



## A. INTRODUCTION

1. The terms of reference of the Independent Human Rights Act Review (“the IHRAR”) mandate the Panel to investigate two themes: how the Human Rights Act (“the HRA”) regulates the relationship between domestic courts in the UK and the European Court of Human Rights (“ECtHR”); and how the HRA affects the relationship between the executive, Parliament and the courts in the UK. It is clear from the terms of reference, however, that the UK government does not contemplate withdrawing from the European Convention of Human Rights (“the ECHR”) and the Panel’s investigation, therefore, should be proceed on that basis.
2. These submissions are premised on the basis that the manner in which rights should be enforced in a particular democracy depends on the existing constitutional framework of that democracy and also, at least in some cases, on its international obligations. We provide an outline of interpretive provisions in other constitutional settings but in doing so do not suggest that they can be imported, without more, into the UK setting.
3. As will become clear from these submissions, it is our view that the HRA has been a successful innovation for the following reasons:
  - (a) the HRA has made an important contribution to the protection and promotion of human rights in the UK – in particular it has achieved the purposes set out

in the 1997 White Paper, *Rights Brought Home*,<sup>1</sup> in permitting people in the UK to approach UK courts for relief under the ECHR and not require them to approach the ECtHR in Strasbourg and has allowed UK courts to develop a human rights jurisprudence rooted in UK constitutional traditions and values;

- (b) the HRA has established an appropriate balance both between the ECtHR and the UK courts, and between the executive, Parliament and the courts;
- (c) the HRA provides a nuanced remedial framework which provides robust protection for rights while recognising that Parliament is the “senior partner”<sup>2</sup> in its relationship with the courts; and
- (d) the HRA, and its remedial framework, has been influential in the design and development of human rights systems in other jurisdictions.

4. These submissions are divided into six parts: in the first we consider the manner in which the HRA regulates the relationship between the ECtHR and the UK courts, particularly through the mechanism provided by section 2 of the Act; then we consider the interlocking mechanism provided by sections 3 and 4 of the Act, which regulates the relationship between the executive, Parliament and the courts; third we provide a brief account of structures of rights protection in other jurisdictions and how the HRA has influence them; fourth, we provide a comparative overview of interpretive provisions in different constitutional settings; fifth, we consider what might be seen as a shortcoming in section 4 and finally, we provide a brief analysis of how different constitutional settings and cultures affect constitutional practice.

## **B. THE HRA REGULATION OF THE RELATIONSHIP BETWEEN THE ECtHR AND THE UK COURTS (SECTION 2 OF THE HRA)**

5. Section 2 of the HRA requires courts to “take into account” jurisprudence of the ECtHR when deciding questions connected with convention rights. At the time the HRA was introduced to Parliament, the Lord Chancellor, Lord Irvine, stated that

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<sup>1</sup> *Rights Brought Home: The Human Rights Bill* (October 1997, CM 3782).

<sup>2</sup> The characterisation is made by Aileen Kavanagh in *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 407.

section 2 would “permit UK courts to depart from Strasbourg decisions”.<sup>3</sup> The approach of the UK courts to section 2 has acknowledged that they may depart from the jurisprudence of the ECHR but only in limited circumstances. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*, Lord Slynn said “[i]n the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights.”<sup>4</sup> And in *R (Ullah) v Special Adjudicator*,<sup>5</sup> Lord Bingham held that “it follows that the national court subject to a duty such as imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law”.<sup>6</sup> In the last decade, it may be said that there has been a greater openness to departing from the jurisprudence of the ECtHR than in earlier years. An example of this trend is the recent decision, *R (Hallam) v Secretary of State for Justice*,<sup>7</sup> where the members of the Supreme Court differed on whether the Strasbourg case law applied to the case before it. Lord Mance, for example, could not conclude that the current Strasbourg jurisprudence was “coherent or settled on the points critical” to the appeal.<sup>8</sup> It is inevitable that a test like section 2 will give rise to some difficulty in application, but it would be wrong to assume that amending the text of section 2 would remove that difficulty.

6. We agree with Professor Kavanagh’s assessment of the application of section 2 by the UK courts:

“Whilst paying ‘proper regard’ to the Strasbourg jurisprudence, the domestic courts must nonetheless develop a human rights jurisprudence which is sensitive to the domestic context. Nothing in the House of Lords’ approach to section 2 requires our domestic courts to ‘routinely and uncritically apply decisions that do not sufficiently make allowance for the special qualities of our domestic jurisdiction’. On the contrary, the courts have stressed that they are not ‘inflexibly bound’

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<sup>3</sup> 583 HL 514, 515 (8 November 1987); 584 HL col 1271, cited in Kavanagh (n 2) 146.

<sup>4</sup> [2001] UKHL 23 at [26].

<sup>5</sup> [2004] UKHL 26.

<sup>6</sup> Ibid at [20].

<sup>7</sup> [2019] UKSC 2.

<sup>8</sup> Ibid at [73].

by Strasbourg jurisprudence, and can distinguish and depart from it when appropriate”.<sup>9</sup>

7. In our view, section 2 of the HRA strikes a delicate balance between the jurisprudence of the ECtHR and the UK courts that the UK courts have implemented in a carefully calibrated fashion and no amendment of section 2 is warranted.

**C. THE HRA REGULATION OF THE RELATIONSHIP BETWEEN THE EXECUTIVE, PARLIAMENT AND THE COURTS (SECTIONS 3 AND 4)**

8. The HRA employs a dual remedial framework through sections 3 and 4 of the Act. The interpretive mandate is set out in section 3 and instructs the courts to “so far as it is possible to do so” to read and give effect to legislation “in a way which is compatible with Convention Rights”.<sup>10</sup> If it is not possible to read a provision in a way which is compatible with Convention Rights, the court may choose to issue a declaration of incompatibility which does not affect the validity of the law (but is designed to draw the compatibility issues to the attention of Parliament – in the expectation, that Parliament will either resolve the incompatibility or provide justification for the incompatibility).
9. The UK courts have taken a broad approach to the interpretive mandate in section 3. The House of Lords read the mandate in *R v A (No 2)* (discussed in more detail below) as permitting a “linguistically strained” interpretation to ensure compatibility with Convention Rights.<sup>11</sup> This interpretation was refined by the House of Lords in *Ghaidan v Godin-Mendoza*.<sup>12</sup> In that case the interpretive direction was described as potentially requiring “a court to depart from the unambiguous meaning the legislation would otherwise bear”<sup>13</sup> and also to permit

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<sup>9</sup> See Kavanagh (n 2) 164.

