁰

A quite different position applies in cases of a non-pure public, or civil or criminal, law nature, where constitutional commitments such as those relating to protection of property and the rule of law, will often mean that Parliament is either legally or practically prevented from retrospectively altering the rights and liabilities of parties in a particular case.⁴¹

Take *Ghaidan* itself as an example. If the Legal Committee in *Ghaidan* had relied on s 4 of the *HRA*, instead of s 3, the immediate result would have been that the plaintiff, Mr Godin-Mendoza, was given a choice between vacating the London flat he and his

³⁷ *Gender Recognition Act 2004* (UK) c 7, s 11, sch 4.

³⁸ *Gender Recognition Act 2004* (UK) c 7, s 5, s 11, sch 4.

³⁹ (2004) 219 CLR 562.

⁴⁰ David Marr, 'Liberty is Left in Shaky Hands When the High Court No Longer Defends It' *Sydney Morning Herald* (Sydney), 31 March 2005. Note that there is in fact some doubt whether this course was truly open to the Minister, on the interpretation given to s 196 of the *Migration Act 1958* (UK) in *Al-Kateb*. No challenge was brought to the decision, however.

⁴¹ Ben Juratowitch, *Retroactivity and the Common Law* (2008).

same-sex partner shared before the death of his partner and paying the much (indeed likely prohibitively) higher market rent demanded by the landlord for him to renew the lease.⁴² Because the case involved a dispute between two private parties (ie a landlord and potential tenant), the Westminster Parliament would also thereafter have had little capacity, consistent with its obligations under the *Convention*, to alter the consequences of whatever 'choice' he made, even if it wished to.⁴³ The right of the landlord under the *Convention* to the 'peaceful enjoyment of...[his] possessions' has been interpreted by the European Court of Human Rights as conferring a general right to enjoyment of property, not just physical possession, and also as requiring that laws affecting property rights be both 'accessible, precise and foreseeable'⁴⁴ and strike 'a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'⁴⁵ Legislation directed retrospectively to granting Mr Godin-Mendoza a statutory tenancy would also almost certainly fail even the less demanding of these two requirements under art 1 of the *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*.⁴⁶ It would deprive private parties such as the defendant landlord in *Ghaidan* of a set of legal rights or immunities which had previously been definitively granted and settled by a court.⁴⁷

Consider also a criminal case decided under the UK HRA such as *R v A (No 2)* ('*R v A*'), involving the rape-shield provisions in the *Youth Justice and Criminal Evidence Act 1999* (UK) c 23 ('*YJCEA*'), and in relation to which the Legal Committee has also been strongly criticised for over-reliance on its power of reading down (ie s 3), as opposed to exercising its declaratory powers under s 4.⁴⁸

The *YJCEA* specifically attempted to *codify* the grounds on which evidence of prior sexual history could be admitted, in part because there was a perception that the previous discretionary rape-shield regime had been largely unsuccessful in achieving its aims.⁴⁹ Nevertheless, the House of Lords held that it was entitled to rely on its

⁴² [2004] 2 AC 557, 560-1.

⁴³ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, 9 ETS, art 1 (entered into force 18 May 1954).

⁴⁴ *Carbonara & Ventura v Italy* (2000) VI Eur Court HR 91, [64].

⁴⁵ *Soering v UK* (1989) 11 EHRR 439, [89]. See also *Carbonara & Ventura v Italy* (2000) VI Eur Court HR 91 (articulating relevant rule of law requirements); *Sporrong & Lonnroth v Sweden* (1982) 52 Eur Court HR (ser A) 9 (developing the fair balance test); the discussion in Tom Allen, 'Compensation for Property Under the *European Convention on Human Rights*' (2007) 28 *Michigan Journal of International Law* 287.

⁴⁶ This is likely why the remedial legislation introduced even before the decision of the House of Lords in *Ghaidan* purported to operate only prospectively: see *Civil Partnerships Act 2004* (UK) c 3, s 81 sch 8.

⁴⁷ For an exploration and critique of the potential inconsistency between a bar on legislatively-created, as opposed to judicially-created, retroactivity, see Juratowitch, above n 41; David Mead, 'Rights, Relationships and Retrospectivity: The Impact of Convention Rights on Pre-Existing Private Relationships Following *Wilson* and *Ghaidan*' (2005) *Public Law* 459.

⁴⁸ See discussion in *R v A* [2002] 1 AC 45, 59.

⁴⁹ Cf Jennifer Temkin, 'Sexual History Evidence – Beware the Backlash' (2003) *Criminal Law Review* 217, 222 ('It was the failure of discretionary regimes to staunch the flow of sexual history evidence which prompted the enactment of s 41').

powers of reading down under s 3 to interpret the relevant provisions as 'subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the *Convention* should not be treated as inadmissible.'⁵⁰ The decision of the House of Lords in this case therefore not only disregarded the 'the niceties of the language of section 43(3)(c)';⁵¹ it also almost entirely ignored the broader intention of Parliament, which was to *replace* a discretionary regime providing for the exclusion of evidence of a complainant's prior sexual history with a rule-based or codified scheme.⁵² This departure from the intention of Parliament will also be quite common where courts are willing to bypass the text of a statute, because even if judges attempt in good faith to discern the intent of the legislature in such circumstances, they will often find that they end up rewriting, rather than giving effect, to the actual balance Parliament has struck in a particular area.⁵³

While the decision can rightly be criticised on these grounds,⁵⁴ it is important to bear in mind the reason why members of the Legal Committee may have felt pressure in this case to provide a remedy under s 3 rather than s 4 of the UK *HRA*.

Had the Committee relied on a remedy under s 4, the direct result would have been that 14 defendants were put at risk of what in the Committee's view would have been wrongful conviction for an offence carrying a formal maximum penalty of life imprisonment, and a guideline sentencing range of 5 to 8 years, absent any aggravating circumstances.⁵⁵ While hypothetically Westminster could have responded to such a decision by adopting legislation creating a right to a new trial on the part of persons convicted under the relevant provisions of the *YJCEA*, such legislation would in practice have been extremely unlikely.⁵⁶ It would have created potentially serious delays and increases in cost in the English criminal justice system, in an area where speedy and effective prosecution is a matter of high community concern.

Knowing this, rather than facing a simple question of the 'correct' interpretation of s 3 as opposed to s 4, in cases such as *R v A* and *Ghaidan*, the Law Lords faced an extremely difficult choice between, on the one hand, avoiding the distortion of statutory language and intent, and, on the other, ensuring justice as they saw it to individual litigants.

Because judges in the common law tradition are trained to believe that there can be no right without a judicial remedy,⁵⁷ they will also be strongly predisposed in such cases to prefer the demands of justice as they see it over the demands of statutory

⁵⁰ *R v A* [2002] 1 AC 45, 68.

⁵¹ *Ibid.*

⁵² See Peter Mirfield, 'Human Wrongs' (2002) 118 *Law Quarterly Review* 20, 23; Jennifer Temkin, above n 49, 240.

⁵³ See Frank Easterbrook, 'Foreword: The Court and the Economic System' (1984) 98 *Harvard Law Review* 4; cf Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (2008).

⁵⁴ Easterbrook, above n 53; cf Carolyn Evans and Simon Evans, above n 53.

