INTERPRETING LEGISLATION CONSISTENTLY WITH HUMAN RIGHTS

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Introduction

It is a tremendous relief to be able to give a seminar on the substantive aspects of domestic human rights law in Australia. As someone who has been a proponent of the domestic incorporation of international human rights standards for over ten years it is a delight to not have to argue the case for why such protections should be enacted but instead be able to delve into the actual operation of a domestic human rights statute.

The ACT was, of course, the first Australian jurisdiction to substantially embrace the protection of human rights in its *Human Rights Act 2004*.[1] It will enjoy its third anniversary this year. Victoria last year passed its *Charter of Human Rights and Responsibilities Act 2006* ('the Victorian Charter') which partly commenced on 1 January 2007 and will come into full operation on 1 January 2008.

Both of the enactments require all legislation within their respective jurisdictions to be interpreted consistently with human rights. It is a far reaching and important provision because of the breadth of its operation. As administrative lawyers we know that the effect of a particular interpretation will have ramifications *inter alia* for the exercise of power, the breadth of discretion and the nature of the process.

It is the requirement of consistent interpretation in the *Human Rights Act 2004* and the *Charter of Human Rights and Responsibilities Act 2006* which is the subject of this paper. I have chosen to refer generically to all legislation which adopts legislatively protections of the type typified by the ACT and Victorian acts as a 'human rights statute' rather than use the term human rights act or charter which may tend to confuse.

So what will this paper consider? In order to grasp the operation of the interpretive obligation in human rights statutes one must understand the unique structure and operation of such statutes to appreciate the role of the interpretation obligation. Clearly there will also be a tension between the original purpose of the legislation to be interpreted and the human rights statute, especially where it was enacted prior to the human rights statute. One needs to also establish the limits of the interpretation obligation so as to avoid judicial amendment of the relevant statute. A proper assessment needs to be made of the human right concerned as to its specificity and whether it is justifiably limited. Finally, I attempt to identify a process that may be undertaken to interpret legislation consistently with human rights.

The Australian and comparative context

The ACT and Victorian statutes are unlikely to remain the only Australian jurisdictions with human rights statutes. The Tasmanian Law Reform Institute is shortly to report on a charter of human rights for Tasmania and the WA Attorney-General recently established a

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committee to consider the same question in WA. The former NSW Attorney-General Bob Debus spoke in favour of a charter but the NSW government has yet to revisit the previous Premier's ardent opposition to one. The ALP recently committed to a consultation process for a national charter of human rights if it wins office.

Discussions in Australia about the legislative protection of human rights are generally around the same structure of protections for human rights. The ACT and Victorian models draw heavily on both the UK *Human Rights Act 1998* and before that the New Zealand *Bill of Rights Act 1991*. Both of those enactments require all legislation to be interpreted consistently with human rights and so provide fertile ground for ACT and Victorian lawyers interpreting their respective statutes. The comparative human rights lawyer has much jurisprudence to revel in as long as he or she is willing to undertake the mental gymnastics required to utilise the case law and avoid its pitfalls. Behind the legislative protections available in the UK and New Zealand (and now the ACT and Victoria) are the constitutionally entrenched protection for human rights in the Canadian *Constitution Act 1982,* better known as the *Charter of Fundamental Rights and Freedoms,* and the *Constitution of the Republic of South Africa 1996*. Both the ACT and the Victorian statutes openly encourage the consideration of the jurisprudence of foreign domestic and international courts and tribunals.[2]

The place of an interpretive obligation within a human rights statute

The model for the protection of human rights found in the human rights statutes in the ACT and Victoria is based upon what has become known as the 'dialogic model'. At the centre of this model is a rejection of the constitutional model (found in Canada, the USA and South Africa) which allows a court to invalidate inconsistent legislation.

The model adopted involves a conversation, if you like, between the legislature and the judiciary about the protection of human rights. On the one hand a member introducing a bill is required to indicate to Parliament whether the bill is compatible or not with the human rights set out in the human rights statute. In the ACT the Attorney-General must prepare what is known as a 'compatibility statement' for presentation in the Legislative Assembly.[3] Similarly in Victoria the member of Parliament proposing to introduce a Bill must prepare a 'statement of compatibility' to be laid before a House of Parliament.[4] This allows for human rights issues to be fairly and openly canvassed in Parliament, and therefore publicly. It further provides an indication to a court later interpreting the statute of the intended effect of the bill with respect to human rights.

