

HUMAN RIGHTS AND STATUTORY INTERPRETATION

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INTRODUCTION

Suzanne Corcoran's introduction to this book notes the lack of interest in theories of statutory interpretation by the Australian judiciary. Australian practice in statutory interpretation is a patchwork of approaches leading to inconsistent and contentious results. This chapter examines a new legislative device, the use of interpretative clauses in statutory bills of rights, and considers how this development will affect debates about statutory interpretation. I argue that human rights-consistent interpretation can only operate in the context of a dynamic theory of statutory interpretation.¹

A feature of some modern bills of rights is a direction that legislation be read to be consistent as far as possible with a designated set of rights. For example, s 6 of the *New Zealand Bill of Rights Act 1990* (NZ) (*'New Zealand Bill of Rights Act'*) provides that:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The New Zealand legislation specifically precludes the possibility of judicial repeal or non-application of laws inconsistent with the protected rights and freedoms.² The *New Zealand Bill of Rights Act* was the model for s 3 of the United Kingdom *Human Rights Act 1998*:

¹ See Suzanne Corcoran, 'The Architecture of Interpretation: Dynamic Practice and Constitutional Principles', ch 3.

² *New Zealand Bill of Rights Act 1999* (NZ) s 4.

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [European] Convention [on Human Rights and Fundamental Freedoms 1950] rights.³

The United Kingdom law states that the interpretative obligation applies to all laws ‘whenever enacted’. It ‘does not affect the validity, continuing operation or enforcement of any incompatible primary legislation’.⁴ The *Human Rights Act* allows the overturning of subordinate legislation that is incompatible with human rights, but it ‘does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.’⁵

The first Australian bill of rights, the Australian Capital Territory’s *Human Rights Act 2004* (ACT) (‘ACT *Human Rights Act*’), adapted the language of the New Zealand and United Kingdom laws. Section 30(1) provides:

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

The ACT law’s definition of human rights largely tracks the rights contained in the *International Covenant on Civil and Political Rights 1966*.⁶ Section 30(2) goes on to specify that this interpretative preference is subject to s 139 of the *Legislation Act 2001* (ACT) (‘*Legislation Act*’), which contains a statement of the ‘purposive’ rule of statutory interpretation in the following terms:

- (1) In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.

³ *Human Rights Act 1998* (UK), s 3 (1).

⁴ *Human Rights Act 1998* (UK), s 3 (2)(b).

⁵ *Human Rights Act 1998* (UK), s 3 (2)(c).

⁶ Opened for signature 16 December 1966, 999 UNTS 171, Part III (entered into force March 23 1976) (‘*ICCPR*’). For a discussion of the relationship between the *ICCPR* and the rights included in the ACT *Human Rights Act 2004* (ACT) see Hilary Charlesworth, ‘What Rights are Covered in the ACT Human Rights Act?’ (Paper delivered at a conference on Australia’s First Bill of Rights, Canberra, 1 July 2004) (Available at <<http://www.gtcentre.unsw.edu.au/Paper-Charlesworth.doc>>).

Section 30(3) of the ACT *Human Rights Act* follows s 138 of the *Legislation Act* to define the term ‘working out the meaning of a Territory law’ as:

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

Both the United Kingdom and ACT *Human Rights Acts* give superior courts the power to issue a formal declaration of incompatibility with human rights if it is not possible to interpret legislation to be consistent with the specified human rights.⁷ These declarations do not affect the validity of the law in question. Rather, they are designed to draw political attention to the breach of human rights. The *New Zealand Bill of Rights Act* contains no parallel provision.

The adoption of a human rights-consistent approach to statutory interpretation has been popular in modern bills of rights because it appears to avoid the charge of democracy-erosion that dogs bills of rights, allowing the judiciary to strike down legislation found to breach rights standards.⁸ The assumption has been that the new rule of statutory interpretation is less of an interference with the processes of a majoritarian democracy than entrenched protection of human rights. Judicial interpretation of laws seems a less interventionist activity than that of invalidation.⁹ Indeed, a feature of the three statutory schemes discussed here has been their marketing as methods allowing a ‘human rights dialogue’ between the various branches of government.¹⁰ The preservation of parliamentary supremacy in the three Acts has led however to criticism from some

⁷ *Human Rights Act 1998* (UK), s 4; *Human Rights Act 2004* (ACT), s 32.

⁸ Eg, Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights* (2000) 166.

⁹ For discussion of this issue see Jeffrey Goldsworthy, ‘Judicial Review, Legislative Override, and Democracy’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 263; compare Barry Friedman, ‘The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty’ (2002) 112 *Yale Law Journal* 153.

¹⁰ See *Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand* (1988) 3; Francesca Klug, above n 8, 164–175; ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003).

quarters that the mechanism of human rights interpretation is inadequate to protect human rights. For example, the United Nations Human Rights Committee has questioned the efficacy of the New Zealand and United Kingdom human rights laws, recommending that both countries revise them to allow courts to strike down legislation inconsistent with the rights set out in the *ICCPR*.¹¹

This chapter examines the way in which New Zealand and United Kingdom courts have reacted to this interpretative regime.¹² In both countries there has been much debate about the proper role of the courts in statutory interpretation and what scope the injunction to give a human rights-consistent reading to legislation leaves for legislative intent. The first Australian legislative experiment with human rights-promoting interpretation, the *ACT Human Rights Act*, is likely to generate similar controversy.