⁵⁵ This, at least, was the position at the time of *R v A*, and prior to the enactment of the *Sexual Offences Act 2003* (UK) c 42: see *R v Millberry* [2002] EWCA Crim 2891.

⁵⁶ Any attempt directly to reverse the result as it applied only to A would very likely be constitutionally prohibited, even in the UK, by rule of law principles.

⁵⁷ See, eg, *Peck v Jenness*, 48 US 612, 623 (1849) ('A legal right without a remedy would be an anomaly in the law').

integrity.⁵⁸ This will be true in both civil and criminal cases, but particularly so in criminal cases where the common law has traditionally given common law judges broad residual responsibility for ensuring that a defendant obtains a fair trial.⁵⁹

While it is not fully appreciated even in the UK, this also explains why in civil and criminal cases, despite clear calls by various members of the House of Lords to adopt a restrained approach to s 3,⁶⁰ English courts have consistently stretched legislative language, even to the point of completely ignoring both it and much of the legislative intention which lies behind it.⁶¹

As Table 1 shows, of the 10 declarations of incompatibility made by English courts between 1999 and 2004 (and upheld on appeal), nine of those cases arose in a pure public law setting; whereas of the nine cases decided in this period under s 3 of the HRA, only two had a purely public law character.

Table 1 Legislative Sequels to Judicial Decisions under the HRA

Nature of case (expanded case sample)	Pure public/ administrative law	Civil or criminal law
Cases decided under s 4	9	1*
Cases decided under s 3	2	7

Of the relevant s 4 cases, two concerned the administrative detention of mental health patients; one the administrative detention of potential terrorism suspects; two the validity of births and marriage records (one of which was the *Bellinger* case); one a question of tax law; one concerned civil penalties related to customs and immigration; and one, the scope of discretion enjoyed by the parole board.⁶² Only one case, *R v*

⁵⁸ On the potential relevance of psychological pressures of this kind on judicial behaviour, see, eg, Steven L Winter, *A Clearing in the Forest: Life, Law, and Mind* (2003).

⁵⁹ See *Dietrich v The Queen* (1992) 177 CLR 292.

⁶⁰ See, eg, *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 858 (Steyn LJ); 863 (Buxton LJ).

⁶¹ See, eg, *R v Holding* [2005] 1 WLR 1040 (reading 'out' the word or from the provisions of s 75(1) of *Representation of the People Act 1983* (UK) c 2, stating that 'no expenses shall...be incurred' unless those expenses relate to presenting to the electors a candidate or his views, and to certain forms of broadcasting or other communication, *or* do not exceed a prescribed limit, and therefore the relevant provision as largely inapplicable to Holding's conduct); *R(O) v. Harrow Crown Court* [2006] 3 WLR 195, 202 (reading s 25(1) of the *Bail Act 1976* (UK) c 63, providing that where a person is charged with certain categories of offense, that person should 'be granted bail...only if the court or...the constable...is satisfied that there are exceptional circumstances which justify it', as imposing a merely evidentiary burden on an accused to show circumstances justifying release on bail, which the prosecution was then required to rebut).

⁶² *R (H) v London North and East Region Mental Health Review Tribunal* [2002] QB 1 (administrative detention of mental health patients); *R(D) v Secretary of State for the Home Department* [2003] 1 WLR 1315 (parole board discretion in respect of mental health patients); *R (on the application of M) v Secretary of State for Health* [2003] 1 WLR 1318 (representation of persons challenging administrative detention, in mental health context);

McR,⁶³ (masked above with an asterisk) involved a true criminal or civil law issue, and the court in that case issued a remedy which, while it purported to be a remedy under s 4, was in fact tantamount to declaration of *inconsistency*, rather than incompatibility.⁶⁴

By contrast, of the s 3 cases, four were pure criminal law cases concerning the scope of criminal sentencing discretion; evidentiary rules or burdens of proof in criminal trials (*R v A* was one of these cases); and the scope of terrorism-related criminal offenses.⁶⁵ An additional three were civil in nature and related to a claim of wrongful death under the *Fatal Accidents Act 1976* (UK) c 30; proceedings for winding up in bankruptcy; and a residential tenancy dispute (namely, *Ghaidan*).⁶⁶ Only two cases were purely public law in nature with one involving a question about the scope of parole board discretion, and one about the scope of the powers of a coroner in a coronial inquest.⁶⁷

A similar pattern can also be observed if one extends the sample of cases decided under the *HRA* from 2004 to 2006.⁶⁸ Of the additional five cases decided in reliance on s 3 during this period, all arose in either a civil or criminal, rather than pure public law context. Three cases were criminal law cases involving a criminal conviction for incurring unauthorized election expenses; the grant of bail to those charged with serious criminal offences; and the length of a mandatory minimum term to be served by a prisoner under a life sentence.⁶⁹ Two were civil cases involving a dispute about

Blood and Tarbuck v Secretary of State for Health (Unreported, High Court, Sullivan J, 2002) (registration of parentage); *Bellinger* [2003] 2 AC 467 (validity of marriage); *R (Wilkinson) v Commissioners of Inland Revenue* [2003] 1 WLR 2683 (tax deduction); *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 (customs-related civil penalty scheme); *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 (parole board discretion); *A v Secretary of State for the Home Department* [2004] UKHL 56 (Unreported, Lord Bingham, Lord Nicholls, Lord Hoffmann, Lord Hope, Lord Scott, Lord Rodger, Lord Walker, Lord Hale and Lord Carswell, 16 December 2004) (administrative detention of non-citizens deemed a national security threat).

⁶³ [2002] NIQB 58.

⁶⁴ *Ibid* (hearing appeal against conviction for buggery). The High Court in that case not only made a declaration of incompatibility; it also granted an order for *certiorari* quashing the effect of the appellant's conviction, in a way which approximated an exercise of the stronger remedial power to issue a declaration of inconsistency.

⁶⁵ *R v Offen* [2001] 1 WLR 253 (criminal sentencing); *R v A* [2002] 1 AC 45 (admissibility of evidence in criminal trial); *R v Lambert* [2001] 3 WLR 206 (burden of proof in criminal trial); *A-G's Reference No 4 of 2002* [2004] UKHL 43 (Unreported, Lord Bingham, Lord Steyn, Lord Phillips, Lord Rodger and Lord Carswell, 14 October 2004) (scope of terrorism-related crimes).

⁶⁶ *Cachia v Faluyi* [2001] 1 WLR 1966 (hurdles to civil action under Fatal Accidents Act); *R v Carass* [2002] 1 WLR 1714 (burden of proof in bankruptcy proceedings); *Ghaidan* [2004] 2 AC 557 (residential tenancy dispute).

⁶⁷ *R (Sim) v Parole Board* [2003] 2 WLR 1374 (power of parole board); *R (Middleton) v Her Majesty's Coroner for the Western District of Somerset* [2004] 2 WLR 800 (scope of coronial inquest).

⁶⁸ This cut-off is designed to prevent the over-counting of remedies issued by lower courts subsequently overturned on appeal.