On the other hand the courts must interpret all legislation in accordance with the same human rights. While a particular interpretation may deliver a substantive and desired outcome for a proponent the court may not stray beyond the legislation itself. If the human right and the enactment under consideration are in direct conflict then the court may only declare that the enactment is inconsistent with the human rights concerned.[5] Such a declaration does not affect the validity of the legislation under consideration.[6]

A truly novel part of both the ACT and Victorian statutes is that a court's declaration of incompatibility must be presented to the Legislative Assembly or to Parliament, as the case may be, together with a response by the government within 6 months.[7] The provision compels the public discussion of a breach of human rights while maintaining the sovereignty of Parliament. There is no requirement for the government to amend the relevant legislation but it, arguably, must provide a justification for legislation which is inconsistent with a human right.

Both the Victorian and the ACT statutes specify the human rights which are protected. Generally the enumerated human rights are drawn from the *International Covenant on Civil*

and Political Rights but there are some important additions.[8] While I do not need to refer to specific rights it is important for the issue of interpretation to understand how the rights are set out.

First, in contrast with the abstraction and generalities of many common law rights in both the ACT *Human Rights Act 2004* and the Victorian Charter each human right is set out with a reasonable degree of specificity. For example, in the Victorian Charter the common law right to 'freedom of expression' becomes instead, at s 15, a right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds orally, in writing, in print, by way of art and in another medium chosen by him or her.[9]

Second, under both statutes all human rights may be reasonably limited if the limit is demonstrably justified in a free and democratic society.[10] The reasonable limitation of human rights is crucial to the operation of human rights protections because it rejects, save perhaps for the right to life and freedom from torture, the idea of absolute human rights. In the case of freedom of expression, to continue the example, reasonable limits have been held to include the prohibition or restriction of pornography and defamation laws. Appreciation of the limits that may be legitimately and lawfully placed on rights is vital to the task of interpreting legislation consistently with human rights for a number of reasons. If rights are considered absolute or are overstated then the inclination of the judicial officer is likely to be to consider the right as a relevant consideration but not to apply it as a right.

The process required in both the ACT *Human Rights Act 2004* and the Victorian Charter is that the judiciary should not be squeamish in saying *prima facie* a human right is infringed because they may then turn their attention to whether the statutory provision or its interpretation is reasonably justified in a free and democratic society. That is where the main game is. An example will assist. A statutory power is used to restrict persons from demonstrating immediately outside an international conference. The exercise of the power prima facie infringes the freedom of peaceful assembly. However, the limit on the right is reasonable in a democratic society because the demonstration can occur in another place proximate to the conference so that both the conference and the demonstration may occur simultaneously.

A proper understanding of this process of assessment of legislative provisions vis-à-vis human rights is important because it allows one to ascertain whether one interpretation should be preferred over another. The job is incomplete if the interpretation contended for is *prima facie* inconsistent with a human right but an assessment of the reasonableness of the limit has not been undertaken. I will return to this issue later in the paper.

Neither the ACT *Human Rights Act 2004* nor the Victorian Charter allow for a person to enforce specific human rights or to seek damages for a breach of such rights. Human rights are only justiciable through other means such as the prerogative writs or established causes of actions such as in tort. Accordingly, the main area in which human rights issues are likely to be fought is within the confines of administrative law. Human rights issues have frequently arisen in criminal matters in the ACT courts where the matter at issue has been the exercise of statutory powers whether by the courts, prosecution authorities or the police. Interpreting such legislation in accordance with human rights is at the centre of the implementation of the two human rights statutes.

Orthodox role for common law rights in the interpretation of statutes

It is useful to remind ourselves at this point of the orthodox position with respect to interpreting legislation when it affects a common law right. It is well established that a statute will not be read so as to infringe upon a civil right unless the words of the legislature are

expressed with irresistible clarity or necessary intendment. [11] The principle has been restated numerous times recently and the decision in *Coco v R* is an excellent example.

The issue was again explored by the High Court in *Al-Kateb v Godwin* Gleeson CJ said that courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms unless such an intention is clearly manifested by unambiguous language which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.[12] Gleeson CJ returned to a 1908 decision of the High Court and the fourth edition of *Maxwell on Statutes* to remind us that it is 'improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.[13]

In an oft cited passage[14] of the House of Lords decision in *R v Secretary of State for the Home Department; ex parte Simms*[15] Lord Hoffman restated the position as the principle of legality:

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

As we know, in *Al-Kateb* the absence of an ambiguity in the detention provisions of the *Migration Act 1958* meant that the majority in the High Court considered itself constrained by the wording of the statute. Hayne J opined that the wording was intractable[16] and would not yield to an interpretation that protected the applicant's right to liberty.