<sup>10</sup> “Convention Rights” is defined in section 1 of the Act.

<sup>11</sup> *R v A (No 2)* [2002] 1 AC 45 at [44] *per* Lord Steyn.

<sup>12</sup> [2004] UKHL 30.

<sup>13</sup> *Ibid* at [30].

courts “to supply by implication words that are appropriate”<sup>14</sup> to render the legislation compatible with the ECHR.

10. However, there are limits to the approach as was also made clear in *Ghaidan*. Any interpretation must not “contradict any cardinal principle” of the legislation<sup>15</sup> nor “be inconsistent with a fundamental feature of the legislation”.<sup>16</sup> In short, the interpretation must “go with the grain of the legislation”.<sup>17</sup> In addition, the courts have acknowledged that any interpretation of legislation may not have “important practical repercussions which the court is not equipped to evaluate”.<sup>18</sup> The approach in *Ghaidan*, has been the accepted and settled position in UK courts since.
11. Almost all uses of the remedial framework have also led to relevant changes in the law, either through the courts’ approach itself, or the response of the UK Parliament to the making of a declaration of incompatibility under section 4.<sup>19</sup>
12. While there are no official statistics on the number of cases in which the courts have employed the dual remedial framework of sections 3 and 4, the Ministry of Justice does report to the Joint Committee on Human Rights on the Government response to human rights judgments. The most recent report has recorded that 43 declarations of incompatibility have been made by the UK courts from 2 October 2000 through to the end of July 2020.<sup>20</sup>

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<sup>14</sup> Ibid at [121] *per* Lord Rodger.

<sup>15</sup> Ibid at [128] *per* Lord Rodger.

<sup>16</sup> Ibid at [33] *per* Lord Nicholls.

<sup>17</sup> Ibid at [33] *per* Lord Nicholls, adopting a phrase used by Lord Rodger at [121].

<sup>18</sup> Ibid at [115] *per* Lord Rodger.

<sup>19</sup> See the useful and important empirical study by Professor Jeff King, King J, ‘Parliament’s Role Following Declarations of Incompatibility under the Human Rights Act’ in Hunt M, Hooper H and Yowell P (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Bloomsbury Publishing 2015) and also see the following cases that illustrate the pattern, *Bellinger v Bellinger* [2003] 2 AC 467 (HL); *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 (Eng CA); *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 (HL); *R (H) v London North and East Region Mental Health Review Tribunal* [2002] QB 1; *R (D) v Secretary of State for the Home Department* [2003] 1 WLR 1315 (Eng CA); and *Blood and Tarbuck v Secretary of State for Health English* [2003] EWHC.

<sup>20</sup> Ministry of Justice *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments 2019-2020*.

13. Through a mix of section 3 and 4 remedies, UK courts have thus made an important contribution to the protection and promotion of rights in a range of areas, including in the context of:
- (a) Mental health law;<sup>21</sup>
  - (b) Customs and immigration;<sup>22</sup>
  - (c) Anti-terrorist policy;<sup>23</sup>
  - (d) LGBTQI rights;<sup>24</sup> and
  - (e) Criminal justice reform.<sup>25</sup>
14. There is also strong evidence that the HRA has had an indirect impact on the development of a human rights culture and consciousness within the executive government.<sup>26</sup>

**D. THE HRA ESTABLISHES A PARTNERSHIP BETWEEN PARLIAMENT AND THE COURTS, IN WHICH PARLIAMENT IS THE “SENIOR PARTNER”**

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<sup>21</sup> See for example *R (H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)* [2002] QB 1 (Eng HC); *R (D) v Secretary of State for the Home Department* [2003] 1 WLR 1318, [2002] EWHC 2805 Admin (Eng HC); *R (on the application of M) v Secretary of State for Health* [2003] ACD 389, [2003] EWHC 1094 (HC Admin Div).

<sup>22</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 (Eng CA).

<sup>23</sup> See for example *Attorney General's Reference No 4 of 2002* [2004] UKHL 43.

<sup>24</sup> See for example *Ghaidan* (n 12), *Bellinger* (n 19).

<sup>25</sup> *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 (HL); *R v Offen*. [2001] 1 WLR 253 (Eng CA); *R v Lambert*, [2002] 2 AC 545; *R (Sim) v Parole Board* [2003] 2 WLR 1374 (Eng HC).

<sup>26</sup> On this culture, and both its development and limits, see generally Janet Hiebert and James Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press, 2015).

15. The HRA is reflective of what has variously been termed the “new Commonwealth” model,<sup>27</sup> the dialogue model,<sup>28</sup> a Parliamentary bill of rights,<sup>29</sup> or “weak form”<sup>30</sup> review model of rights charters. Whatever name is applied, this model is intended to foster increased engagement with human rights and collaborative partnership by and between all branches of government in seeking to produce outcomes that respect and protect human rights. This model thus rejects a strict version of the separation of powers in which constitutional actors operate in isolation from one another. The intention is to establish a *collaborative* relationship between, in particular, Parliament and the courts.<sup>31</sup>
16. In this regard, we note Baroness Hale’s evidence to Parliament’s Joint Committee on Human Rights last month. A member of the Committee asked whether the Court’s duty to give effect to legislation in a manner that is compatible with convention rights caused “any problems in practice” or led courts “to give an unduly strained interpretation to legislation”.<sup>32</sup> Baroness Hale responded as follows:

Thank you for that question. The weasel word in it, if I may say so, is “unduly”. When is an interpretation unduly strained? I do not think it has caused a great many problems in practice. I know there was discussion last week about the main case, *Ghaidan v Godin-Mendoza*, which was about whether the words “living together as husband and wife” could be interpreted so as to include a same-sex couple who were living together in a marriage-like relationship. Four of us in the House of Lords held that, yes, it could be so interpreted, and there was one person who disagreed, but I think most people would think that that was a perfectly proper use of the interpretive obligation and consistent with how things are moving. It was necessary, because Strasbourg takes a very firm line on discrimination against people because of their sexual orientation. It is one of the things that Strasbourg has been very clear about for a long, long time.

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<sup>27</sup> Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

<sup>28</sup> Rosalind Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited’ (2007) 5(3) *International Journal of Constitutional Law* 391.