⁶⁹ See *R v Holding* [2005] 1 WLR 1040; *R (O) v Harrow Crown Court* [2006] 3 WLR 195; *R (Hammond) v Secretary of State for the Home Department* [2006] 1 AC 603.

adverse possession and a claim for defamation.⁷⁰ By contrast, of the additional three cases decided under s 4 in this period and not overturned on appeal, all three were pure public law cases.⁷¹

The sharpness of this contrast between the kinds of case decided under s 3 and s 4 also seems extremely difficult to explain, other than by reference to the dilemma courts face under a UK-style charter between respecting the bounds of their remedial authority and ensuring justice, as they see it, to individual litigants.

There was, for example, no systematic difference between the relevant cases when it came to the kind of relief sought by the parties. In the 14 cases decided under s 4 between 1999 and 2006, the court was urged by either individual rights claimants or the state to grant relief in terms of s 3 (or an equivalent coercive remedy) in at least half of the relevant cases.⁷² There was also no difference between the two sets of cases in terms of the time at which the legislation under challenge was enacted, and thus in the degree to which Westminster could be assumed to have considered the HRA as part of the legislative process. In the 14 cases decided under s 4 and the 15 cases decided

⁷⁰ See *Beaulane Properties Ltd v Palmer* [2006] Ch 79 (scope of doctrine of adverse possession); *Culnane v Morris* [2006] 2 All ER 149 (defence to defamation action).

⁷¹ Two concerned issues relating to immigration, specifically the rights of citizens with non-citizen family members to gain priority access to public housing and the right of persons subject to immigration control to marry: see *R (Morris) v Westminster City Council* [2006] 1 WLR 505 (rights of citizens with non-citizen dependent children); *R (Gabaj) v First Secretary of State* (Unreported, Administrative Court, 28 March 2006) (rights of citizens with non-citizen pregnant spouse). One concerned the eligibility for a tax-concession: see *R (Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 875. A fourth declaration was also issued in respect of rights of access to public housing, but overturned on appeal: see *R (Baiai) v Secretary of State for the Home Department* [2006] 3 All ER 608; aff'd [2008] All ER (D) 411.

⁷² *R (H) v London North and East Region Mental Health Review Tribunal* [2002] QB 1, 8 (argument by appellant); *R v McR* [2002] NIQB 58 (seeking declaration of incompatibility, but with effect of declaration of inconsistency or reading down); *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 758 (argument by Secretary, not opposed by appellant); *R (Wilkinson) v Commissioners of Inland Revenue* [2003] 1 WLR 2683, 2687 (argument by appellant); *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 849; *Bellinger* [2003] 2 AC 467, 471; *R (Hooper) v Secretary of State for Work and Pensions* [2003] 1 WLR 2623 [2]. In *R (D) v Secretary of State for the Home Department*, [2003] 1 WLR 1315 and *R (Morris) v Westminster City Council* [2006] 1 WLR 505, while the petitioners sought relief under the UK HRA only in terms of s 4, they also sought more concrete relief under the *Mental Health Act 1983* (UK) c 20 and *Local Government Act 2000* (UK) c 22, respectively. For cases in which individuals sought only to obtain a remedy purely in terms of s 4, and no other concrete remedy, see *Blood and Tarbuck v Secretary of State for Health*, (Unreported, High Court, Sullivan J, 2002); *R (on the application of M) v Secretary of State for Health* [2003] 1 WLR 1318; *A v Secretary of State for the Home Department* [2004] UKHL 56 (Unreported, Lord Bingham, Lord Nicholls, Lord Hoffmann, Lord Hope, Lord Scott, Lord Rodger, Lord Walker, Lord Hale and Lord Carswell, 16 December 2004). In each case, this can also be explained by quite specific features of the case, such as the symbolic rather than practical significance of the relief sought (*M* case), or a strategic concern to avoid making a demand for immediate relief (*A v Secretary*). Absent publication of the judgment, it is currently impossible to determine the nature of the relief sought in *R (Gabaj) v First Secretary of State* (Unreported, Administrative Court, 28 March 2006).

under s 3 from 1999 to 2006, there were only two cases involving legislation passed after the enactment of the *HRA*.⁷³

What is instead clear from this pattern is that a UK-style charter creates extremely strong pressure on courts, at least in an important sub-set of cases, to ignore the bounds of both statutory meaning and intention. The limited experience to date at the state and territory level in Australia also does nothing to refute this understanding about the link in civil and criminal cases between weak remedies and pressures toward statutory distortion.

Take a case such as *SI bhmf CC v KS bhmf IS* ('*SI bhmf*'),⁷⁴ decided by the ACT Supreme Court under the ACT *Human Rights Act 2004* (ACT) ('ACT *HRA*'). The case involved a challenge to the making by a Registrar of the ACT magistrates' court of a 'final' protection order, under the *Domestic Violence and Protection Orders Act 2001* (ACT) ('*Protection Act*'). The terms of s 51A of the *Protection Act* provided that an interim protection order 'becomes a final order' if a respondent does not return an endorsement copy of an interim order seven days prior to the return date for the final order.⁷⁵ Because the respondent was not aware of this, and did not return the order by this time, the Registrar granted a final order, valid for 12 months, without giving the respondent an opportunity to challenge its basis.

Higgins CJ chose to 'read down' the terms of s 51A, so that, where an endorsement copy of an interim order was not returned, the magistrate had a discretion, rather than obligation, to enter a final order, and a further discretion to set aside a final order if sufficient cause was shown.⁷⁶ In doing so, Higgins CJ clearly ignored a large amount of the language in the relevant section, as well as at least part of the Legislative Assembly's intention of creating a more victim-protective system of protection orders.⁷⁷

Because of this, the decision has been strongly criticised by scholars such as Hilary Charlesworth for adopting a remedial approach which is 'unsatisfactory...from the perspective of the promotion of a human rights dialogue'.⁷⁸

The difficulty with this criticism, however, is that it ignores the degree to which Higgins CJ was in fact responding to the same kind of dilemma faced by the UK courts in *Ghaidan* and *R v A*: namely, the dilemma of whether to prioritise respect for statutory language and intent, or instead the protection of individual rights (as he saw it) in the particular concrete case.

Had Higgins CJ declined to engage in radical reading down of the kind he did (or in the alternative, to invalidate the relevant legislation for inconsistency with Ch III of

⁷³ In the context of s 4, see *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728; *A v Secretary of State for the Home Department* [2004] UKHL 56 (Unreported, Lord Bingham, Lord Nicholls, Lord Hoffmann, Lord Hope, Lord Scott, Lord Rodger, Lord Walker, Lord Hale and Lord Carswell, 16 December 2004). In the case of s 3, see *R v A* [2002] 1 AC 45; *A-G's Reference No 4 of 2002* [2004] UKHL 43 (Unreported, Lord Bingham, Lord Steyn, Lord Phillips, Lord Rodger and Lord Carswell, 14 October 2004) .

⁷⁴ (2005) 34 Fam LR 468.

⁷⁵ *Domestic Violence and Protection Orders Act 2001* (ACT) s 51A(3)(b).

⁷⁶ (2005) 34 Fam LR 468, 485 [98].

⁷⁷ For discussion of the relevant legislative intent, see *SI bhmf* (2005) 34 Fam LR 468, 483.