But human rights do not solely emerge from the common law. The history of international standard setting since the end of World War II is replete with human rights conventions. The best known is the *International Covenant on Civil and Political Rights* and it provides the source of the human rights which appear in both the ACT *Human Rights Act 2004* and the Victorian Charter. The response in Australian law generally to international treaty obligations and their impact upon statutory interpretation is therefore relevant to our consideration of interpretation obligations under human rights statutes.

The established position is that a statute is to be interpreted and applied, so far as its language admits, in a manner which is consistent with the comity of nations or the established rules of international law.[17] We know from *Lim's Case* that where there is ambiguity in an Act which purports to give effect to an international agreement the court will adopt the interpretation which best facilitates the operation of the agreement.[18] Where ambiguity exists in legislation which does not purport to implement an international treaty or convention *Teoh* is authority for the proposition that the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, 'at least' where the legislation post-dates the ratification of the international instrument.[19] While acknowledging that it was probably too late to reject that statement of principle in *Teoh*, McHugh J said that given the sheer number of applicable treaties he doubted that Parliament really considered each of its international obligations before passing legislation.[20] Following this line of reasoning, Gleeson CJ held in *Coleman v Power* that a 1931 Queensland statute should not be interpreted in accordance with the ICCPR because no intention of consistency with the ICCPR could be inferred to Parliament.[21]

The approach is not limited in its application to ambiguous statutory provisions.[22] Rather, wherever the language of a statute is susceptible of a construction which is consistent with the terms of the relevant international instrument and the obligations which it imposes on Australia, that construction must prevail.[23] *Coleman v Power* reaffirms the application of that part of the *Teoh* decision to statutes which post-date the international convention in question.

The new obligation

As is apparent from the wording of the interpretation clauses the obligation in the ACT, Victoria, the United Kingdom and New Zealand is very similar without being identical. I set them out in full.

Section 32(1) *Charter of Human Rights and Responsibilities Act 2006* (Vic):

> (1) So 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.

Section 30(1) *Human Rights Act 2004* (ACT):

> (1) 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.
>
> (2) Subsection (1) is subject to the Legislation Act, section 139.
>
> Note Legislation Act, s 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test).
>
> (3) In this section:
>
> "working out the meaning of a Territory law" means—
>
> (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.

Section 3(1) *Human Rights Act 1998* (UK):

> 3(1) 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 Convention rights.[24]

Section 6 of the *Bill of Rights Act 1991* (NZ):

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

Three of the obligations refer to consistency and one to compatibility with human rights. Recourse to standard dictionaries establishes that the terms consistent and compatible are interchangeable. The ACT, Victorian and UK clauses all require that consistency should be sought 'as far as it is possible to do so'. The ACT and Victorian statutes also clarify that the purpose of the legislation being interpreted is to be given primacy. That is, the purpose provides the parameters within which the process of interpretation may occur.

The UK and New Zealand statutes do not specifically consider the purposive question but the case law has revealed that this is, of course, an important constraint on the interpretation process. The *Bill of Rights Act 1991* (NZ) requires a human rights consistent meaning to be given where ever one 'can be given'. The UK legislation is in slightly different form and there may be a reasonable argument to be made that it is different to the other three. It requires all legislation to be 'read and given effect' in a way which is compatible with human rights. Any argument that sought to maintain that the obligation under s 3 of the *Human Rights Act 1998* (UK) was more intrusive than the similar obligations in the ACT and Victoria would have to substantiate that interpretation of legislation is something less than reading and giving effect to legislation.

Parenthetically I note that the ACT *Human Rights Act 1998* utilises the phrase 'in working out the meaning of a Territory law' which is then defined at s 30(3). The sub-section makes clear that the definition is not limited to ambiguity or curing an absurd or unreasonable interpretation but includes both confirming or displacing an apparent meaning of 'finding the meaning of the law in any other case'. The apparent intent of that provision is to avoid a narrow interpretation of the interpretation obligation itself by limiting it operation only to the former cases. Given the wide-reaching nature of the obligation in the relevant UK jurisprudence with respect to s 3 of the UK's *Human Rights Act 1998* it is reasonable to assume that the Legislative Assembly wanted a similarly wide application to the s 30(1) obligation.