<sup>29</sup> Hiebert and Kelly (n 26).

<sup>30</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009).

<sup>31</sup> Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2021 forthcoming). See also Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 2).

<sup>32</sup> The evidence, which was given on 3 February 2021, is available here: Evidence to Joint Committee on Human Rights, 3 February 2021 <<https://committees.parliament.uk/oralevidence/1661/html/>>.

Could I say something else about that case, and indeed about most of the other interpretive cases? That was a case in which the Government intervened to argue very strongly that that was what we should do. We have three choices. Usually the Government argues first for compatibility, but if we decide that it is incompatible, there is then a choice between the interpretive obligation, if we can, to try to cure it or simply to make a declaration of incompatibility. I cannot remember a case that I was involved in where we did not do whichever of those two the Government asked us to do. The Government's first line was always, "It's compatible" but if they lost on that they would then argue either for using the interpretive obligation or for a declaration, and we would usually do what the Government asked for in that respect.<sup>33</sup>

17. Here Baroness Hale is making the important point that once judges have come to the view that a provision is not compliant with the Convention, they pay close attention to the arguments made by government. Indeed, she says that courts "usually" do what government asks and that they did so in *Ghaidan*. Her response provides a clear example of the collaborative relationship between the courts and the government in this area.
18. The drafting of the HRA encourages such collaboration by recognising that it is not merely the role of the courts to protect human rights but the role of the executive and the legislature also. How these institutions react to each other occupying this space is the collaborative or dialogic component in the model.

## **E. THE HRA IS LINE WITH GLOBAL BEST PRACTICE; AND A SUCCESSFUL BRITISH EXPORT: A COMPARATIVE OVERVIEW OF OTHER PROVISIONS**

### **(i) In Line with Global Best Practice**

19. The South African 1996 Constitution was intended to act as a bridge away from a "culture of authority" to one of justification.<sup>34</sup> The Constitution contains a Bill of Rights Act in Chapter 2 which entrenches a wide array of fundamental rights. Section 39 of the Bill of Rights sets out the interpretive provisions which provide:

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<sup>33</sup> Ibid at Q27.

<sup>34</sup> Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31, 32.



- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

20. Section 39(2) is intended to serve a similar function to that of section 3 in the HRA, despite being formulated in quite a different manner. In the leading case, *Langa DP* held that the interpretive provision means that courts “must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section”.<sup>35</sup> It is notable that this approach is very similar to the approach in section 3 of the HRA, despite the very different language of section 39(2). Yet, it is perhaps not surprising that the Court adopted an approach which seeks to find a Bill of Rights-compliant interpretation to legislative provisions. Enacting a Bill of Rights is evidence of a clear legislative purpose to protect rights, and seeking to interpret legislation that gives effect to that legislative purpose is respectful of the legislature and its purpose, as well as respectful of rights.
21. Nevertheless, the application of the approach to section 39(2) does quite often give rise to judicial disagreement. An example of that disagreement is to be found in *Daniels v Campbell and Others*,<sup>36</sup> where the Court divided over the question whether the word “spouse” in legislation could be read to include women who were

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<sup>35</sup> See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others, in re Hyundai Motor Distributors and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC) at [23].

<sup>36</sup> [2004] ZACC 14. For judicial disagreement arising in similar circumstances, see also *Bertie Van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others* [2009] ZACC 1.

married according to Muslim rites, but not according to civil law. The majority held that the word “spouse” could be read in this way to achieve a Bill of Rights compliant result. However, two judges dissented holding that the word “spouse” could not be read in that manner and would have instead issued a declaration of invalidity.

**(ii) A Successful British Export**

22. There can be no exact transplant of constitutional frameworks or provisions because of differences in constitutional context and culture,<sup>37</sup> which we explain in more detail below at paragraphs 57 to **Error! Reference source not found.** Nevertheless since its adoption, the HRA has become an extremely successful legal export. The HRA has become a leading model and influence on global constitutionalism, especially the “new Commonwealth” constitutional model.<sup>38</sup>
23. To date, the HRA has directly informed the design, application and/or interpretation of:
  - (a) the Australian Capital Territory’s (“ACT”) Human Rights Act 2004 (“ACT HRA”);
  - (b) Victoria’s Charter of Human Rights and Responsibilities Act 2006 (“Victorian Charter”);
  - (c) Queensland’s Human Rights Act 2019 (“QHRA”); and
  - (d) the New Zealand Bill of Rights Act 1990 (“NZBORA”).
24. Each of these rights charters have also been widely seen as successful innovations in the protection of rights in their respective jurisdictions, and particularly in the case of the Australian legislation, which followed the enactment of the HRA, as reflecting a positive British influence on the development of a new model of constitutionalism. However, despite that clear influence it is important to note that neither Australia nor New Zealand are bound by the ECHR, and so the context for their legislation is materially different.

**(iii) The ACT HRA**

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<sup>37</sup> Tushnet (n 30) 21.

<sup>38</sup> See generally Gardbaum (n 27).

25. In April 2002, the Chief Minister and Attorney-General of the ACT, Jon Stanhope appointed a ACT Bill of Rights Consultative Committee which was tasked with conducting an inquiry as to “whether it [was] appropriate and desirable to enact legislation establishing a bill of right in the ACT” and if so; what form that bill of rights should take.<sup>39</sup> Following extensive consultation, polling and receipt of written submissions, the Committee recommended that the ACT government adopt a bill of rights act, named the Human Rights Act in a dialogic model. While the Committee recognised that to some extent dialogue already exists in constitutional and governance arrangements, where the judiciary comments on the adequacy efficacy or sensibility of particular pieces of legislation, this is often found in an environment on uncertainty as to what is “permissible and appropriate” in each circumstance.<sup>40</sup> The purpose of the ACT HRA was to define the appropriate roles, responsibilities and methods of dialogue which it was hoped would encourage “a culture of dialogue about human right, in which views are respectfully aired, respectfully heard and respectfully responded to”.<sup>41</sup> When searching for a model to emulate, the Committee reviewed the effectiveness of the United States Bill of Rights Act, the Canadian Charter of Rights and Freedoms 1982, NZBORA, the South African Bill of Rights 1996, and the HRA.
26. The Committee agreed that the model reflected in the HRA which preserves the balance between the three branches of government in relation to the protection of rights was the preferred approach to adopt in the ACT. The Committee was so concerned to avoid the “stand off” between the judiciary and legislature that it recommended against adopting the title “bill of rights” for fear it would invoke thoughts of the adversarial United States Bill of Rights.<sup>42</sup> The result of the Consultative Committee’s process, was the enactment of the Human Rights Act 2004. The rights protected by the ACT HRA are drawn from the International

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<sup>39</sup> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (ACT Bill of Rights Consultative Committee, 2003).