⁷⁸ Charlesworth, above n 6, 50.

the *Constitution*), but instead relied on the declaratory power open to him under s 30 of the ACT HRA, there would have been a very real danger of ongoing – potentially serious – injustice to the respondent, at least as the court saw it. Until the ACT Legislative Assembly saw fit to revisit s 51A of the Act, or the 12 month term of the order issued against him expired, the respondent would have faced a very real danger of criminal liability (on a strict liability basis) for breach of an order, which he argued should never have been issued in the first place. The maximum penalty for such a breach was, in turn, a fine of \$50 000, or up to five years' imprisonment.⁷⁹

Under a Canadian-style statutory charter, this same dilemma need not arise, because courts have the power to *invalidate* legislation for inconsistency with individual rights, and therefore have no need to rely on a power of reading down, in order to achieve justice as they see it in cases such as *R v A* or *SI bhmf*.

This does not mean that under a Canadian-style rights charter, the danger of statutory distortion will be zero. In cases such as *Ghaidan*, where legislation is arguably under- rather than over-inclusive, unless a court also enjoys the kind of power to 'read-in' or insert language into a statute enjoyed by courts such as the SCC under the Canadian *Charter*, there will always be *some* danger of statutory distortion⁸⁰ This is also one reason why, minimalist arguments aside, there could be advantages to adopting a charter of rights by constitutional rather than statutory means.

From a minimalist perspective, however, because this option of a more entrenched charter is ruled-out from the outset, the question is whether, relative to a UK-style charter, a Canadian-style statutory charter is likely to reduce the danger of statutory distortion. And the answer to this question is almost certainly yes – because, instead of the danger of statutory distortion arising in *all* civil and criminal cases, it will arise, at most, under a Canadian-style charter in a sub-set of these cases involving legislation that the court views to be under- rather than over-inclusive.

B Ordinary dialogue and the British model in Australia

At a federal level in Australia, the danger of statutory distortion under a UK-style rights charter, relative to that under a Canadian-style charter, is also likely to be even more acute than in the UK itself, given the potential constraints imposed by Ch III of the *Constitution*.⁸¹

There is clearly substantial room for debate about what Ch III implies for the validity of a scheme of weak remedies at a federal level.⁸² One possibility is that Ch III

⁷⁹ *Domestic Violence and Protection Order Act 2001* (ACT) s 34 (repealed).

⁸⁰ See, eg, *Schachter v Canada* [1992] 2 SCR 679.

⁸¹ In the ACT in particular, the interpretive pressure imposed by Ch III may be equally as great because the relevant constraints apply to at least some degree: see *SI bhmf* (2005) 34 Fam LR 468, 485-6; Stefanie Wilkins, 'Constitutional Limits on Bills of Rights Introduced by a State or Territory' (2007) 35 *Federal Law Review* 431.

⁸² Cf Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188, 204-7 (arguing in favour of the existence of a 'matter' and Commonwealth judicial power in these circumstances); The Hon Michael McHugh, 'A Human Rights Act, the Courts and The Constitution' (Speech delivered at the Australian Human Rights Commission, Sydney, 5 March 2009) 20; Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity

means that no Australian court can validly issue a UK-style declaratory remedy in the exercise of federal jurisdiction, because such a remedy would be wholly unconnected from any 'matter' for the purposes of ss 75, 76 or 77 of the *Constitution*, or less likely, incompatible with the exercise of judicial power, and thus wholly inconsistent with Ch III. A second possibility is that state and federal courts would have jurisdiction to issue such declarations, but the High Court would be limited in its ability to hear appeals against the decision to issue or refrain from issuing a declaration of incompatibility. Section 73 of the *Constitution* limits the Court's appellate jurisdiction to appeals from 'judgments, decrees, orders, and sentences', and on one view, a declaration of incompatibility might not be sufficiently 'definitive of legal rights' to qualify as a judgment for these purposes.⁸³ A third possibility is that the Court might lack jurisdiction to hear an appeal from the decision to grant a declaration of incompatibility in only a sub-set of cases, in which neither party to the appeal sought to pursue reading-down as an alternative remedy. In such cases, the Court might find that it was being asked to exercise a power outside 'the judicial power of the Commonwealth' conferred by Ch III.⁸⁴ A fourth and final possibility is that the Court might consider a system of weak remedies to be wholly consistent with both the specific and general requirements of Ch III.

Given the Court's existing approach in this area, the most likely outcome seems to be that the Court will adopt either the third or the fourth approach namely, find that, at most, Ch III precludes the Court from hearing certain appeals against the making of a declaration of incompatibility and in no way generally impairs the functioning of a UK-style rights charter.

The first approach seems particularly unlikely from both a doctrinal and comparative perspective. In *Kable v DPP*,⁸⁵ the High Court set out a number of factors relevant to determining whether a power is judicial or not, including whether the exercise of the power turns on the existence of any breach of antecedent law or legal obligation; involves the resolution of 'an actual or potential controversy as to existing rights and obligations'; allows for the exercise of discretion and has traditionally been exercised by courts, legislators or members of the executive.⁸⁶ According to this

of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12 *Deakin Law Review* 1 (arguing that such a scheme would be valid in its entirety); James Stellios, 'State/Territory Human Rights Legislation in a Federal Judicial System' (2008) 19 *Public Law Review* 52 (arguing that, while the better view is such a model is compatible with Ch III, existing High Court precedent raises substantial doubts about the question).

⁸³ *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273, 277 (Barwick CJ) (holding that '[i]t is of the essence of a judgment within the meaning of the *Constitution* that it is binding upon parties and definitive of legal rights'). See also discussion in *Mellifont v A-G (Qld)* (1991) 173 CLR 289.

⁸⁴ *Australian Constitution* s 71.

⁸⁵ (1996) 189 CLR 51.

⁸⁶ See (1996) 189 CLR 51, 106 [22]-[24] (importance of judgement by reference to antecedent obligations) (Gaudron J); 119 [27] (traditional allocation of powers), 122 [33] (actual or potential controversy, existing rights and obligations) (McHugh J); 131 [29]-[30] (traditional allocation of powers, and whether function involves determination of rights and liabilities akin to judgment of guilt) (Gummow J).

approach, a declaration of incompatibility also clearly satisfies at least the first, third and fourth of these requirements.⁸⁷

From a comparative perspective, there is also good evidence that the grant, by courts, of a declaration of incompatibility is compatible with their otherwise continuing to behave like, and be respected as, impartial common law legal tribunals. In the UK, English courts have now issued close to 20 declarations of incompatibility which have been upheld on appeal, without any noticeable change in the broader functioning of the English judiciary.⁸⁸ In New Zealand, the New Zealand Court of Appeal has since 2000 asserted an equivalent power to make an indication of inconsistency,⁸⁹ without any widespread adverse effects on the public standing of the Court or lower courts.⁹⁰

Providing a national rights charter incorporates certain features of the ACT *HRA* and the *Victorian Charter* regarding the role of the Attorney-General (or relevant Minister), rather than strictly follows the *UK HRA* as a model, the second approach also seems unlikely.⁹¹

In the UK, from a domestic legal standpoint, the duty of a Minister of the Crown under the *UK HRA* to respond to a declaration of incompatibility is purely political rather than legal. This is because the making of a declaration of incompatibility by the courts enlivens only a special legal *power*, rather than duty, on the part of the relevant minister to amend the operation of the relevant legislation.⁹²