I NEW ZEALAND INTERPRETATIVE PRACTICE UNDER THE *BILL OF RIGHTS ACT*

What has been the effect of s 6 of the *New Zealand Bill of Rights Act*? The legislation was introduced in 1990 with little fanfare and seemed to have found the legal profession unprepared to explore its potential.¹³ Judges initially differed on the issue of whether the Bill of Rights introduced a new principle of statutory interpretation or whether s 6 simply codified a common law principle. For example, Sir Robin Cooke, when President of the New Zealand Court of Appeal, described the effect of s 6 as a rule of interpretation ‘comparable in importance to — perhaps of even greater importance than — [the purposive rule of statutory interpretation].’¹⁴ Justice Gault, a member of the same Court, offered the alternative view that the interpretative obligations ‘probably go little further

¹¹ [176] (New Zealand), [408]–[435] (United Kingdom), UN Doc A/50/40. For further discussion see Geoffrey W G Leane, ‘Enacting Bills of Rights: Canada and the Curious Case of New Zealand’s “Thin” Democracy’ (2004) 26 *Human Rights Quarterly* 152.

¹² I do not address here the impact of these sections on the interpretation of the common law. For such a discussion see Max du Plessis and Jolyon Ford, ‘Developing the Common Law Progressively— Horizontality, the Human Rights Act, and the South African Experience’ [2004] *European Human Rights Law Review* 286.

¹³ Paul Rishworth et al, *The New Zealand Bill of Rights* (2003) 9.

¹⁴ *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272.

than the common law presumption of statutory interpretation that where possible statutes are not to be interpreted as abrogating the common law rights of citizens.’¹⁵

New Zealand courts have read s 6 as requiring ambiguous wording for the human rights-consistent interpretative obligation to apply. They have also understood s 6 as involving the selection of the interpretation that least infringes the relevant right or rights, although the language of s 6 simply refers to a rights-consistent interpretation. The Court of Appeal provided an authoritative description of the process of statutory interpretation required by the *New Zealand Bill of Rights Act* in *Moonen v Film and Literature Board of Review*:¹⁶

After determining the scope of the relevant right or freedom [protected by the Bill of Rights Act], the first step is to identify the different interpretations of the words of [the legislation in question] which are properly open. If only one meaning is properly open that meaning must be adopted ... If more than one meaning is available, the second step is to identify the meaning which constitutes the least possible limitation on the right or freedom in question. It is that meaning which s 6 of the Bill of Rights, aided by s 5, requires the Court to adopt. Having adopted the appropriate meaning, the third step is to identify the extent, if any, to which that meaning limits the relevant right or freedom.¹⁷

The fourth step identified by the Court of Appeal is to consider whether the extent of any such limitation, as found, can be demonstrably justified in a free and democratic society in terms of s 5 of the Bill of Rights which provides:

Subject to section 4 of this Bill of Rights [providing that courts may not hold legislation implicitly repealed, revoked or invalid or ineffective], the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The *Moonen* Court argued that s 5 required the identification of the legislature’s objective in enacting the provision under challenge and the assessment of the importance of that aim. The Court stated that:

¹⁵ *Simpson v Attorney-General* [1994] 3 NZLR 667, 712.

¹⁶ [2000] 2 NZLR 9 (*Moonen*).

¹⁷ *Ibid* [17] (Tipping J).

The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved.¹⁸

Moonen involved the interpretation of s 3 of the *Films, Videos and Publications Classification Act 1993* (NZ) which required the classification of publications that ‘promote or support’ sexual activity with children as objectionable. Moonen argued that the section should be read to be consistent with his rights to freedom of thought and expression.¹⁹ The Court agreed with this argument in principle, although it was not persuaded by Moonen’s account of the scope of the rights. *Quilter v Attorney-General*²⁰ is an example of a situation where the court could find no ambiguity in the relevant legislation, and thus no basis for a human rights-consistent interpretation. In that case the Court of Appeal refused to read the word ‘marriage’ in the *Marriage Act 1955* (NZ) as including a relationship between two women, whether or not the traditional interpretation of the idea of marriage constituted discrimination against same sex couples. Justice Gault explained:

The Marriage Act is clear and to give it such different meaning would not be to undertake interpretation but to assume the role of lawmaker which is for Parliament. That is particularly so in an area where the law reflects social values and policy.²¹

Justice Tipping described the proposed interpretation as not ‘properly’ open on the words of the legislation. He defined ‘properly’ as ‘a legitimate process of construction’²² and noted that, under s 6, ‘[w]e may interpret, but we cannot rewrite or legislate’.²³ Another formulation of this point by the Court of Appeal has been that s 6 cannot be used as a

¹⁸ Ibid [18].

¹⁹ *New Zealand Bill of Rights Act 1999* (NZ), ss 13, 14.

²⁰ [1998] 1 NZLR 523.

²¹ Ibid 526.

²² Ibid 581.