<sup>40</sup> Ibid [4.6].

<sup>41</sup> Ibid [3.53]; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 76.

<sup>42</sup> ACT Bill of Rights Consultative Committee (n 39) [3.57]. See also Hilary Charlesworth, ‘Australia’s First Bill of Rights: The Australian Capital Territory’s Human Rights Act’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006).

Covenant on Civil and Political Rights (“ICCPR”) (though not all ICCPR rights are included).<sup>43</sup> Following amendment, the ACT HRA also includes the rights to education,<sup>44</sup> and the right to work (and other work related rights).<sup>45</sup>

27. The key British influence on the ACT HRA, however, is its **non-entrenched status and remedial architecture**. Following the scheme of the UK HRA, the ACT HRA is a non-entrenched statute which seeks to promote respect and protection for human rights through dialogue between the three branches of government.<sup>46</sup>
28. The interpretive mandate in the ACT HRA has changed over time. When the ACT HRA was originally enacted, the interpretive direction to the courts in section 30 was similar to that in the HRA, it provided that:

In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.

29. In this context, the ACT Supreme Court also endorsed the view of Lord Nicholls in *Ghaidan v Godin-Mendoza* that the interpretive direction “may require a court to depart from the unambiguous meaning the legislation would otherwise bear”.<sup>47</sup> It is arguable whether this was the intended purpose of the original section 30 as the Committee was not minded to provide the judiciary with the ability to essentially rewrite legislative provisions through interpretation.<sup>48</sup> This was in explicit rejection of Lord Steyn’s approach in *R v A (No 2)* permitting a “linguistically strained” interpretation to ensure compatibility with Convention rights.<sup>49</sup>
30. A crucial difficulty with this interpretation was section 139 of the Legislation Act 2001 which provided a competing interpretive direction to that of the ACT HRA. Section 139 of the Legislation Act required the courts to give a provision an interpretation which best achieved the statute’s purpose should be preferred to any

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<sup>43</sup> The prohibition on propaganda for war and national, racial or religious hatred and the right to form trade unions. See Byrnes, Charlesworth and McKinnon (n 41) 81.

<sup>44</sup> *Human Rights Act 2004* (ACT) s 27A (‘ACT HRA’).

<sup>45</sup> *Ibid* s 27B.

<sup>46</sup> ACT Department of Justice and Community Safety, *Twelve-Month Review of the Human Rights Act* (June 2006) 33.

<sup>47</sup> *Ghaidan v Godin-Mendoza* (n 12) [30].

<sup>48</sup> ACT Bill of Rights Consultative Committee (n 39) [4.24].

<sup>49</sup> *R v A (No 2)* (n 11) [44] *per* Lord Steyn.

other purpose. The correct approach to these seemingly contrary positions was never resolved by the courts. Instead, a review of the ACT HRA by the Department of Justice and Community Safety recommended that section 30 of the ACT HRA be amended to clarify that a human rights consistent interpretation *must* prevail unless that would defeat the purpose of the legislation.<sup>50</sup>

31. The recommendation was adopted by the ACT government and was implemented into legislation through an amendment to section 30. Section 30 now provides a direction to the courts to interpret legislation in a way which is compatible with human rights “[s]o far as it is possible to do so consistently with its purpose”.
32. As with the HRA, the ACT HRA empowers the courts to issue declarations of incompatibility.<sup>51</sup> However, unlike the HRA there is a statutory requirement in the ACT HRA that the government provide a response to the ACT Legislative Assembly.<sup>52</sup>

#### **(iv) The Victorian Charter of Rights and Responsibilities**

33. The Victorian Charter was first proposed by the Victorian Attorney-General in 2004 in the Attorney’s “New Directions for the Victorian Justice System 2004-2014: Attorney-General’s Justice Statement”.<sup>53</sup> The statement proposed a new justice system for the state of Victoria and included the idea of a charter of human rights. As with the ACT HRA, an independent consultation committee was established to recommend whether a charter of rights was appropriate and desirable for Victoria, and if so, in what form. The result of the consultation process was delivered on 30 November 2005, after just six months of consultation, and included a draft Charter (which with only minor modifications became the Victorian Charter).<sup>54</sup>

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<sup>50</sup> ACT Department of Justice and Community Safety (n 46).

<sup>51</sup> ACT HRA (n 44) s 32.

<sup>52</sup> Ibid 33.

<sup>53</sup> Victoria Department of Justice, ‘New Directions for the Victorian Justice System 2004-2014: Attorney-General’s Justice Statement’ (2004).

<sup>54</sup> George Williams, ‘The Victorian Charter of Human Rights and Responsibilities: Origins and Scope’ (2006) 30(3) *Melbourne University Law Review* 880, 892.

34. The final **remedial structure** of the Victorian Charter is also based primarily on the HRA.<sup>55</sup> The interpretive framework of the Victorian Charter is set out in section 32(1) and provides:

[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

35. Like the amended ACT HRA (and in accordance with section 139 of the Legislation Act) the interpretive framework makes specific reference to the purpose of the legislative provision being interpreted by the courts and prevents the court from invalidating legislation.<sup>56</sup> And section 36 of the Charter provides that if the court is unable to interpret a law consistently with the charter, the Supreme Court of Victoria may make a “declaration of inconsistent interpretation”. Mirroring section 4 of the HK HRA, a declaration under section 36 does not affect the validity of the law subject to the declaration.<sup>57</sup>
36. The interpretation of the Victorian Charter has also been informed by, if not controlled by, UK precedents and understandings. In *Momcilovic*,<sup>58</sup> the High Court of Australia (“HCA”) was required to consider the scope of the interpretive mandate provided by section 32(1), and whether it was a clause akin to the common law principle of legality or was it more wide-reaching.<sup>59</sup> The Court split evenly on this question, but did reject the wide-reaching approach adopted by the UK courts.<sup>60</sup>

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<sup>55</sup> Ibid at 881, 893.