In the ACT and Victoria, by contrast, the making of a declaration of incompatibility or indication of inconsistent interpretation by the courts enlivens a legal duty, and not a more substantive legal power, on the part of the relevant minister to respond to the decision. In the ACT, s 33 of the *ACT HRA* provides that the Attorney-General has two duties consequent on the making by a territory court of a declaration of incompatibility. First, the Attorney-General must present a copy of the declaration of incompatibility to the Legislative Assembly within six sitting days of receiving a copy of the declaration; and second, within six months of that date, he or she must prepare a written response to the declaration of incompatibility and present it to the Legislative Assembly. Sections 34 and 35 also provide for the Attorney-General to be notified of relevant proceedings, and joined as a party. In Victoria, s 37 of the *Victorian Charter* imposes almost identical duties on the Minister responsible for the statutory provisions in respect of which the declaration is made, and provisions regarding the giving of notice to the Attorney-General, and right of the Attorney-General to intervene, with

⁸⁷ It will certainly involve the application of existing human rights standards, established by both national and international law. English precedent confirms that it turns on an exercise of discretion by a court: see, eg, *Bellinger* [2003] 2 AC 467, 482 (Lord Nicholls). The making of a declaration of incompatibility also involves an exercise of power which, while to some degree novel in a judicial setting, has no historical link to the exercise of either legislative or executive power.

⁸⁸ See Tate, above n 16, 235.

⁸⁹ See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

⁹⁰ For more concentrated academic criticism, see, eg, Allan, above n 2; Grant Huscroft, 'Protecting Rights', above n 2, 129

⁹¹ See Gageler, 'In the Matter of Constitutional Issues Concerning a Charter of Rights', above n 10.

⁹² See, eg, *Schachter v Canada*, [1992] 2 SCR 679.

the additional requirement that the Minister cause his or her written response to the declaration to be published in the Government Gazette.

In both the ACT and Victoria this means that the making, or non-making, of a declaration of incompatibility has direct consequences for the legal duties of federal or state Ministers. This connection also ensures that any request of a party, asking the Court to issue such a remedy, involves a question with the decisiveness and concreteness necessary for the Court to exercise jurisdiction under s75 of the *Constitution*.⁹³

Even if the Court were to reject this argument, that the decision to grant a declaration of incompatibility itself involves a 'matter,' it also seems more likely to endorse the third, as opposed to second, approach to the constitutionality of declarations of incompatibility – ie to hold that, in most cases at first instance, the grant of a remedy is incidental to what is clearly a constitutional matter: namely, a dispute as to whether a particular statute should be read down so as to conform to a particular interpretation of charter rights.⁹⁴ Likewise, on an application for special leave to appeal against the making of such a declaration, the Court seems more likely than not to find that a challenge to the grant (or refusal) of such a declaration is sufficiently connected – in the negative – to 'definitive' resolution of such a matter, to constitute a 'judgment' for the purposes of the Court's appellate jurisdiction under s73 of the *Constitution*.⁹⁵ Without the ability to make such a declaration, in cases where a plaintiff's appeal fails, the Court will often find it extremely difficult to make clear to plaintiffs whether the reason for the defeat of their appeal is that they were not able to persuade the Court of the merits of their claim, or rather, that they failed in their claim at a remedial stage. From a rule of law perspective, the ability of a court to explain how it has resolved a matter will also clearly be integral to its resolution of the matter itself. Even if the Court were to accept this argument, however, it might still find that it is limited in its ability to hear *some* appeals from the making of a declaration of incompatibility. In some sub-set of cases on appeal, neither the applicant nor the respondent may wish to pursue reading down as an alternative remedy. Having won at first instance on the merits, a rights plaintiff, particularly in a pure public law case, may not wish to disturb the lower court's finding by way of a cross-appeal. The state, as respondent, may also lack an interest in arguing for reading down as an alternative remedy.⁹⁶

In such cases, the absence of a claim for reading down would also almost certainly mean that, if the Court were to reject the general argument about ministerial obligation, it would also reject an application for special leave to appeal. The appeal in

⁹³ See, eg, *Minister of Works (WA) v Civil and Civic Pty Ltd* (1962) 116 CLR 273; *Mellifont v A-G (Qld)* (1991) 173 CLR 289; cf Gageler, 'In the Matter of Constitutional Issues Concerning a Charter of Rights', above n 10, [21]. As Gageler notes, this connection could also further be strengthened by requiring under a rights charter that the Attorney-General be joined as a party to proceedings before such a declaration can be made.

⁹⁴ Cf *Stellios*, above n 82, 65–8 (expressing doubts on this question).

⁹⁵ Cf *Saffron v R* (1953) 88 CLR 523 (Dixon CJ).

⁹⁶ While in some cases the government may view reading down as preferable to a declaratory remedy, because for example it is less politically salient and therefore costly, in others it may well regard such a remedy as *less* desirable on account of the fact that it deprives Parliament of the power of non-implementation.

question would have no direct consequence for the *legal* rather than political imperative facing Parliament (or state Parliaments) to respond to a lower court decision. As such, it would clearly involve a request for the Court to exercise a form of judicial power beyond the scope of *Commonwealth* judicial power. Such cases would, of course, very likely constitute a fairly small fraction of the total number of cases ultimately arising under a national rights charter. However, the mere possibility of a case falling into this category would be sufficient to create *some* additional pressure for state or federal courts to avoid relying on a declaration of incompatibility in Australia, relative to the UK.

The mere existence of doubt – and debate – among various distinguished commentators over the constitutionality of a declaration of incompatibility mechanism would also, by itself, likely be sufficient to create additional pressure in Australia, relative to the UK, towards statutory distortion at first instance, unless and until the High Court indicated a preference for the fourth approach to validity.⁹⁷

Imagine an early case in which, in response to an identified rights violation, a state court or federal court at first instance was weighing whether to issue a declaration of incompatibility, or rather to engage in a process of (so called) reading down.

A decision to rely on reading down might well be criticised by the High Court for going too far in stretching a court's powers of interpretation. The Court, however, would almost certainly uphold the lower court's decision as constitutional, and also find that it had power to set aside such a decision on appeal.⁹⁸ The lower court therefore could not be criticised for asserting either a power which it did not in fact enjoy under the *Constitution*, or advancing its own interpretation of the charter at the expense of the Court.

If a lower court judge were, on the other hand, to rely on a declaration of incompatibility, the judge's decision might be subject to two far more serious criticisms. The High Court might, if it were to adopt the first approach to the constitutionality of a UK-style charter in Australia, find that the lower court had acted wholly contrary to the *Constitution*. Alternatively, if the Court were to prefer the second or third approach, it might find that, while the lower court had not itself contravened Ch III, its decision did not constitute a judgment for the purposes of s 73, or the subsequent actions of the parties had mooted the basis for exercising Commonwealth judicial power, and was thus not subject to an appeal to the Court. If this were the case, the lower court's decision might then be criticised by the broader legal community as constituting an unnecessary assertion of unilateral power to interpret the charter at the expense of the High Court.

⁹⁷ See especially McHugh, above n 82; Sir Gerard Brennan, 'Introduction to Human Rights Law: Seminar – Part II' (2007) 81 *Australian Law Journal* 248, 258

⁹⁸ The one potential caveat to this is that the Court might find that, in some cases, reliance on a super-extended power of reading down so as to 'read in' curative language into legislation might constitute an exercise of legislative, rather than judicial, power in a manner inconsistent with Ch III: see McHugh, above n 82, 27–30. This, however, seems unlikely, given the degree to which it assumes a realist approach by members of the Court to the process of reading down, and therefore the extent to which it would also likely be correlated with a more realist/functionalist approach to the separation of powers on the part of the Court.