Foundation issues

It is still early days in the Australian judicial discussion of human rights statutes of the type considered in this paper. While there are some Court of Appeal decisions from the ACT the *Human Rights Act 2004* has yet to receive High Court attention. This contrasts markedly with the position in the UK where the House of Lords has lustily embraced the *Human Rights Act 1998* and produced a considerable number of decisions exploring the implication of the interpretation provision. The New Zealand Court of Appeal has used the interpretation provision in the *Bill of Rights Act 1991* over a longer period than the House of Lords but perhaps a little less enthusiastically. I turn now to consider some of the foundation issues decided there which have clear ramifications for the implementation of the ACT *Human Rights Act 2004* and the Victorian Charter.[25]

It was not long after the commencement of the *Human Rights Act 1998* (UK) that Lord Woolf sitting in the Court of Appeal opined that the interpretive provision at s 3 was to be treated as having amended all legislation which predated it so as to incorporate the obligation.[26] In some ways that is a statement of the obvious but the ramifications are clearly wide. There is no reason to think the statement does not apply to the ACT and Victorian statutes.

As a consequence of that width the interpretation obligation in both statutes applies to legislation that applies between private parties.[27] That is, the interpretation is not limited to circumstances which involve the interaction between a public authority and an individual. This raises an interesting dilemma when a statutory provision impacts equally on an individual and a company. Both statutes are adamant that it is only individuals who possess human rights[28] yet the implication of the decision in *X v Y* is that where a compatible interpretation is to be given to a statutory provision for an individual then that interpretation is to be preferred in the name of consistency of interpretation even where a corporation does not specifically possess the human right concerned.

This issue was touched upon in the recent ACT decision of *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* where Higgins J determined that the legislative provision did not infringe the right to a fair hearing of a third party objector, irrespective of whether the objector was an individual or a company.[29]

The next step taken in the UK and New Zealand jurisprudence is that there is no need for there to be an ambiguity in the statute before a court is obliged to interpret a legislative provision compatibly with human rights.[30] The interpretive obligation has been called 'an emphatic abduration by the legislature'.[31] Lord Steyn remarked in *R v A* that,

> [u]nder ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation …Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. [32]

This passage gives on flavour of the way in which the UK courts have considered the extent of the interpretation obligation. No doubt this is because of what has been described as the quasi-constitutional status of such human rights statutes.[33] The model used in New Zealand and then in the UK were adapted from the Canadian Charter of Fundamental Rights and Freedoms. The Canadian Charter allows for the invalidation of legislation by the Supreme Court where it unreasonably contravenes a Charter right. In order to avoid invalidation the Court is required to do all that it can to construe a statutory provision in accordance with a Charter right.

Transposing that model to New Zealand and the UK the respective Parliaments rejected granting the courts a power to invalidate a statutory provision which was incompatible with a human right. Instead they adopted the process of a court declaration being laid before Parliament. That has been considered as the ultimate measure and one to be avoided if at all possible while respecting the sovereignty of Parliament. Again Lord Steyn expressed the position succinctly in *Ghaidan v Godin-Mendoza* that the interpretive obligation is regarded as the primary remedial remedy whilst a declaration of incompatibility is regarded as an exceptional course.[34] One can readily understand the rationale behind this proposition. If the effect of legislation on a human right is interpreted in a way similar to the manner in which common law rights have been treated then the courts will need to continually resort to a declaration of incompatibility. The inherent undesirability of frequent and multiple such declarations leads one to the necessary conclusion that the interpretive obligation in a human rights statute must be somewhat greater than the position prior to the enactment of such a human rights statute.

The greater obligation was expressed in both *Ghaidan* and *R v A* as being that even if the legislation 'admits of no doubt' as to the available interpretations, 's 3 may nonetheless require the legislation to be given a different meaning'. [35] This statement raises the reasonable inquiry of just how far the judiciary should go in interpreting manner in this way and at what stage may one say that the judiciary has overstepped the constitutional boundary between it and the legislature. I will consider that next.

Forming a demarcation line

The quotation from Lord Hoffmann in *Simms* provided at the start of this paper is an indication that the House of Lords is deeply concerned with the demarcation between judiciary and legislature and the sovereignty of Parliament. The discussion of *Al-Kateb* and related cases above indicates that the Australian High Court is similarly concerned about the demarcation line. Where that line has been drawn in the UK may not necessarily be replicated in Australia but that assertion is not based on the terms of the interpretive obligation which is as I have said essentially similar.

Amos gives the following summary of the UK position in her new book *Human Rights Law*:[36]

> … It is not possible to use section 3 if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible or provisions which do so

> by necessary implication.[37] Furthermore, it is not possible to do 'violence' to the language or to the object of the provision so as to make it unintelligible or unworkable,[38] or to commit judicial vandalism by giving the provision an effect quite different from that which Parliament intended.[39]

This line is drawn so as to admit of the possibility of the Parliament passing legislation which is incompatible with human rights. Existing legislation may simply not be able to be interpreted so as to be compatible with human rights and proposed legislation may be specifically intended to override human rights.