<sup>56</sup> Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Character of Human Rights and Responsibilities Act 2006’ 32(2) *Melbourne University Law Review* 422, 430.

<sup>57</sup> Ibid.

<sup>58</sup> *Momcilovic v The Queen* [2011] HCA 34, 245 CLR 1.

<sup>59</sup> *Momcilovic* was a case under the Drugs, Poisons and Controlled Substances Act 1981 which contains a double deeming provision first that a substance is deemed to be in the possession of a person who occupies the premises where a prohibited substance is found *and* secondly substances held in a certain quantity are deemed to be held for the purposes of trafficking. The reverse onus components of this deeming provision had previously been interpreted by the Victorian courts to be a legal burden, that is the defendant had to prove on the balance of probabilities that the substances was not in their possession. The Court was asked to consider whether, subsequent to the Victorian Charter being enacted, this burden should correctly be interpreted to be an evidentiary one.

<sup>60</sup> Bruce Chen, ‘The Human Rights Act 2019 (Qld): Some Perspectives from Victoria’ (2020) 45(1) *Alternative Law Journal* 4, 7.

Given the different language of s 32(1) this rejection was not surprising. Subsequent to the decision of *Momcilovic*, the Victoria courts have also taken a middle ground approach between the principle of legality and the approach of the UK courts adopting a principle of legality plus approach. This “principle of legality plus” approach means that the courts treat section 32(1) not as requiring or authorising “a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction”.<sup>61</sup> However, the “plus” part of the approach is that the courts can read in or read down words provided they do not “change the true meaning of a provision”.<sup>62</sup> It is the principle of legality with a “wider application”.<sup>63</sup> Nonetheless, UK cases and precedents were a central part of argument before the HCA.

#### (v) Queensland Human Rights Act

37. The QHRA was the result of political negotiations in order to secure a minority Labor government following the 2015 state election.<sup>64</sup> In order to secure the support of an independent member of parliament, Labor agreed to seek advice on the implementation of a charter of rights.<sup>65</sup> In 2015, the Legislative Assembly directed the Legal Affairs and Community Safety Committee to consider whether it was “appropriate and desirable” to legislate a non-supreme charter of rights.<sup>66</sup> The Committee reported back in June 2016, the Government members of which were recommending that a charter of rights be introduced while opposition members of the committee were of the opposite view.<sup>67</sup> There was concern by some in the community that any charter of rights would not include judicial supervision of

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<sup>61</sup> *Slaveski v Smith* [2012] VSCA 25 at [20].

<sup>62</sup> *Ibid* at [45].

<sup>63</sup> *Ibid*.

<sup>64</sup> Mr Wellington’s rights concerns were in response to the Liberal National Party’s “bikie laws” which Mr Wellington was concerned infringed human rights without proper consideration.

<sup>65</sup> Emma Phillips and Aimee McVeigh, ‘The Grassroots Campaign for a Human Rights Act in Queensland: A Case Study of Modern Australian Law Reform’ (2020) 45(1) *Alternative Law Journal* 31, 33.

<sup>66</sup> Legal Affairs and Community Safety Committee “Inquiry into a possible Human Rights Act for Queensland” Report No 30, June 2016 vii.

<sup>67</sup> *Ibid* at ix.

rights.<sup>68</sup> However, the Labor Government committed to introducing a charter of rights based on the Victorian model and in turn the HRA.<sup>69</sup>

38. Following the 2017 state election and significant consultation, the Labor government introduced the Human Rights Bill on 31 October 2018.<sup>70</sup> The Bill passed its final reading on 27 February 2019 and took effect from 1 January 2020. The QHRA, as with the ACT HRA and the Victorian Charter, legislates the dialogue model of rights protection.<sup>71</sup> The interpretive framework of the QHRA is set out in section 48 which provides that:

All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

39. Again, this is similar to section 3 of the HRA, section 30 of the ACT HRA and section 32 of the Victoria Charter, though the QHRA goes one step further in adding a second interpretation directive. Section 48(2) provides that:

If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

40. The Queensland courts have approached the interpretive analysis in the QHRA as a two-stage test.<sup>72</sup> First, the court determines the ordinary meaning which of the statutory provisions and whether that ordinary meaning is compliant with rights. This is an analysis of whether it limits human rights or not and if it does whether that limit is justified when considering the factors in section 13 of the QHRA. Only if the limit cannot be justified, then does the court look to whether the provisions can hold an alternative meaning under section 48(2). This is similar to the approach which has been adopted in New Zealand discussed in more detail below.

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<sup>68</sup> Phillips and McVeigh (n 65) 35.

<sup>69</sup> Australian Labor Party “Queensland State Policy Platform 2016” October 2016 79.

<sup>70</sup> Phillips and McVeigh (n 65) 36.

<sup>71</sup> Chen (n 60) 4; Louis Schetzer, ‘Queensland’s Human Rights Act: Perhaps Not Such a Great Step Forward?’ (2020) 45(1) *Alternative Law Journal* 12, 12.

<sup>72</sup> See for example *Australian Institute for Progress Ltd v Electoral Commission of Queensland* [2020] QSC 054.



**(vi) New Zealand Bill of Rights Act**

41. The purpose of NZBORA was to “limit the powers of the executive and Parliament and to ensure that human rights were given greater legal weight”.<sup>73</sup> Contrary to the Australian acts discussed above, NZBORA was not the result of an independent constitutional committee, instead it was largely driven by the then Minister of Justice and later Prime Minister Geoffrey Palmer and followed established parliamentary consultation processes.<sup>74</sup> In 1985, the New Zealand Labour Government released the White Paper *A Bill of Rights for New Zealand* which set out a draft bill and the arguments in favour of a bill of rights. Originally proposed as a supreme law and including rights drawn from the ICCPR and including the Treaty of Waitangi, it was criticised for excessively empowering the judiciary and introducing added uncertainty into the law.<sup>75</sup> The general perception was that New Zealander’s wanted to retain full law-making power in their Parliament.<sup>76</sup>
42. The NZBORA which emerged from the parliamentary process was much watered down but retained some of the familiar provisions discussed above. The interpretive framework is set out in section 6 which provides that:
- [w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.
43. This interpretative framework in section 6 has been interpreted by the New Zealand courts with the surrounding section of NZBORA in full view. Section 4 provides that the courts do not have the power to invalidate legislation and section 5 provides that rights may be subject to reasonable limits—some have referred to these three

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<sup>73</sup> Sir Geoffrey Palmer, ‘What the New Zealand Bill of Rights Act Aimed to Do, Why It Did Not Succeed and How It Can Be Repaired’ (2016) 14(2) *New Zealand Journal of Public and International Law* 169, 171. Interestingly, Professor Peter Hogg, a New Zealand constitutional law scholar and one of the “founders” of constitutional dialogue theory, was an adviser on the draft bill – see Claudia Geiringer and Paul Rishworth, ‘Magna Carta’s Legacy? Ideas of Liberty and Due Process in the New Zealand Bill of Rights Act’ 597, 690., at 609.