Given this, it would clearly make sense, pending clarification of the issue by the High Court, for a lower court judge, who was in any way concerned about the potential for criticism of his or her decisions, to avoid reliance on a declaration of incompatibility. In the eyes of most commentators, a judge's failure to appreciate the constitutional limits on their authority, or the potential undesirable constitutional consequences of their decisions, will clearly be more a serious lapse in judgment than the over-zealous exercise of an actual interpretive discretion. 'Reading down' a statute, even to the point of ignoring its language and intent, will therefore tend to be the much more cautious path for a trial judge in most early charter cases.

If this is indeed the case, the result will be that, in the crucial formative years of a charter's early operation, Parliament is not only deprived of the hoped-for power of non-implementation under a UK-style rights charter. By reason of statutory distortion, it will also be deprived, to an even greater degree than Westminster has been to date in s 3 cases, of the more general ability to engage in dialogue via the use of ordinary legislative means.

III CANADIAN STYLE RIGHTS CHARTERS AND JUDICIAL DEFERENCE

A The *CBOR* and the danger of overly weak judicial review?

For some, modelling a national rights charter on a Canadian-style statutory charter raises the distinct difficulty that such a charter might turn out to be *too* minimalist in the change it achieves regarding the protection of individual rights in Australia.⁹⁹

Under the *CBOR* itself, the SCC, for example, has invalidated legislation for inconsistency with rights on only one occasion since 1960.¹⁰⁰ Because the Court has read the language in s 1 of the *CBOR*, providing that certain rights should 'continue to exist', as restricting the scope of the *CBOR* to those rights already recognized in 1960, the *CBOR* has had little potential to promote an evolving dialogue about rights in Canada. The concern is, therefore, that if a national rights charter were modelled on the *CBOR*, rather than lead to a truly minimalist form of rights reform, it could lead to no reform at all.

To a large extent, however, this concern overlooks the fact that sustained academic criticism of the SCC's approach to the interpretation of the *CBOR*, as too deferential, means that, for the High Court, that approach would in all likelihood serve as a strong anti-precedent, rather than precedent, in the interpretation of any *CBOR*-style charter

⁹⁹ For arguments in favour of a more entrenched Canadian-style rights charter in Australia, see, eg, Castan Centre for Human Rights Law, *Submission to the National Human Rights Consultation* (2009) [3.4], [6.1].

¹⁰⁰ This is despite the fact that, for more than 20 years, the *CBOR* was the only national rights charter in operation in Canada. After the enactment of the *Charter*, there were comparatively few cases in which the *CBOR* had the potential to provide broader protection for individual rights than the charter. One potential exception is in the case of the right to property: see, eg, David Johansen, 'Property Rights and the Constitution' (Background Paper No BP-268E, Parliamentary Research Branch, Library of Parliament, Canada, 1991).

in Australia.¹⁰¹ By itself, this would go a substantial way towards ensuring that any Canadian-style rights charter adopted in Australia will promote some form of constitutional change in regard to the protection of rights. The very different international human rights law context in Australia today, compared to when the CBOR was enacted, also further increases this likelihood.

In 1960 neither of the two covenants comprising the 'international bill of rights' — ie the *International Covenant on Civil and Political Rights*¹⁰² and the *International Covenant on Economic, Social and Cultural Rights*¹⁰³ — had been drafted, let alone come into force. Not surprisingly, given this the SCC regarded the CBOR as addressed to protecting a fairly narrow set of common law rights rather than human rights more broadly. Now, by contrast, the international bill of rights forms a crucial backdrop to all modern rights charters. Governments have routinely pointed to the international bill of rights, and the obligations it creates as a reason to adopt a domestic rights charter.¹⁰⁴ Foreign courts have accordingly interpreted those charters so as to give broad effect to any international consensus surrounding human rights.¹⁰⁵ In Australia, the High Court's existing willingness to consider international human rights norms in various common law and statutory contexts also suggests that its approach to the interpretation of a national rights charter would likely be similar.¹⁰⁶

¹⁰¹ See, eg, Michael Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' (1998] *Public Law* 266, 275 (suggesting that 'the dismal performance of the Canadian judiciary with the "ordinary statute" Canadian Bill of Rights 1960' was common knowledge in New Zealand legal circles and has been viewed there as 'an object-lesson to avoid repeating').

¹⁰² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

¹⁰³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

¹⁰⁴ For the influence of the ICCPR on the drafting of the Canadian Charter, eg, see John Claydon, 'The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms' (1987) 2 *Connecticut Journal of International Law* 349 (1987); Lorraine E Weinrib, 'Canada's Charter: Comparative Influences, International Stature' in Debra M McAllister and Adam M Dodek (eds), *The Charter at Twenty: Law and Practice* (2002) 495; for the influence of the ICCPR on the drafting of the NZBOR, see Kenneth J Keith, "'Concerning Change": The Adoption and Implementation of the New Zealand Bill of Rights Act 1990' (2000) 31 *Victoria University of Wellington Law Review* 721, 743; Paul Rishworth, 'The Inevitability of Judicial Review under "Interpretive" Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism' (2004) 23 *Supreme Court Law Review* 233, 255; and for the influence of both the ICCPR and ICESCR on the drafting of the 1993 Constitution of the Republic of South Africa, which carried over to a substantial degree into the 1996 Constitution, see, eg, Anton J Steenkamp, 'The South African Constitution of 1993 and the Bill of Rights: An Evaluation in Light of International Human Rights Norms' (1995) 17 *Human Rights Quarterly* 101; John Dugard, 'International Law and the South African Constitution' (1997) 6 *European Journal of International Law* 77.

¹⁰⁵ For cases in the United Kingdom prior to the enactment of the HRA relying on transnational rights norms see, eg, *Waddington v Miah* [1974] 1 WLR 683, 694; *Reg v Home Secretary; Ex parte Brind* [1991] 1 AC 696, 747-8; in Canada see, eg, *Re Mitchell and the Queen*, (1983) 42 OR (2d) 481.

¹⁰⁶ See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 306; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42; *Minister for Immigration and Ethnic Affairs v Teoh*, (1995) 183 CLR 273. See also

If a rights charter were enacted pursuant to Parliament's power over external affairs in s 51(xxix) of the *Constitution*, this likelihood of the Court adopting international human rights understandings as a starting point for interpretation, under a national rights charter, would seem even greater. In this case, rather than simply helping promote a more morally attractive or pragmatically informed reading of particular rights,¹⁰⁷ a decision by the Court to give some weight to international human rights understandings could be crucial to the ongoing validity of a rights charter.¹⁰⁸

B A charter and the danger of overly strong judicial review?