²³ Ibid 572.

basis for a ‘strained interpretation’ of legislation.²⁴ Such statements leave considerable room for debate about the borderline between ‘interpreting’ and ‘rewriting’ legislation. They also do not provide guidance in circumstances where there may be a clear ambiguity in the legislative text but a human rights-consistent approach would deliver a meaning at odds with the purpose of the statute.²⁵

Two cases involving the interpretation of sentencing legislation, designed to have retrospective effect, suggest that the s 6 obligation may sometimes play a relatively powerful role in protecting human rights at the expense of legislative intent. In *R v Poumako*²⁶ the Court of Appeal held that, where there was a choice of interpretations, a human rights-consistent one was to be preferred, regardless of the intention of the legislature.²⁷ Two members of the Court however rejected this approach to s 6, arguing that ‘the judicial task of interpreting the text of a statute has little point unless it is associated with the objective of ascertaining Parliament’s intention.’²⁸ In the end, the method of interpretation was not decisive in the outcome of the case. The legislation at issue in *Poumako* was also considered in *R v Pora*.²⁹ Chief Justice Elias (joined by Tipping J) said that s 6 constitutes a ‘general principle of legality’ that requires Parliament to ‘speak clearly’ if it wishes to impinge on basic rights.³⁰ This was presented as a restatement of the common law principle that ‘[f]undamental rights cannot be overridden by general or ambiguous words’.³¹ It is not clear what the courts’ approach would be in the case where the Attorney-General has reported to Parliament under s 7 of the Bill of Rights that a bill contains provisions inconsistent with the protected human rights.³²

²⁴ *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272 (Cooke P).

²⁵ Susan Glazebrook, ‘The New Zealand Bill of Rights Act 1990: Its Operation and Effectiveness’ (Paper delivered at the South Australian State Legal Convention, 22–23 July 2004).

²⁶ [2000] 2 NZLR 695.

²⁷ *Ibid* [37] (Gault J).

²⁸ *Ibid* [82] (Thomas J).

²⁹ [2001] 2 NZLR 37.

³⁰ *Ibid* [52]–[53].

³¹ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131, quoted in *R v Pora* [2001] 2 NZLR 37 at [53].

³² Glazebrook, above n 25.

An issue that has emerged in New Zealand jurisprudence is what action a court may take if it finds legislation inconsistent with protected rights and freedoms. Section 4 precludes invalidation of legislation on the basis that it is inconsistent with the Bill of Rights and no provision is made for any judicial declaration of incompatibility. The Court of Appeal has however implied a power, ‘and on occasions the duty’, to make a ‘judicial indication’ that a law is inconsistent with human rights, although it must be enforced.³³ This power has as yet only been exercised by a single judge³⁴ and the Court of Appeal has avoided making a definitive statement on the issue.³⁵ The assertion of judicial power to make such statements has been criticised as an usurpation of legislative power.³⁶

Statutory interpretation to achieve the protection of human rights has thus had a mixed impact in New Zealand. It is now clear that s 6 of the *Bill of Rights Act* goes further than the common law principle that statutory interpretation should, where possible, accommodate individual rights.³⁷ First, the *Bill of Rights Act* codifies a particular set of rights and, in s 5, a procedure to measure limitations on rights. This explicit mechanism to consider rights in interpreting legislation has had much greater impact than the common law rule.³⁸ Second, although courts have insisted that there be an ambiguity in the legislation before they consider the application of a human rights-consistent interpretation, the necessary uncertainty in meaning can on occasion be generated by the assumption that Parliament intended to preserve the rights contained in the Bill of Rights.³⁹ Legislative intent has however played a more significant role in the assessment of appropriate limits on rights in New Zealand than it has in the United Kingdom. There is of course a potential conflict between legislative intent with respect to a specific law and the intention of the legislature in enacting the quasi-constitutional Bill of Rights. This

³³ *Moonen* [2000] 2 NZLR 9, [20] (Tipping J).

³⁴ See, eg, Justice Thomas in *R v Poumako* [2000] 2 NZLR 695.

³⁵ The issue was raised by both the parties in *R v Pora*, but a bench of seven judges did not deal with it. See Andrew S Butler, ‘Judicial Review, Human Rights and Democracy’ in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights* (2002) 47, 50.

³⁶ See, eg, James Allan, ‘*Moonen* and McSense’ [2002] *New Zealand Law Journal* 142; compare Andrew S Butler, ‘Judicial Indications of Inconsistency — A New Weapon in the Bill of Rights Armoury?’ (2000) *New Zealand Law Review* 43.

³⁷ See Paul Rishworth et al, above n 13, ch 4.

³⁸ *Ibid* 120.

³⁹ See discussion *ibid* at 142–155.

tension has generally been resolved in New Zealand through giving priority to the former manifestation of parliamentary intention. The influence of jurisprudence under the United Kingdom *Human Rights Act*, discussed below, on the New Zealand judiciary⁴⁰ may eventually lead to a reorientation of this priority.

II UNITED KINGDOM INTERPRETATIVE PRACTICE UNDER THE *HUMAN RIGHTS ACT*

Section 3 of the United Kingdom *Human Rights Act* has been described as stronger than its New Zealand inspiration.⁴¹ This analysis may seem initially surprising in light of the apparently more robust wording of s 6 of the *New Zealand Bill of Rights Act*, which, unlike the *Human Rights Act*, does not include the qualification to the obligation of human rights-consistent interpretation ‘so far as it is possible to do so’. One reason given for the asserted difference in strength between the two Acts is the contemplation of ‘reasonable limits’ on rights that are ‘demonstrably justified in a free and democratic society’ in s 5 of the *New Zealand Bill of Rights Act*.⁴² However, whether s 5 restricts the interpretative task more than the doctrine of proportionality developed in the jurisprudence of the *European Convention*⁴³ is not at all clear. Another proffered reason for the comparative United Kingdom strength is the *Human Rights Act*’s provision for judicial declarations of incompatibility with human rights.⁴⁴ Whatever the differences in text,⁴⁵ the four years of operation of the United Kingdom *Human Rights Act*⁴⁶ show initial hesitation in using the interpretative obligation, but increasingly confident and interventionist judicial reaction to the task of human rights-consistent interpretation.