<sup>74</sup> See generally Palmer (n 73).

<sup>75</sup> M Rodriguez Ferrere and Andrew Geddis, ‘Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland’ (2016) 35 *University of Queensland Law Journal* 251, 257.

<sup>76</sup> Ibid 255.

sections as the “unholy trinity” because of their, at times, confused application.<sup>77</sup> The New Zealand Supreme Court has resolved to apply the interpretive framework in section 6 of NZBORA as follows. First, the court must ascertain the natural and ordinary meaning of the legislative provision which it is interpreting and determine whether that interpretation limits a right protected by NZBORA. This approach is said to give the most weight to section 4 and ensuring Parliament’s intended meaning is adopted by the courts. If there is a limitation of an NZBORA right, the court must then determine whether that limitation is compliant with section 5 (ie. whether it is demonstrably justified in a free and democratic society). This is generally referred to as a “section 5 analysis”.<sup>78</sup> Only if a court answers this questions in the negative (ie. the limitation resulting from the ordinary interpretation of the legislative provisions is not demonstrably justified) is a court permitted to engage in a “section 6 analysis” and consider whether the legislative provision “can” be given a meaning which is right consistent.<sup>79</sup>

44. The approach to this interpretive framework has meant that the courts have refused to read provisions to permit issues which are seen as contentious by some, such as prisoner voting and assisted dying; and in doing so again engaged, though declined to follow, the interpretive approach adopted by the UK courts.<sup>80</sup>
45. There is currently, no explicit statutory power for the New Zealand courts to issue declarations of inconsistency. While courts have long considered whether they have authority to issue such a declaration, early cases suggested that they were unwilling to take such a significant step. This led some commentators to label the discussion a “road to nowhere”.<sup>81</sup> Indeed, even where the courts found that

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<sup>77</sup> James Allan, 'The Operative Provisions of the Bill of Rights: An Unholy Trinity' (1995) 5 *Bill Of Rights Bulletin* 79 cited in *ibid* at 269.

<sup>78</sup> And largely tracks the test set out in *R v Oakes* [1986] 1 SCR 103.

<sup>79</sup> If a section 6 analysis discovers an alternative meaning which is consistent with the purpose of the statute, then that meaning should be applied. If an alternative meaning cannot be found, then the original meaning must be applied by dint of section 4. While this approach has been subject to criticism from New Zealand’s former Chief Justice during her time on the bench, it has largely settled the question of how to apply the interpretive framework: see Rodriguez Ferrere and Geddis (n 75) 271.

<sup>80</sup> *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1 at [239].

<sup>81</sup> Claudia Geiringer, ‘On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act’ (2009) 40 *Victoria University of Wellington Law Review* 613.

legislative provisions were inconsistent with NZBORA (and an alternative meaning could not be found) the courts did not seek to issue a declaration of inconsistency but relied on the “reasoning to speak for itself”.<sup>82</sup> It was not until 2015 that New Zealand’s High Court issued a “declaration of inconsistency” similar to the kinds of remedies available under section 4 of the HRA.<sup>83</sup>

46. The litigation resulting in the declaration concerned the disenfranchisement of prisoners from the right to vote in the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (“**2010 Amendment Act**”). The 2010 Amendment Act extended the prohibition on voting to all prisoners where it had previously been limited to prisoners sentenced to a term of imprisonment of three years or more. This declaration was subsequently upheld by the Court of Appeal,<sup>84</sup> and Supreme Court on appeal.<sup>85</sup> Following this line of cases, the incoming Labour Government proposed an amendment to NZBORA to specifically recognise the power of the judiciary to issue declarations of inconsistency and to introduce a requirement for the Government to present a report to the House of Representatives about the declaration (the contents of such report have not yet been defined).<sup>86</sup>

**(vii) Concluding remarks on comparative survey**

47. In our view, this consideration of the experience of Australia, South Africa and New Zealand makes clear that interpretive provisions are affected by the constitutional framework around them. The UK constitutional framework is different from Australia, South Africa and New Zealand in various, different ways. In Australia, for example, the Legislation Act has had a material influence on the interpretive provisions in the ACT, Victoria and Queensland rights legislation. A notable difference between the UK and these three jurisdictions is the fact that the UK is bound by the ECHR. The design of the HRA, and in particular, sections 2, 3 and 4 of the HRA appear to us to have been carefully designed to meet the twin goals of the legislation – to enable people in the UK to approach courts for relief under the

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<sup>82</sup> Rodriguez Ferrere and Geddis (n 75) 278. It did not however, as the provision was not altered and was in fact extended to further encroach rights.

<sup>83</sup> *Taylor v Attorney-General* [2015] NZHC 1706, [2015] NZLR 791.

<sup>84</sup> *Attorney-General v Taylor* [2017] NZCA 215.

<sup>85</sup> *Attorney-General v Taylor* [2018] NZSC 104.

<sup>86</sup> New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020.

provisions of the ECHR without having to go to Strasbourg, and to enable UK courts to develop a robust human rights jurisprudence that fits the UK context. In our view, an amendment of section 3 to limit the courts' ability to read legislation compatibly with the ECHR might well threaten both those aims.