Realistically, the far greater danger under any Canadian-style, charter in Australia is that, even if the charter is merely statutory in origin, the High Court will tend to interpret the charter in a way that gives *too little*, rather than too much, deference to parliamentary judgments about the scope and priority given to particular rights, and thereby leads to an overly *maximalist* form of constitutional change in this area.¹⁰⁹

In Canada, under the Canadian *Charter* in particular, it has certainly been the experience that in most cases the SCC has taken a largely non-deferential approach to the interpretation of the *Charter*, which leaves limited room for judgments by Parliament or provincial legislatures about the meaning of *Charter* rights. Formal powers of dialogue on the part of Parliament and provincial legislatures, under s 33 of the *Charter* (the so-called 'notwithstanding clause') have also been of little direct assistance in promoting scope for legislative dialogue. In the 37 years in which the *Charter* has been in operation, there has been only one case in which the notwithstanding clause has been used to override a decision by the Canadian Supreme Court under the *Charter*.¹¹⁰ That instance involved the SCC's decision in *Ford v Quebec (Attorney-General)*,¹¹¹ and the decision by the Quebec legislature to reinstate a preference for French-only, as opposed to bilingual, signs in the province.¹¹²

Greg Cranwell, 'Treaties and Australian Law: Administrative Discretions, Statutes and the Common Law' (2001) 1 *Queensland University of Technology Law and Justice Journal* 49.

¹⁰⁷ On moral desirability, see, eg, Eric A Posner and Cass R Sunstein, 'The Law of Other States' (2006) 69 *Stanford Law Review* 131; Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129; and on pragmatically informed, see, eg, Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225; Rosalind Dixon, 'George Winterton: A Friend to Students and Foreign Law' in *Memorial Volume in Honour of George Winterton* (forthcoming 2009).

¹⁰⁸ Cf *Re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) [43].

¹⁰⁹ For critical commentary on the possibility of dialogue without such deference, see, eg, Waldron, 'Models', above n 27. See also Allan, above n 2.

¹¹⁰ See Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter' (2001) 44 *Canadian Public Administration* 255, 256-8.

¹¹¹ [1988] 2 SCR 712 ('Ford').

¹¹² See *An Act to Amend the Charter of the French Language*, SQ 1988, c 54, s 10 ('Bill 178'). Thereafter, the Quebec legislature repealed its own attempt at dialogue by passing legislation designed to give much broader effect to the decision of the SCC in *Ford* [1988] 2 SCR 712, suggesting that a more narrowly tailored alternative to French-only signage laws would be laws requiring French to be 'present and predominant' on all signs. See *An Act to Amend the Charter of the French Language*, SQ 1993, c 40, s 18 ('Bill 86').

Parliament has never invoked section 33 of the *Charter*, and provincial legislatures have used it only fifteen times in addition to its usage in connection with *Ford*. Twelve of those further instances also involved Quebec.¹¹³

For this reason, as I have argued elsewhere, one the key prerequisites to the achievement of a weaker form of judicial review in Canada, as compared to (say) the US, has been the greater willingness of the Canadian, as compared to the US Supreme Court, in a limited number of 'second look' cases, involving challenges to dialogic legislative sequels, to defer to legislative constitutional judgments.¹¹⁴ I have shown, for example, that of the five instances between 1982 and 2005 in which the Canadian Parliament or a provincial legislature sought to narrow the effect of the SCC's interpretation of the *Charter* via ordinary legislative means, and the Court was subsequently asked to rule on the validity of that sequel, four involved a decision by the Court not only to uphold the relevant sequel, but also to some degree to defer to the legislative constitutional judgments implicit in such sequels.¹¹⁵ In only one instance in the more than 20 years of litigation under the *Charter* – in *Sauvé v Canada (Chief Electoral Officer)*¹¹⁶ – has the SCC actively refused to uphold a legislative sequel in its entirety. This decision by the Court in *Sauvé II* also involved one of the few occasions in which a majority of the Court was willing explicitly to reject the idea of deference to the Canadian Parliament in second look cases.¹¹⁷

From this perspective, a crucial challenge for proponents of a minimalist charter in Australia will clearly be to determine not simply how to 'borrow' from Canada at the level of formal constitutional design, but also how to encourage the High Court, in its interpretation of any Canadian-style charter, to emulate this more *informal* aspect of the SCC's approach to Canada's more entrenched rights *Charter*.¹¹⁸

A related and equally important challenge will be to determine how to encourage the Australian Parliament to follow the lead of the Canadian Parliament, and Canadian provincial legislatures, in enacting the kind of ordinary dialogic legislative sequels necessary for such a model of deference-based dialogue to succeed. And in this context in particular, comparative experience suggests that the chances of achieving this will tend to be lower, rather than higher, under a charter that confers only weak remedies on the High Court, than under a charter that gives the Court stronger remedial powers.

In the UK, among the mostly public law cases reported in Table 1 involving the making of a declaration of incompatibility under s 4 of the UK *HRA*, at least two cases have been met with a legislative response evidencing some form of direct

¹¹³ See Kahana, above n 110.

¹¹⁴ Dixon, 'Charter Dialogue', above n 8.

¹¹⁵ See, eg, *R v Darrach* [2000] 2 SCR 443; *Winko v British Columbia (Forensic Psychiatric Institute)* [1999] 2 SCR 625; *R v Hall* [2002] 3 SCR 309; *Canada (AG) v JTI-Macdonald Corp* [2007] 2 SCR 610.

¹¹⁶ See *Canada Election Act*, RSC 1985, c E-2 (as amended by *An Act to Amend the Canada Elections Act*, SC 1993, c 19, s 23(2)); *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 ('*Sauvé II*').

¹¹⁷ See, eg, *Sauvé II* [2002] 3 SCR 519, [8]-[9].

¹¹⁸ One way in which the drafters of a rights charter might do this is by making clear that a formal power on the part of Parliament to override a court decision, such as exists under a power of suspension or amendment, is not intended to be exhaustive of the scope Parliament has to modify the court's interpretation of a rights charter.

disagreement or dialogue with English courts.¹¹⁹ These two cases also represented a significant proportion of the total number of cases in which a dialogic legislative sequel could reasonably have been expected, given that only five declarations were issued in this period at the House of Lords or Court of Appeal level,¹²⁰ and also that these were the only cases in which the government ultimately sought to uphold the compatibility of the relevant legislation with the *Convention*.

However, in the context of those mostly civil and criminal cases decided under s 3 of the *HRA*, where the possibility of statutory distortion was far more present, there was a quite different rate of dialogic legislative response. Of the nine cases decided during this same period under s 3, only one was met by a legislative response evidencing any direct disagreement, when at least five cases could reasonably have been expected to generate such a response. (In six out of the nine cases, for example, the government sought actively to defend the compatibility of the relevant legislation both at first instance and on appeal; and that in several cases, the 'law and order' priorities of the government would have seemed to point strongly toward the Westminster Parliament having an interest in engaging in dialogue with the courts.¹²¹)

In Canada, by contrast, there has been a consistent willingness on the part of Parliament and provincial legislatures to enact dialogic sequels in response to *both* public *and* non-pure public law cases, even under the *Charter*. The SCC invalidated legislation for inconsistency with the *Charter* on 54 distinct occasions between 1982 and 2005, and in 13 of those cases, the Canadian Parliament or provincial legislatures responded by enacting legislation containing some clear and direct form of legislative disagreement with the SCC about the proper balance to be struck between rights and interests in a particular area.¹²² Moreover, among those 13 cases, while there were

¹¹⁹ *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 and *R (Anderson) v Secretary of State for the Home Department*, [2003] 1 AC 837.