Perhaps the most concise summary of the position taken in the UK is that the courts cannot judicially insert words into legislation where to do so would contradict the 'essential principle or scope of the legislation'.[40] Within those confines there is a considerable amount of judicial wriggle room which has been utilised relatively freely.

It has been held that it is legitimate to judicially read words into a phrase or into a provision in order to ensure compatibility.[41] Similarly a word may need to be judicially removed to ensure compatibility.[42] Alternatively the effect of a provision may be stated without reading in the word concerned.[43] Even an interpretation which linguistically may be strained can be adopted.[44]

All this appears counterintuitive to the current position taken by the High Court vis-à-vis the interpretation of legislation where it touches upon a common law right. The difficulty with not accepting the position taken by the House of Lords is that more legislation will be held to be incompatible with human rights and returned to the Legislative Assembly or Parliament as a declaration of incompatibility.

It is worth returning to the interpretive section itself and recalling the purpose in s 30(1) of the ACT *Human Rights Act 2004* and s 32(1) of the Victorian Charter. Both require that all legislation be interpreted consistently with human rights subject to the purpose of the legislation being interpreted. There is a clear indication there of the sweeping nature of the legislation and the purpose of the Parliament is impliedly a revision of all legislation. In the same way as the House of Lords considered itself constrained by the essential principle or scope of the legislation both the ACT and Victoria may consider themselves bound by the purpose of the legislation. However, that purpose is not the pre-human rights statute purpose but rather that original purpose *as amended* by the interpretation obligation.

One wonders if the test adopted by McHugh J in *Kingston v Keprose Pty Ltd*[45] for when it is permissible to judicially add words to a statute might be adapted to the purpose. That test is in three parts:

1. The court must know the mischief with which the court was dealing.

2. The court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved.

3. The court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.[46]

Instead of the inadvertence of Parliament at Part 2 of the test Parliament's newly stated requirement to interpret legislation consistently with human rights could be substituted. The eventuality which McHugh J says has called for the addition or subtraction of words must be the combined effect of the purpose of the statute being interpreted plus the interpretive obligation rather than inadvertence. That is, the legislation must be interpreted in keeping with its original purpose as well as consistently with human rights.

That brings me then to the question of whether there is any difference in the way in the interpretive obligation applies to legislation enacted before as opposed to after the commencement of the human rights statute. The ACT *Human Rights Act 2004* simply applies to a Territory law and the Victorian Charter applies to 'all statutory provisions'. For more abundant caution the Victorian Charter specifies at s 49(1) that the Charter applies to all Acts and subordinate instruments whether made before or after commencement of the Charter. Despite this apparent equality of treatment there is a reasonable distinction to be made between the way in which pre and post commencement legislation is interpreted.

The requirement to lay before the Legislative Assembly or the Parliament a statement of compatibility with a new bill indicates that the member concerned has considered the issue of compatibility. Where a Bill is laid before Parliament with a statement that it is compatible with human rights then it is reasonable to assume that the legislature has turned its mind to the issue of compatibility and passed legislation which not only it says is compatible but also that the judiciary may rightly assume is to be interpreted as compatible. What follows then is that there is likely to be a higher standard applied to words in a post-commencement statute which is said to infringe a human right than a statute passed before commencement. Such an interpretation accords with Gleeson CJ's words in *Coleman v Power* referred to above. For pre-commencement statutes the difficult task of marrying the original purpose with the interpretive obligation must be undertaken.

Examples of the interpretation obligation in practice

In *R v A* the House of Lords considered legislation enacted to prevent the alleged victim of a rape from being cross-examined with respect to her sexual history except in certain closely defined circumstances. The law had been passed after the commencement of the *Human Rights Act 1998*. Although the legislation pursued a legitimate aim of protecting victims and society in general, the defendant's right to a fair trial was unreasonably infringed where denial of the relevant evidence could lead to his unjust conviction. Cross-examination was permitted where the incidents to be cross-examined about concerned were similar to the rape and could not be explained as coincidence. Their Lordships opined that cross-examination of previous sexual history with the complainant could occur where it was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.[47] Lord Steyn said that it is realistic to proceed on the basis that the legislature would not have wanted to deny to the accused the opportunity of putting a full defence by advancing truly probative material. Where such material was not so probative it should be excluded by the trial judge.[48]