#### **F. A SHORTCOMING OF SECTION 4 OF THE HRA**

48. This review is an important and necessary result of significant constitutional change in the UK. The importance of review statutory charters of rights has also been recognised in the other jurisdictions canvassed in this study with legislative reviews scheduled in the ACT, Victoria, and Queensland, and an ad hoc review taking place in New Zealand.<sup>87</sup> There is one main issue with the current operation of the HRA: the inability of the court to provide justice to litigants who successfully challenge legislation on the grounds of Convention compliance, in circumstances where the court issues a declaration of incompatibility. This drawback is all the more worrying in circumstances where Parliament has acted on the declarations of incompatibility but has not done so in a manner that grants relief to the litigant.
49. This concern is significant, especially in cases of a civil or criminal law nature. These are often cases in which "Parliament is either legally or practically prevented from retrospectively altering the rights and liabilities of parties in a particular case".<sup>88</sup> For example, in *Ghaidan v Godin-Mendoza*,<sup>89</sup> the issue was whether the same-sex partner of a deceased tenant was entitled to enjoy the benefit of a statutory tenancy as the "spouse" of the deceased tenant. The House of Lords answered this question in the affirmative, and relied on section 3 to read in same-sex partners into

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<sup>87</sup> See sections 95 and 96 of the QHRA requiring a review of the Act after July 2023 and July 2027 and completed reviews in the ACT, Victoria and New Zealand: ACT Department of Justice and Community Safety (n 46); ACT Human Rights Commission, *Look Who's Talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004 by the Human Rights and Discrimination Commissioner* (2014); Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (2015); New Zealand Constitutional Advisory Panel, *New Zealand's Constitution: A Report on a Conversation* (2013).

<sup>88</sup> Rosalind Dixon, 'A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?' (2009) 37 *Federal Law Review* 335, 344.

<sup>89</sup> *Ghaidan v Godin-Mendoza* (n 12).

the relevant statutory scheme. Indeed as we have mentioned above, according to Baroness Hale, the Government asked that the situation be achieved through a remedial reading under section 3.<sup>90</sup> If the House of Lords had made a declaration under section 4, as some suggest would have been the preferred approach in the circumstances,<sup>91</sup> Parliament could have responded by amending the law so as to ensure that injustice was avoided in future cases, but possibly not so as to prevent injustice to Mr Godin-Mendoza himself. Any retrospective legislation of this kind could arguably have impermissibly interfered with the rights of the landlord the Convention to the “peaceful enjoyment of ... property” which has been interpreted to include not only possession of property but also requiring laws which affect property rights to be accessible, precise and foreseeable.<sup>92</sup>

50. Similarly, in *R v A (No 2)*, the defendant was charged with sexual assault and sought leave under section 41 of the Youth Justice and Criminal Evidence Act 1999 (“YJCEA”) to adduce evidence, and to ask questions, relating to an alleged sexual encounter between himself and the complainant before the alleged assault. The YJCEA attempted to codify the grounds on which prior sexual history evidence could be admitted. The House of Lords rejected this codification however, and used section 3 to interpret the 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”.<sup>93</sup> What would have happened if the House of Lords had not used section 3 and instead issued a declaration of incompatibility? The direct result would have been that 14 defendants would have been put at risk of what in House of Lord’s view “would have been wrongful conviction for an offence carrying a formal maximum penalty of life imprisonment, and a guideline sentencing range of five to eight years, absent any aggravating circumstances”. Again, it may be possible (although it may also be prohibited by constitutional principles)<sup>94</sup> that Parliament may have taken up the case and introduced legislation to prevent this injustice, but only after some delay.

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<sup>90</sup> See paras 16 - 17 above.

<sup>91</sup> See for example, Hilary Charlesworth, 'Who Wins under a Bill of Rights?' (2006) 25 University of Queensland Law Journal 39.

<sup>92</sup> Dixon, 'A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?' (n 88) 345.

<sup>93</sup> *R v A (No 2)* (n 11) at 68.

<sup>94</sup> Dixon, 'A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?' (n 88) 346.

51. To address this shortcoming, Professor Stephen Gardbaum has proposed ameliorating the HRA remedial framework by providing for a system of *ex gratia* executive remedies.<sup>95</sup> We are not certain that such a system would be sufficient but we share his concern that there is no existing mechanism whereby such relief can be provided. .
52. One of the authors of this submission, Professor Dixon, has suggested that another solution may be to build in the possibility for individualised relief to the design of section 4 of the HRA itself.
53. Professor Dixon’s approach might be met by an amendment to section 4(6) of the HRA to read as follows:
- A declaration under this section (“a declaration of incompatibility”) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, except as it applies to the particular parties before the court.
54. The difficulty of this approach, of course, is that it would not provide relief to individuals similarly situated to the successful litigant, which would be in conflict with the rule of law value of treating like cases alike.
55. It is not clear that there is a solution to the difficulty created by section 4, which seems premised on the possibility of successful litigants not being afforded the relief they seek. We suggest that the Panel consider the problem of whether relief can be afforded to a successful litigant in cases when a declaration of incompatibility is made, either as proposed by Professor Gardbaum or Professor Dixon. .
56. Common law judges are predisposed to believe that there can be no right without a remedy and are “strongly predisposed” to decide a case to do justice between the parties.<sup>96</sup> Without a procedure whereby successful litigants can be afforded relief in the circumstances of a declaration of incompatibility, the only avenue open to courts to afford them relief is if legislation can be interpreted in a manner that is compliant with the Convention as provided in section 3 of the HRA.

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<sup>95</sup> Gardbaum (n 27).

<sup>96</sup> Dixon, ‘A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?’ (n 88) 347.

## G. DIFFERENT CONSTITUTIONAL CONTEXTS AND CULTURES

57. As foreshadowed at paragraph 22 above, while the HRA has been influential in the interpretation and introduction of human rights instruments in Australia and New Zealand, each of those jurisdictions has modified the text of the HRA to suit their specific constitutional contexts and cultures, and the interpretation of these instruments has been affected by distinctive structural and contextual factors. These include:

- (a) the degree to which a human rights instrument contains a general limitation clause;
- (b) whether the courts have access to “strong-form” review remedies,
- (c) the degree to which the constitutional structure is entrenched; and
- (d) considerations arising from constitutional structure and federalism.

58. It follows that any attempt by the UK to borrow, or re-import, the somewhat different statutory language used in these jurisdictions would be subject to interpretation by UK judges, in response to these contextual differences. These factors affect the way provisions are worded and applied in each of these jurisdictions and as such, transplanting one jurisdiction’s legislative text into the constitutional culture of another cannot be expected to produce the same or even similar results.

### General Limitation Clause

59. Unlike the HRA, the Australian and New Zealand rights instruments include general limitation clauses which, provide that human rights can be subject to reasonable limits which are demonstrably justifiable.<sup>97</sup> General limitations clauses are based on the premiss that rights may justifiably be limited by the legislature, and the possibility of such limitations, affects the manner in which courts rely on interpretive remedies.