¹²⁰ See, eg, *R v McR* [2002] NIQB 58; *R (on the application of M) v Secretary of State for Health* [2003] 1 WLR 1318; *Blood and Tarbuck v Secretary of State for Health* (Unreported, High Court, Sullivan J, 2002); *R (H) v London North and East Region Mental Health Review Tribunal* [2002] QB 1. There will, of course, be some cases where a decision not to appeal is strategic, rather than a sincere indication of agreement. The four cases decided at a lower court level in the UK in this period seem far from this kind of case, however. The government ultimately conceded the question of incompatibility in all four cases, either at the initial hearing or afterward.

¹²¹ See John Darnton, 'British Labor Party Sheds Marx for Middle Class', *New York Times* (New York), 5 October 1994 (detailing future Prime Minister Tony Blair's law and order priorities at the time of assuming leadership of British Labor); Brian Wheeler, *The Tony Blair Story* (2007) BBC News <<http://news.bbc.co.uk/2/hi/6506365.stm>> at 13 November 2009 (on the broad priorities of the Blair government, and legislative majority, from 1997-2007). For cases in which such concerns might have been thought to be particularly relevant, see, eg, *R v Offen* [2001] 1 WLR 253 (narrowing the range of cases in which an automatic life sentence would apply) and *R (Sim) v Parole Board* [2003] 2 WLR 1374 (narrowing the circumstances in which a prisoner recalled from release on licence could be held in custody, by 'reading-down' the apparent presumption in favour of continued detention, so as to create a presumption in favour of release).

¹²² Dixon, 'Charter Dialogue', above n 8.

three cases of a pure public law nature,¹²³ there were 10 that involved legislation of a squarely criminal (or at least quasi-criminal) character.¹²⁴

Quite striking in this context is also the fact that among the total number of dialogic sequels passed, 12 out of 13 were enacted via ordinary legislative means, under s 1 of the *Charter*, rather than in reliance on the notwithstanding clause in s 33.¹²⁵ Because, in the context of a constitutionally entrenched charter, this created some real risk that the SCC would deny legal effect to such dialogic sequels, one might think that the rate at which Canadian legislators have been willing to enact such sequels under the *Charter* in fact tends to understate the degree to which they might have been willing to take a similar path under a less entrenched charter, such as the CBOR, which also gives the courts strong remedies.

IV CONCLUSION

Minimalism when it comes to potential changes to the relationship between the High Court and federal Parliament is, of course, far from the only criterion by which proposals for a national rights charter ought to be judged. Such proposals should clearly also be assessed by reference to a number of other criteria, including concerns about the impact of a national charter on the federal system, on the achievement of particular ideals of social justice and on the operation of various substantive areas of law.

On federalism grounds, in particular, there may be some argument to be made in favour of a UK-style charter over Canadian-style one, if a national charter is to apply to state as well as federal law.¹²⁶

When it comes to a power of legislative amendment or suspension such as that conferred by a Canadian-style charter, state Parliaments will be far more constrained than the federal Parliament in their ability to make use of such mechanisms. They will clearly lack power to *amend* the terms of a federal rights charter, as interpreted by the Court. They will also in many cases, by virtue of s 109 of the *Constitution*, have limited power to impliedly suspend the operation of a charter in a way which expresses interpretive disagreement with the Court.

Section 109 of the *Constitution* provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' The High Court has also held that 'inconsistency' may be direct or indirect. It may arise from a conflict of duties, or rights and duties, created by federal as opposed to state law ('direct inconsistency'), or from the conflict which arises between state and federal law where state law continues to

¹²³ *Sauvé v Canada* (A-G) [1993] 2 SCR 438; *Corbiere v Canada* (Minister of Indian and Northern Affairs) [1999] 2 SCR 203; *Figueroa v Canada* (A-G) [2003] 1 SCR 912.

¹²⁴ *R v Vaillancourt* [1987] 2 SCR 636; *Ford* [1988] 2 SCR 712; *R v Bain* [1991] 1 SCR 91; *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139; *R v Swain* [1991] 1 SCR 933; *R v Seaboyer* [1991] 2 SCR 577; *R v Zundel* [1992] 2 SCR 731; *R v Morales* [1992] 3 SCR 711; *Sauvé v Canada* (A-G) [1993] 2 SCR 438; *R v Daviault* [1994] 3 SCR 761; *RJR-MacDonald Inc v Canada* (A-G) [1995] 3 SCR 199; *Thomson Newspapers v Canada* (A-G) [1998] 1 SCR 877.

¹²⁵ The exception is *Ford* [1988] 2 SCR 712.

¹²⁶ Cf Australian Bill of Rights Bill 1985 (Cth).

apply in circumstances where Parliament has intended to 'cover the field' in a particular area ('indirect inconsistency').¹²⁷ Direct inconsistency, in turn, will be measured by the Court without any reference to the intention of Parliament as to whether such a conflict should exist.¹²⁸ Even if the federal Parliament were to pass a law in support of a state Parliament's attempt to engage in dialogue, by providing, for example, that a charter 'was not intended to apply to, or interfere with, the operation of' a particular state law, state Parliaments would have limited ability to use implied repeal as a tool for disagreeing with the Court about its preferred interpretation of charter rights.

By contrast, a power of non-implementation such as that created by issuing a declaration of incompatibility could just as readily be exercised by state Parliaments, as by the federal Parliament. Adoption of a UK-style charter could help ensure that, if a national rights charter were to bind the states, it would do so in a way which was as minimalist as possible from the standpoint of federalism¹²⁹.

Existing debates about a national rights charter tend, however, to focus almost exclusively on the issue of the horizontal balance between the High Court and federal Parliament rather than on vertical balance between the Court and state Parliaments; and in this context, this paper has sought to show that the current orthodoxy in favor of a UK-style charter is dangerously misguided.

Rather than encouraging greater dialogue, a UK-style declaration of incompatibility mechanism has done exactly the opposite. In civil and criminal cases, in particular, it has encouraged statutory distortion of a kind which has seriously undermined the willingness of Westminster to engage in dialogue with the English courts under the UK *HRA*. In Australia, one should also expect that this distortion – and damage to dialogue – will be even greater, given our distinct constitutional framework.

¹²⁷ See, eg, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 478 (Knox CJ and Gavan Duffy J) (holding that direct inconsistency can arise where a Commonwealth law grants a right the exercise of which a state law interferes with); *University of Wollongong v Metwally* (1984) 158 CLR 447 ('*Metwally*') (outlining nature of tests for direct and indirect inconsistency).

¹²⁸ See *Metwally* (1984) 158 CLR 447 (holding that Parliament cannot unilaterally define, retrospectively, the scope of even indirect inconsistency).

¹²⁹ It is worth noting that a Canadian-style charter could potentially achieve the same result by providing for a power of state parliamentary override similar to that found in s 33 of the Canadian *Charter of Rights and Freedoms* 1982. For such a power to be effective in all cases, however, s 109 of the *Constitution* would need to be amended, via the referendum process in s 128 of the *Constitution*, so as to give constitutional precedence to such an override power. While such a process need not lead to a constitutionally entrenched, and therefore maximalist, rights charter at the level of substance (it could, eg, simply involve an attempt to give Parliament power to enact a statutory rights charter that modifies the effect of s 109), from a procedural perspective, it would clearly mean that the enactment of a statutory charter was far from minimalist.