The opposite position was taken to legislation interpreted in the case of *Re S*.[49] The case concerned the making of care plans with respect to children in danger. The Court of Appeal had propounded an entirely new procedure not contained in the legislation which included a starring system which established milestones for the parents to achieve and reviews by the court. The new system was unanimously rejected by the House of Lords because it constituted amendment rather than interpretation. The increased involvement of the courts was against the clearly established scheme of the Act that local authorities rather than the courts were to provide oversight.[50]

There have been a number of cases dealing with the issue of reverse onus provisions in criminal legislation. In *R v Lambert* the defendant was apprehended in the possession of certain controlled substances. The governing legislation shifted the onus to the defendant of proving a lawful reason for the possession once the prosecution had established that the substance was a controlled substance and it was in the actual possession or control of the defendant. The orthodox interpretation of such reverse onus provisions was that the defendant held the persuasive burden of proof. Concerned that the right to the presumption of innocence was contravened by such a provision the House of Lords determined that

instead of a declaration of incompatibility it could interpret the reverse onus provision as only requiring that the defendant bore only an evidential burden.[51]

An interesting contrast may be made between the decisions in *Ghaidan v Godin-Mendoza* and the New Zealand Court of Appeal decision in *Quilter v Attorney-General*.[52] The former concerned legislation which provided security of tenure to a surviving tenant where the two persons were married or living in a long-term bona fide relationship. The House of Lords had to determine whether the legislation applied to homosexual couples in the way that it did for heterosexual couples. The underlying policy was said to be the support of the survivor of a stable relationship. The fact that the legislation had been amended to include de facto heterosexual couples was a reasonable basis upon which to extend the application of the survivorship provisions to a homosexual survivor.[53]

In *Quilter* the Court of Appeal was asked to construe the *Marriage Act 1955* (NZ) consistently with the *Bill of Rights Act 1991.* The legislation did not mention the gender of the partners to a marriage and conceivably the legislation could have been interpreted to allow a marriage between a man and a man or a woman and a woman. Notwithstanding the application of the interpretive obligation in s 6 of the *Bill of Rights Act 1991* the Court preferred an original intent argument that there was an unstated assumption by the legislature that marriage partners would be of opposite sexes.[54] The interpretation contended for was rejected because it was said to be clearly contrary to what Parliament intended.[55]

The ACT cases

The ACT *Human Rights Act 2004* will celebrate its third year of operation next month. As has been the experience in the UK many of the decisions have arisen alongside actions taken for other purposes. It is in criminal cases mostly that we have seen the application of the interpretive principle at s 30(1) of the *Human Rights Act 2004*. The interpretive obligation has been called into play to augment arguments already available with respect to the admissibility of evidence obtained under questionable search warrants or to argue for a permanent stay of charges. While there has been some detailed consideration of the interpretive obligation we have yet to see the closely argued appellate level decisions seen in the UK and New Zealand.

One concern that I have about the application of the interpretive provision is borne out of an absence of discussion of the limitation clause at s 28 of the ACT statute. This is a different issue to those just discussed with respect to the UK jurisprudence but is nonetheless insightful. Unfortunately the section falls in the legislation after all the human rights are set out. This may be a recipe for it to be ignored. In the Victorian statute it falls at s 7 before the human rights are listed. They play the same role of allowing human rights to be limited it the limit is demonstrably justified in a free and democratic society. Wherever a limitation is placed on a right by a statute, an interpretation of a provision or the exercise of the power or discretion the court should ask itself whether that limit is reasonably justified or not. In my reading of the case law this, generally speaking, is being ignored. That is not to say that the wrong conclusion is being reached, rather that the full process is, with respect, being truncated.

Some examples will assist. *In re the Adoption of TL*[56] Connolly J had to determine whether an application for adoption of a child by a step-father should be preferred to an order for guardianship or custody. His Honour held that it was a requirement of the Act to consider the family as the basic unit of society which is entitled to be protected.[57] However, there was no consideration of how or why the default position of guardianship was an unreasonable limit on the right. Respectfully one is left with the impression that the right to family was treated as

a relevant consideration to a wide discretion rather than acting to constrain the particular discretion. The decision in *R v YL* is another example of this occurring.[58]

In *R v Griffin*[59] the ACT Court of Appeal considered an application for a permanent stay of criminal proceedings.[60] At first instance the defendant had achieved a stay by arguing that a crucial piece of evidence had been lost by the police and that he was irretrievably prejudiced. The Court referred to the right a fair trial in the s 21 of the *Human Rights Act 2004* but then went on to apply the discretion with respect to such stay applications according to well established principle. It held that the trial could proceed as long as certain directions were given to the jury.[61] Although the result is unlikely to have been different the court did not consider whether the requirement of standing trial was a demonstrably justifiable limitation on the defendant's right to a fair trial under s 21.