⁴⁰ Ibid 10.

⁴¹ Klug, above n 8, 38. See also Lord Steyn in *R v A* [2000] 2 AC 326, [44].

⁴² Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113, [44].

⁴³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) (*‘European Convention’*). Eg, *Peck v United Kingdom* (App No 44647/98) [2003] ECHR 44.

⁴⁴ Francesca Klug, ‘The United Kingdom Experience’ in Christine Debono and Tania Colwell (eds), *Comparative Perspectives on Human Rights* (2004) 1, 4. See also Lord Cooke of Thorndon, ‘The British Embracement of Human Rights’ [1999] *European Human Rights Law Review* 243, 254.

⁴⁵ Rishworth et al, above n 13, argue that ‘there is no convincing difference’ between the wording of the New Zealand and United Kingdom provisions at 147.

⁴⁶ The Act did not come into force until October 2000 in order to allow two years of preparation and training.

The *Human Rights Act* was designed to disturb the British tradition of statutory interpretation. Before the Act entered into force, Jack Straw, then Home Secretary, told an audience of civil servants:

By and large, our legal culture is about finding the true meaning of the law. In the case of statute, what matters is what Parliament intended. Moral norms and ethical principles don't normally come into it. The Human Rights Act requires us to look for *possible* meanings, not the *true* meaning. And the ambition of the Human Rights Act is that possible meanings that fit with the Convention principles and norms are always to be preferred. Deciding day-to-day legal questions on the basis of such fundamental ethical principles, set out in statute, is a new departure.⁴⁷

In Parliament, the Lord Chancellor, Lord Irvine, described the *European Convention* rights as 'the magnetic north [to which] ... the needle of judicial interpretation will swing'.⁴⁸ Early decisions under the *Human Rights Act* however showed judicial caution with the new interpretative power.⁴⁹ One discernible pattern in decisions has been a hesitation to review clear statutory language in cases where judges sense they lack expertise.⁵⁰ An example of this deference is the High Court's decision in *R (Pearson and Martinez) v Home Secretary and Others*.⁵¹ The legislative disqualification of prisoners from voting was challenged in the case as a breach of their human rights. The Queen's Bench dismissed the challenge with rather vague references to the margin of appreciation enjoyed by states in limiting the right to vote. Parliament's authority to curtail the rights of prisoners was accepted without detailed consideration.

⁴⁷ Jack Straw, 'Building a Human Rights Culture' (Address to Civil Service College Seminar, 9 December 1999) (emphasis in original) quoted in Francesca Klug, above n 8, 34.

⁴⁸ Third Reading speech on the Human Rights Bill, United Kingdom, *Parliamentary Debates*, House of Lords, 5 February 1998, col 839 quoted in David Mead, 'Swallowing the Camel, Straining at the Gnat: The Implications of *Mendoza v Ghaidan*' [2003] *European Human Rights Law Review* 501.

⁴⁹ Eg, *R v Director of Public Prosecutions; Ex parte Kebilene* [2000] 2 AC 326. An assessment of the *Human Rights Act* written in 2001 found that s 3 had not made an appreciable difference to the outcome of many cases: Ian Leigh, 'The UK's Human Rights Act 1998: An Early Assessment' in Huscroft and Rishworth (eds), above n 31, 325. For a similar view written a year later see David Bonner, Helen Fenwick and Sonia Harris-Short, 'Judicial Approaches to the Human Rights Act 1998' (2003) 52 *International and Comparative Law Quarterly* 549.

⁵⁰ Francesca Klug, 'The United Kingdom Experience', above n 44, 6.

⁵¹ [2001] HLRL 39.

The House of Lords decision in *R v A (No 2)*⁵² exhibited a new confidence in the interpretative mandate. It flexed considerable judicial muscle in interpreting legislation through the lens of s 3 of the *Human Rights Act*. At issue was the interpretation of s 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK) that would have precluded cross-examination of a complainant in a rape trial about her sexual history (known as a ‘rape shield’ provision). The provision allowed the court to give leave for such cross-examination in very limited circumstances. The defendant in this case argued that s 41 compromised his right to a fair trial, enshrined in article 6 of the *European Convention*. Lord Steyn’s opinion regarded the interpretative obligation under s 3 as ‘strong’ indeed ‘radical in its effect’, ‘an emphatic adjuration by the legislature’, applying ‘even if there is no ambiguity in the language in the sense of the language being capable of two different meanings.’⁵³ The only limit to a human rights-consistent interpretation contemplated by Lord Steyn would be if ‘a *clear* limitation on Convention rights is stated *in terms*’.⁵⁴ Lord Steyn wrote that:

In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions.⁵⁵

The House of Lords proceeded to read the rape shield law as subject to an implied provision that evidence required to ensure a fair trial would be admissible, thus attenuating the ‘excessive reach’ of the law.⁵⁶ Thus some ‘logically relevant sexual experiences’ between the accused and the complainant could be admitted if they were ‘so relevant to the issue of consent that to exclude [them] would endanger the fairness of the trial’.⁵⁷ On Lord Steyn’s analysis, a judicial declaration of incompatibility ‘is a measure of last resort’.⁵⁸ He quoted from the legislative history of the *Human Rights Act* to support this view of declarations, including a statement by the Lord Chancellor that ‘in

⁵² [2002] 1 AC 45 (*R v A*).