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<sup>97</sup> See for example, s 6 NZBORA, s 13 QHRA, s 28 ACT HRA and s 7 Victorian Charter.

### Availability of Strong Form Remedies

60. A further, and significant, constitutional factor that influences the interpretation of human rights instruments is the availability of strong form remedies (for example, the ability to invalidate legislation or “read in” legislative language). When courts that have strong-form remedial jurisdiction are presented with an apparent inconsistency between legislation and a human rights instrument, they may have a clear remedial choice: they can seek to address the inconsistency through the adoption of a compliant interpretation of the relevant provision or they can resort to a declaration of invalidity, often with ancillary relief, to address it.
61. The ability to resort to strong form remedies reduces the pressure to rely on remedial forms of construction as a means of affording justice to the claimant before a court. It seems reasonable to expect that in such circumstances courts may be less willing to depart from the plain meaning of statutory language because they can address the inconsistency and afford relief to the successful litigant through the use of strong form remedies.

### Entrenchment of Constitutional Structure

62. The degree to which a jurisdiction’s constitutional structure is entrenched (both politically and legally) will likewise influence how a court approaches the construction of a statutory rights charter, and its interpretive obligation under such a charter. In Canada, it is widely acknowledged that the Supreme Court of Canada has taken different approaches to the interpretation and enforcement of the 1960 Bill of Rights, on the one hand, which was not entrenched, and the 1982 Charter of Rights and Freedoms, which is. Commentators suggest that the different approaches may have resulted from the difference in entrenchment between the two instruments.<sup>98</sup>

### Constitutional Structure and Federalism Considerations

63. Finally, how a rights instrument is applied and interpreted will depend on the place it occupies within a broader constitutional structure. In Australia, for example, the

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<sup>98</sup> See for example Bruce Elman, ‘Altering the Judicial Mind and the Process of Constitution-Making in Canada’ (1990) 28 *Atla L Rev* 521 and Rosalind Dixon, ‘Partial Bills of Rights’ (2015) 63(2) *American Journal of Comparative Law* 403, 420.



strict separation of judicial and non-judicial power at a Commonwealth level was cited by the High Court of Australia in *Momcilovic* as a reason to adopt a more restrictive view of the interpretive mandate under s 32 of the Victorian Charter than the appellate committee adopted in *Ghaidan*.<sup>99</sup>

64. Similarly, the federal nature of the constitutional system in Australia, and the status of the Victorian Charter, ACT HRA and QHRA as state or territory rights instruments has inevitably influenced the interpretation of those rights instruments – as both less likely to be subject to authoritative interpretation by the High Court,<sup>100</sup> and thus a site of potential state-based democratic experimentalism, and less significant national instruments likely to be given a broad or expansive construction.

#### Good Faith Disagreement

65. Finally, we suggest that any interpretive mandate of the kind set out in section 3 of the HRA will inevitably lend itself to good faith and reasonable disagreement among judges about the precise bounds of that mandate. A provision of this kind attempts to balance competing concerns to protect and promote parliamentary sovereignty, on the one hand, and human rights, on the other, and disagreement as to how concerns should be balanced or reconciled in a particular case will often arise. Judges around the world have also grappled with these questions in good faith, and in ways that show the inevitability of different approaches to any interpretive mandate placed on a court, regardless of the specific language used to express the bounds of that mandate.
66. In Australia, for example, the High Court effectively split 3-3 as to whether section 32 of the Victorian *Charter* imposed an interpretive mandate akin to common law principles or else something broader.<sup>101</sup>
67. In New Zealand, Elias CJ adopted a different approach to the interpretation and application of sections 4, 5 and 6 of NZBORA to that adopted by the majority of the

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<sup>99</sup> *Momcilovic v The Queen* (n 58) at [145] and [150]-[159] *per* Gummow J.

<sup>100</sup> see for example *Momcilovic* (finding that a declaration of inconsistent interpretation under s 36 of the Charter was not a “judgment, order or decree” for the purposes of an appeal to the High Court under s 73 of the Commonwealth Constitution).

<sup>101</sup> Justice Heydon agree with the three justices who favoured the broader approach in this context, but reasoned in a way that suggested that the whole scheme was invalid).

Supreme Court. Moreover, over time, the New Zealand's Supreme Court's application and interpretation of these provisions has developed, first in *Moonen*,<sup>102</sup> then in *Hansen*,<sup>103</sup> and most recently in *D v New Zealand Police*.<sup>104</sup> Similarly, as mentioned above, the question whether statutory provisions can be read consistently with the Bill of Rights in the South African Constitution has given rise to good faith disagreement on the South African Constitutional Court.

68. Accordingly, interpretive provisions in rights instruments, which often seek to balance conflicting principles such as parliamentary sovereignty and rights protection, or legal clarity and rights protection, are inherently likely to give rise to disagreement, no matter how they are formulated.

## H. SUMMARY AND CONCLUSION

69. The HRA has been extremely successful in protecting and promoting the enjoyment of human rights in the UK. It has allowed UK litigants to seek relief in UK courts, obviating the need to seek relief from the ECtHR, and it has allowed UK courts to develop a principled rights jurisprudence responsive to the context of the UK. It has contributed to the reshaping of laws and policies relating to mental health, LGBTQI rights, anti-terrorist policy, customs enforcement and criminal justice, and in contributing to developing a greater rights consciousness within both the legislative and the executive branch.
70. This review provides an opportunity to review the application of the HRA both by reviewing the UK's experience as well as the experience of other jurisdictions that have sought to protect fundamental rights in their domestic law. Reviews of this nature are appropriate.
71. It is our view that the careful and balanced structure of sections 2, 3 and 4 of the HRA have been a success. They fit within the existing constitutional framework in the UK, including its international obligations under the ECHR. If there is a drawback in the system, it lies in the inability of courts to provide relief to successful litigants

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<sup>102</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

<sup>103</sup> *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1 at [239].

<sup>104</sup> [2021] NZSC 2.

in circumstances where they issue a declaration of incompatibility. Dissatisfied litigants, of course, retain their right to seek relief in Strasbourg. In our view, although there may be ways to address this drawback, none will provide a perfect solution. The scheme was designed to ensure that Parliament is the senior partner in the relationship between the legislature, executive and judiciary, and so it is Parliament that bears the primary responsibility for ensuring that rights are protected. Section 4 of the HRA reflects this scheme.

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