In *R v Upton*[62] Connolly J considered another stay application but in that case carefully identified what the justification for the limitation was before allowing a limited form of stay. His Honour closely followed English authority which applied the UK *Human Rights Act 1998* in a similar case.[63]

A distillation of the process

I have made an attempt to distil the process needed to assess legislation as to its consistency with human rights under either the ACT *Human Rights Act 2004* or the Victorian Charter. In many ways it is very much a work in progress but indicates a distillation of the available comparative jurisprudence considered in this paper.

Human rights jurisprudence provides a process by which a provision of legislation, or an administrative act for that matter, may be considered to determine whether a breach of a human right has occurred. The proportionality principle evident in s 28 of the ACT *Human Rights Act 2004* and s 7 of the Victorian Charter works may be utilised as part of a four part process for the assessment of whether legislation is consistent with human rights. The test below have been adapted from those provided by Paul Rishworth in his book on the *New Zealand Bill of Rights 1991*[64] which he in turn drew from the New Zealand Court of Appeal's decision in *Moonen v Board of Film and Literature Review*.[65]

1. Identify the relevant human right *prima facie* affected and establish the scope of the right;

2. apply the purposive test to the legislation and establish what are the available meanings for the statutory provision;

3. assess whether the interpretation contended for limits the right and, if so, whether the right is demonstrably justified in a free and democratic society;

4. determine the court's disposition:

    a. if the answer to 3 is 'yes' then the legislation is consistent with human rights;

    b. if the answer to 3 is 'no' then reconsider whether words may be judicially added or subtracted to the legislation to achieve consistency without infringing upon the essential principle or scope of the legislation;

    c. if after 4b the answer to 3 is still 'no' then a declaration of incompatibility may be considered.

As mentioned, the crucial part of that exercise is to determine whether the limitation placed on the right is demonstrably justified in a free and democratic society. While that statement

stands alone in the ACT *Human Rights Act 2004* it clearly refers to the principle of proportionality found in the jurisprudence of the European Court of Human Rights and applied with respect to the UK *Human Rights Act 1998*. Largely similar principles are applied by virtue of s.1 of the Canadian Charter of Fundamental Rights and Freedoms and in the decisions of the Human Rights Committee under the ICCPR. In Victoria the drafters chose to specify and elaborate the principle at s.7 of the Victorian Charter so to provide clear guidance. The principle is crucial to the proper operation of either human rights statute.

Conclusion

The interpretive obligation found in both the ACT *Human Rights Act 2004* and the Victorian Charter is likely to have wide ramifications for legislation in both jurisdictions if the jurisprudence from the UK is any guide. The tension between making a declaration of incompatibility and construing legislation consistently with human rights is likely to produce few declarations of incompatibility but some surprisingly substantial revisions of legislation.

A real question arises as to whether the Australian courts will take the obligation on as a new found freedom to interpret legislation more liberally or force inconsistent legislation back to the legislature. That tension may be eased if a proper process is established for the consideration of whether legislation is inconsistent with a human right. That process must necessarily contain a proper assessment of whether the limit placed on the right is demonstrably justified in a free and democratic society. The flexibility of that test and the application of the principle of proportionality is likely to mean that much legislation that at first blush appears to infringe a human right is, in fact, compatible with the human right.

Endnotes

1 While the *Human Rights and Equal Opportunity Commission Act 1986* provides for some important protections for the right against various types of discrimination and allows for complaints where a human right is breached by the Commonwealth it does not have the far-reaching implications of the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
2 Section 32(2) *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(1) *Human Rights Act 2004* (ACT).
3 Section 37(2) *Human Rights Act 2004* (ACT).
4 Section 28(1), (2) *Charter of Human Rights and Responsibilities Act 2006* (Vic)
5 Section 36(2) *Charter of Human Rights and Responsibilities Act 2006* (Vic) and known as a 'declaration of inconsistency', s 32(2) *Human Rights Act 2004* (ACT) and known as a 'declaration of incompatibility'.
6 Section 36(5) *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(1) of the *Human Rights Act 2004* (ACT).
7 Section 33(2), (3) *Human Rights Act 2004* (ACT), s. 37 *Charter of Human Rights and Responsibilities Act 2006* (Vic)
8 See, for example, cultural rights at s 19 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)
9 Section 15(2) *Charter of Human Rights and Responsibilities Act 2006* (Vic)
10 Section 7(2) *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 28 *Human Rights Act 2004* (ACT)
11 See, for example, *Coco v Queen* (1993) 179 CLR 427 at 437
12 (2004) 219 CLR 562 at [19], also reaffirmed in *Coco v The Queen* (1994) 179 CLR 427 and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].
13 *Al-Kateb* at [19] referring to *Potter v Minahan* (1908) 7 CLR 277 at 304.
14 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 30, *Al-Kateb* at [19], and in *Daniels Corporation v ACCC* (2002) 213 CLR 543 at 582 per Kirby Jand Spigelman extra-curially in 'Principle of Legality and the Clear Statement of Principle' (2005) 79 ALJ 769
15 [2000] 2 AC 115 at 131
16 *Al-Kateb* at [241]
17 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; *Polites c Commonwealth* (1945) 70 CLR 60 at 68-69. *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J. See also Pearce and Geddes *Statutory Interpretation in Australia* (6th ed) at [3.10, 5.16].
18 *Lim* at 38.
19 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.