⁵³ *R v A* [2002] 1 AC 45, [44].

⁵⁴ *Ibid* (emphasis in original).

⁵⁵ *Ibid*.

⁵⁶ *Ibid* [45].

⁵⁷ *Ibid* [45]–[46].

⁵⁸ *Ibid* [44].

99% of the cases that will arise, there will be no need for judicial declarations of incompatibility.⁵⁹

Lord Hope's reasons in *R v A* presented an alternative interpretative approach. He argued that 'the entire structure' of the rape shield provision contradicted the idea of implying a provision allowing the court to admit evidence of any prior sexual relationship between the complainant and the accused if this was required for a fair trial.⁶⁰ He pointed to the history of the legislation to emphasise that Parliament had taken a deliberate decision not to give trial courts the discretion to admit such evidence. Lord Hope thus rejected the use of s 3 'if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible' with the *European Convention*, or if the statute contains provisions doing so by necessary implication,⁶¹ although he ultimately agreed with the interpretation of the *Youth Justice and Criminal Evidence Act 1999* (UK) proposed by Lord Steyn.⁶² In other cases, Lord Hope adopted a similar philosophy, arguing that interpretation must be distinguished carefully from amendment of legislation.⁶³

Lord Hope's method was endorsed by many commentators as appropriate for a bill of rights that promoted dialogue between the branches of government. For example, it was applauded by one of the drafters of the United Kingdom legislation as 'adhering more faithfully [than Lord Steyn] to the spirit *and* letter of the [Human Rights Act]'.⁶⁴ Initially at least the judiciary seemed to agree. The Court of Appeal was reluctant to adopt Lord Steyn's radical approach to s 3 in two significant cases.⁶⁵ In *In re S*⁶⁶ however the Court

⁵⁹ United Kingdom, *Parliamentary Debates*, House of Lords, 5 February 1998, col 840 (3rd Reading).

⁶⁰ *R v A* [2002] 1 AC 45, [109].

⁶¹ *Ibid* [108].

⁶² *Ibid* [110].

⁶³ *R. v Lambert* [2002] 2 AC 545, [78]–[81].

⁶⁴ Klug, above n 44, 5. See also Danny Nicol, 'Statutory Interpretation and Human Rights After *Anderson*', [2004] *Public Law* 274; Mead, above n 48; Bonner, Fenwick and Harris-Short, above n 49; Richard Elkins, 'A Critique of Radical Approaches to Rights Consistent Statutory Interpretation' [2003] *European Human Rights Law Review* 641. Compare Richard Clayton, 'The Limits of What's Possible: Statutory Interpretation under the Human Rights Act' [2002] *European Human Rights Law Review* 559.

⁶⁵ *Wilson v First County Trust Ltd (No 2)* [2002] QB 74, [41]–[45]; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, [73]–[77].

⁶⁶ *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757.

of Appeal changed tack. It read a new procedure for monitoring the progress of children who were in the care of local authorities into the *Children Act 1989* (UK) ('*Children Act*') in order to make that legislation consistent with the rights to a fair trial and to respect for private and family life in the *European Convention*.⁶⁷ The formulation of the procedure, involving judicial supervision of the performance of care orders by local authorities, appeared inconsistent with one of the aims of the *Children Act* which was precisely to preclude such scrutiny. The House of Lords was critical of the Court of Appeal's reasoning on appeal.⁶⁸ Lord Nicholls wrote the leading judgment in a unanimous decision. He argued that the Court of Appeal had effectively amended rather than interpreted the *Children Act*.⁶⁹ How was the line between amendment and interpretation to be drawn? Lord Nicholls said:

The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. If anything, the problem is more acute today than in past times. Nowadays courts are more 'liberal' in the interpretation of all manner of documents. The greater the latitude with which courts construe documents, the less readily defined is the boundary. What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation.⁷⁰

In a more recent discussion of the scope of s 3 of the *Human Rights Act*, the Court of Appeal expressed a strong preference for the more cautious formulation of the interpretative obligation developed by Lords Hope and Nicholls.⁷¹

⁶⁷ Articles 6 and 8 respectively.

⁶⁸ *In Re S* [2002] 2 AC 291.

⁶⁹ *Ibid* [39]–[40].

⁷⁰ *Ibid* [40]. See also *R v Johnstone* [2003] 1 WLR 1736.

⁷¹ *Attorney General's Reference No 1 of 2004* [2004] EWCA Crim 1025, [52A].

The House of Lords returned to the nature of the interpretative task under s 3 of the *Human Rights Act* in 2004 in *Ghaidan v Godin-Mendoza*⁷² and decisively confirmed Lord Steyn's robust (or, to critics, 'over-zealous')⁷³ approach in *R v A*. At issue in the case was whether the word 'spouse' as used in a schedule to the *Rent Act 1977* (UK) ('*Rent Act*') (allowing the spouse of a protected tenant to succeed to the tenancy on the tenant's death) could be read to include the same-sex partner of a deceased tenant. In *Ghaidan*, Lord Steyn noted that, in cases where the breach of a *European Convention* right had been established, United Kingdom courts had tended to make declarations of incompatibility under s 4 of the *Human Rights Act* in preference to using the s 3 mandate of human rights-consistent interpretation.⁷⁴ He suggested that this pattern raised questions whether the *Human Rights Act* was being properly implemented.⁷⁵ Lord Steyn identified two factors that contributed to this misunderstanding of the *Human Rights Act*: the constant (though in his view inaccurate) refrain that judicial readings down of legislation or reading in of words under s 3 'would flout the will of Parliament'; and 'an excessive concentration' on the language of a particular statute.⁷⁶

Lord Steyn's understanding of the strength of s 3 was endorsed by three other members of the House of Lords. Lord Nicholls noted that an 'ordinary reading' of the legislation covered only heterosexual partners, but he regarded the judicial duty in s 3 of the *Human Rights Act* as requiring a more inclusive interpretation.⁷⁷ *Ghaidan* restated the strength of the obligation to interpret and to give effect to laws in a way that is compatible with the *European Convention* rights and acknowledged that this may require a court to depart from the legislative intention of Parliament. Lord Nicholls said:

[T]he mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or

⁷² [2004] 3 WLR 113 ('*Ghaidan*').

⁷³ Danny Nicol, above n 64 at ?.

⁷⁴ Lord Steyn's opinion contains a useful appendix (at 130–4) listing cases where a rights breach had been established. He found that in 10 cases, s 3 had been used and in 15 cases, a declaration of incompatibility had been made under s 4 (five of which were later overturned).

⁷⁵ *Ghaidan* [2004] 3 WLR 113, [39].

⁷⁶ *Ibid* [40], [41].

⁷⁷ *Ibid* [5], [7], [32].

expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect, of primary and secondary legislation.⁷⁸

Lord Nicholls noted that the relevant time for the assessment of human rights-compatibility is when the matter arises for determination rather than when legislation is enacted or comes into force,⁷⁹ raising the possibility of revisiting interpretations if human rights standards develop. The House of Lords described Convention-compliant interpretation as the primary remedy under the *Human Rights Act* and regarded a declaration of incompatibility under s 4 as exceptional.

Lord Millett was the sole dissenter in *Ghaidan*. He agreed that the *Rent Act*’s treatment of same sex couples was incompatible with their rights under the *European Convention*, but argued that it was not possible to read the word ‘spouse’ as covering a same sex partner. Lord Millett insisted that s 3 required courts to engage in a rights-compatible reading of legislation ‘by a process of interpretation alone’.⁸⁰ This meant that courts could not ‘supply words which are inconsistent with a fundamental feature of the legislative scheme; nor to repeal, delete, or contradict the language of the offending statute’.⁸¹ Lord Millett regarded the *Rent Act* provision as ‘unmistakably implicit’⁸² in contemplating only heterosexual relationships.

Section 3 of the *Human Rights Act* uses the qualifying phrase, ‘So far as it is possible to do so ...’. Lord Nicholls pointed out in *Ghaidan* that this wording is inherently ambiguous.⁸³ What then are the limits of possibility, the ‘Rubicon which courts may not cross’,⁸⁴ for a human rights-consistent interpretation? Members of the House of Lords in

⁷⁸ Ibid [32].

⁷⁹ Ibid [23].

⁸⁰ Ibid [66] (emphasis in original).

⁸¹ Ibid [68].

⁸² Ibid [82].

⁸³ Ibid [27].

⁸⁴ Ibid [49] (Lord Steyn).

Ghaidan used a range of expressions to describe the point at which the act of interpretation crosses the boundary into unconstitutional judicial legislation: when an interpretation would be incompatible with a ‘fundamental feature’, or the ‘underlying thrust’ of the legislation,⁸⁵ or would not ‘go with the grain’ of the law,⁸⁶ or would call for legislative deliberation, or would change the substance of a provision completely,⁸⁷ or would remove its pith and substance or would violate a cardinal principle of the legislation.⁸⁸ Both *R (Anderson) v Secretary of State for the Home Department*⁸⁹ and *Bellinger v Bellinger*⁹⁰ were used as examples of situations where the relevant legislation was not susceptible to a human rights-compliant interpretation.⁹¹

The House of Lords considered the scope of s 3 of the *Human Rights Act* most recently in *Attorney General’s Reference (No 4 of 2002)*,⁹² endorsing the *Ghaidan* approach to interpretation. At issue was whether a reverse onus provision relating to membership of banned organisations in the *Terrorism Act 2000* (UK) (*‘Terrorism Act’*) was compatible with rights set out in the *European Convention*. Lord Bingham, with whom Lords Steyn and Phillips agreed, found that the section’s restrictions on the presumption of innocence and the right to freedom of speech were not a proportionate or justifiable legislative response to the issue of international terrorism and were thus inconsistent with the *European Convention*. The Attorney-General had urged the House of Lords to make a declaration of incompatibility if it found the legislation to be incompatible with human rights. However, Lord Bingham refused to do so, arguing that reading down the legislative provision as imposing an evidential, rather than a legal, burden of proof on the defendant was ‘well within’ the scope of s 3.⁹³ He acknowledged that Parliament did not intend this interpretation when enacting the *Terrorism Act*, but that it was the intention of the drafters of the *Human Rights Act*. Two other members of the House of Lords, Lords

⁸⁵ Ibid [33] (Lord Nicholls).

⁸⁶ Ibid [49] (Lord Rodger).

⁸⁷ Ibid [110]–[113].

⁸⁸ Ibid [116].

⁸⁹ [2003] 1 AC 837 (*‘R (Anderson)’*).

⁹⁰ [2003] 2 AC 467 (*‘Bellinger’*).

⁹¹ *Ghaidan* [2004] 3 WLR 113, [34].