20 At 141.
21 (2004) 220 CLR 1 at 28
22 *Brown v Classification Review Board* (1998) 154 ALR 67 at 78 per French J; *Secretary of State, Ex Parte Simms* [2000] 2 AC 115 at 130 per Lord Steyn, 131 per Lord Hoffman.
23 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J, see *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ, Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141 at 149.
24 The reference to 'Convention Rights' refers to those rights which appear in the schedule to the *Human Rights Act 1998* (UK) which are drawn from the European Convention of Human Rights.
25 In this section I rely on the excellent coverage of these issues in Merris Amos' *Human Rights Law*, Hart Publishing 2006 with respect to the UK at Chapter 5 and Paul Rishworth's Chapter 4 in Rishworth et al *The New Zealand Bill of Rights* OUP 2003.
26 *Donoghue v Poplar Housing* [2001] EWCA 595; [2000] QB 48
27 *X v Y* [2004] EWCA 662 at [66] and see Amos op cit at pp 49-50
28 Section 6(1) Victorian Charter
29 [2006] ACTSC at [25]
30 *R v A* [2002] 1 AC 45 at [44] per Lord Steyn; *Re S* [2002] UKHL 10 at [37] Lord Nicholls; *Attorney-General v Simpson* ('Baigent's Case') [1994] 3 NZLR 667 (CA)
31 *R v DPP; ex parte Kebilene* [2000] 2 AC 326 per Lord Cooke
32 *R v A* at [44]
33 *Winnipeg School Division No. 1 v Craton* [1985] 2 SCR 150 applied with respect to provincial legislation and *Proceedings Commissioner v Air New Zealand* (1988) 7 NZAR 462, Rishworth op cit at 131 and fn 84
34 [2004] UKHL 30; 2AC 557 at [50]
35 *Ghaidan* at [29] per Lord Nicholls and *R v A* at [44] per Lord Steyn
36 At 121
37 *R v A* at [108] per Lord Hope and see fn 55
38 *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545 at [79]
39 *R v Secretary of State for the Home Department; ex parte Anderson* [2002] UKHL 46; [2003] 1 AC 837 at 70] per Lord Bigham
40 *Ghaidan* at [122] per Lord Nicholls
41 *Ghaidan* at [124] per Lord Rodger
42 Ibid
43 *Ghaidan* at [107] per Lord Rodger and *Lambert* at [81] per Lord Hope and see Amos *op cit* generally at 122-123.
44 *R v A* at [44] per Lord Steyn
45 (1987) 11 NSWLR 404
46 At 302. The test is based on Lord Diplock's decision in *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106. In *James Hardie & Co Pty Ltd v Seltsam* (1998) 159 ALR 268 at 288 Kirby J stated that this was now the settled position. See Pearce and Geddes *op cit* at [2.29].
47 [2002] 1 AC 45 at [45] per Lord Steyn
48 Ibid.
49 [2002] UKHL 10
50 At [42] per Lord Hope, Amos op cit at 127
51 [2001] UKL 37, [2002] 2 AC 545 at [17] per Lord Slynn. See also *Sheldrake v DPP* [2005] 1 AC 264 and *Attorney-General's Reference (No 4)* [2005] 1 AC 264
52 [1998] 1 NZLR 523
53 *Ghaidan* at [35] per Lord Nicholls
54 Rishworth op cit at 146
55 Per Thomas J at 541
56 [2005] ACTSC 49
57 At [14]
58 [2004] ACTSC 115 Crispin J at [31]
59 [2007] ACTCA 6
60 A power available under s 20 of the *Supreme Court Act 1933* (ACT)
61 At [23-24]
62 [2005] ACTSC 52
63 At [18]
64 At 133-134
65 [2000] 2 NZLR 9 (CA)