⁹² [2004] UKHL 43.

⁹³ Ibid [53].

Rodger and Carswell, found the relevant provision of the *Terrorism Act* to be compatible with *European Convention* rights.

Fifteen declarations of incompatibility have been made to June 2004 by United Kingdom courts under s 4 of the *Human Rights Act* in cases where courts were unable to interpret the relevant legislation to be compatible with human rights.⁹⁴ Of these, five have been overturned on appeal. One significant case of a declaration was *R (Anderson)*,⁹⁵ a challenge to the *Crimes (Sentences) Act 1997* (UK), which gave the Home Secretary the power to set the minimum term to be served by mandatory life sentence prisoners found guilty of murder. The House of Lords found that granting the power of release of prisoners to a politician rather than a judicial body was inconsistent with the right under article 6 of the *European Convention* to have a sentence imposed by an independent and impartial tribunal. However, given the express language of the statutory provision, the House of Lords considered that a s 3 reading to preclude participation by the Home Secretary in the determination of prison sentences ‘would not be judicial interpretation but judicial vandalism’.⁹⁶

Another case that resulted in a declaration of incompatibility under s 4 of the *Human Rights Act* by the House of Lords was *Bellinger*.⁹⁷ Mrs Bellinger had been born as a male but had lived most of her adult life as a woman and had undergone surgery for sex reassignment. She sought a declaration that her marriage to Mr Bellinger was valid. The *Matrimonial Causes Act 1973* (UK) recognised marriage only where there was one male and one female partner. The House of Lords refused to interpret the *Matrimonial Causes Act 1973* (UK) to be consistent with the human rights to private life and to marriage on the basis that the issue was inappropriate for judicial determination. Lord Nicholls said:

This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation

⁹⁴ These are listed in an appendix to the opinion of Lord Steyn in *Ghaidan* [2004] 3 WLR 113, 130–4. The most recent declaration of incompatibility made by the House of Lords on 16 December 2004 is in *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56.

⁹⁵ [2003] 1 AC 837.

⁹⁶ *Ibid* [30] (Lord Bingham). See also [59]–[60] (Lord Steyn).

⁹⁷ [2003] 2 AC 467.

and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.⁹⁸

Four years of practice under the United Kingdom *Human Rights Act* seems then to give priority to a human rights-compatible interpretation of legislation over parliamentary intent. Unlike their New Zealand counterparts, United Kingdom courts are prepared to locate a human rights interpretation of unambiguous legislation wherever possible. The limits to this interpretative potential are not always obvious, but appear most clearly when the relevant legislation involves high-profile public issues such as marriage and sentencing of murderers.⁹⁹

III THE POTENTIAL OF THE ACT *HUMAN RIGHTS ACT*

The ACT *Human Rights Act* came into force on 1 July 2004. It was enacted after a lengthy community consultative process.¹⁰⁰ An ACT Bill of Rights Consultative Committee had recommended legislation that followed the New Zealand and United Kingdom models of statutory bills of rights on the grounds that this would best promote dialogue about human rights between all branches of government. The wording proposed by the Committee was:

A court or tribunal must interpret a law of the Territory to be compatible with human rights and must ensure that the law is given effect to in a way that is compatible with human rights, as far as it is possible to do so.¹⁰¹

⁹⁸ Ibid [37].

⁹⁹ For criticism of the lack of judicial consistency in the United Kingdom on what constitutes acceptable and unacceptable interpretative practices see Danny Nicol, above n 64, 278–9. See also David Bonner, Fenwick and Harris-Short, above n 49, 560–1.

¹⁰⁰ See, ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003).

¹⁰¹ Human Rights Bill 2003 (ACT) cl 3, Appendix 4 to *Towards an ACT Human Rights Act* (2003).

The interpretative obligation in the draft legislation included in the Committee's report applied to both legislation and the common law. The Committee's draft included a wide range of human rights, including both economic, social and cultural rights as well as civil and political rights. The final form of s 30 in the ACT *Human Rights Act* is expressed in somewhat weaker form, apparently to ensure consistency with the ACT's *Legislation Act*. Section 30 also includes a specific reference to the purposive rule of statutory construction and makes a human rights-consistent interpretation subject to that rule. It does not explicitly apply to the common law.

At first sight, then, s 30 appears to make a human rights interpretation of legislation available only when it is clear that the Legislative Assembly did not intend otherwise. In this sense it could be read as a codification of the 'principle of legality' by which Parliament is assumed not to intend to impinge on basic rights, unless it uses clear words to do so.¹⁰² This may suggest that s 30 is weaker than both its New Zealand and United Kingdom counterparts in promoting a human rights dialogue. As we have seen, the New Zealand courts have suggested that s 6 of the *Bill of Rights Act* may require interpretations that conflict with Parliament's intention¹⁰³ and the House of Lords has described s 3 of the *Human Rights Act* as imposing 'a stronger and more radical obligation than to adopt a purposive interpretation in the light of the [European Convention on Human Rights]'.¹⁰⁴ The Explanatory Statement tabled when the ACT *Human Rights Act* was introduced into the Legislative Assembly, however, gives a stronger account of s 30.¹⁰⁵ It states that s 30 is 'a new rule of statutory construction' which requires that 'when working out the meaning of a Territory statute or statutory instrument an interpretation that is consistent with human rights must be applied in preference to any other interpretation'.¹⁰⁶ The Explanatory Statement notes the impact of the purposive rule of construction as set out in the *Legislation Act* but explains this partially in reference to the interpretation of the *Human Rights Act* itself:

¹⁰² *Al Kateb v Godwin* (2004) 208 ALR 124, [19] (Gleeson CJ).

¹⁰³ See discussion of *R v Poumako* above.

¹⁰⁴ *Ghaidan* [2004] 3 WLR 113, [44] (Lord Steyn).

¹⁰⁵ Explanatory Statement, Human Rights Bill 2003 (ACT) (Available at http://www.legislation.act.gov.au/es/db_8294/current/rtf/db_8294.rtf).

¹⁰⁶ *Ibid* 5.

Subclause 139(1) [of the *Legislation Act*] requires that Territory laws must be interpreted in a way that best achieves the purpose of the Act. Consequently, the interpretation most beneficial to human rights will best achieve the purpose of the Bill.

Where there is a choice between two interpretations and both interpretations best achieve the purpose of the statute or statutory instrument, the interpretation that is consistent with human rights must prevail.¹⁰⁷

However, the Explanatory Statement goes on to note that '[Section] 30(2) clarifies that if an interpretation that is consistent with human rights would have the affect of defeating the obvious purpose of the statute or statutory instrument the interpretation that is consistent with human rights will not prevail.'¹⁰⁸ It adds:

The effect of [section] 30 is that the courts, tribunals, decision makers and others authorised to act by a Territory statute or statutory instrument must take account of human rights when interpreting the law. A statutory discretion must be exercised consistently with human rights unless legislation intends to authorise administrative action regardless of the human right.¹⁰⁹

It is not yet clear how ACT courts and tribunals will deal with the co-existence in the *Human Rights Act* of a direction to find human rights-consistent interpretations of ACT legislation and a direction to prefer a purposive approach. The broad meaning given to the term 'working out the meaning' of legislation which includes displacing the apparent meaning suggests potential conflict. It is possible that the Supreme Court will use declarations of incompatibility more readily than advised by the House of Lords in the context of the United Kingdom legislation as a method of resolving inconsistencies between human rights and legislative intention. This would arguably fit better with the 'dialogue' philosophy behind the ACT *Human Rights Act*. The comprehensiveness of the Attorney-General's statements on the human rights compatibility of government Bills required by s 37 will be a critical element in the process of dialogue. The operation of s

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid 5

28 of the ACT *Human Rights Act* will also be significant as a technique for balancing human rights protection and legislative intent.

As at the time of writing, s 30 has been used gingerly by both the judiciary and the legal profession. An early discussion of the interpretative clause in s 30 was in *R v YL*.¹¹⁰ Justice Crispin of the ACT Supreme Court used s 30's direction of a human rights-consistent interpretation to support a reading of legislative provisions he had arrived at through a traditional analysis. He invoked s 11 (2) of the *Human Rights Act* (the right of children to protection) to remove any doubt about the use of judicial discretion under s 20 of the *Supreme Court Act 1933* (ACT) not to coerce a child witness to give evidence against his stepmother. Justice Crispin also read the statutory powers of the Director of Public Prosecutions in light of the rights to a fair¹¹¹ and timely¹¹² trial. In another case before the Administrative Appeals Tribunal, s 30 was briefly, and rather desultorily, considered in the interpretation of legislation allowing access to emergency housing.¹¹³ The Tribunal referred to s 11 of the *Human Rights Act* but did not give detailed consideration to its arguably significant impact on waiting lists for housing. The use of s 30 of the *Human Rights Act* is yet to affect the outcome of any case in the ACT.

CONCLUSION

The 'theoretical vacuum' about statutory interpretation in Australia identified by Suzanne Corcoran in this book will be reduced in some measure by the ACT *Human Rights Act's* introduction of a human rights-consistent interpretative principle.¹¹⁴ Section 30 of the *Human Rights Act* requires a novel approach to interpretation, although the unusually explicit priority it accords to the purposive rule of statutory interpretation may erode this

¹¹⁰ [2004] ACTSC 115.

¹¹¹ *Human Rights Act 2004* (ACT) s 21.

¹¹² *Human Rights Act 2004* (ACT) s 22.

¹¹³ *Merritt v Commissioner for Housing* [2004] ACT AAT 37. Other references to the *Human Rights Act* by the ACT Supreme Court include *R v O'Neill* [2004] ACTSC 64; *Firestone v Australian National University* [2004] ACTSC 76; *Szuty v Smythe* [2004] ACTSC 77.

¹¹⁴ There are some signs of similar moves in other Australian states: eg, Human Rights Bill 2004 (SA) (private member's Bill introduced by Sandra Kanck MLC: South Australia, *Parliamentary Debates*, Legislative Council, 15 September 2004, 56–7); Victorian Department of Justice, *Attorney-General's Justice Statement* (May, 2004).

potential. Suzanne Corcoran points out, however, that courts tend to pay lip service to the purposive rule while in reality employing more flexible methods of interpretation.¹¹⁵ If this is the case, s 30 may promote a new dynamic and pragmatic approach to interpretation. The direction to interpret legislation to be consistent with human rights will highlight the political nature of the judicial role, but it will require a combination of respect for human rights with ‘a pragmatic reflection of the evolving nature of the Australian community and recognition of Australia’s engagement in the new international system.’¹¹⁶

¹¹⁵ Suzanne Corcoran, ‘The Architecture of Interpretation: Dynamic Practice and Constitutional Principles’, ch 3 above.

¹¹⁶ Ibid [insert page reference].